ISSN : 1875-4120
Issue : (Provisional)
Published : January 2009

This article will be published in a future issue of TDM (2009). Check website for final publication date for correct reference.

This article may not be the final version and should be considered as a draft article.

Transnational Dispute Management
transnational-dispute-management.com

Cuba and the Development of Odious Debt Doctrine in an Age of Financial Crisis

by L.C. Backer

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Cuba and the Development of Odious Debt Doctrine (Presentation Draft)

Larry Catá Backer
Professor of Law, Pennsylvania State University
306 Beam Building, State College, PA 16802
814.863.3640; lcb911@gmail.com

Abstract: This paper examines the way that the traditional notion of odious debt as a method of repudiating sovereign debt may undergo a conceptual revolution, as it changes focus from the illegitimacy of governments obtaining loans, to the illegitimacy of the systems through which such loans are made and enforced generally. The paper starts with a consideration of the odious debt doctrine as traditionally applied. It then considers the ways in which the traditional expression of the doctrine has been expanded over the last century. This doctrine has served the developed world, and its globalized lending institutions, well since the beginning of the 20th century: from proving the generosity of the developed world through discretionary debt forgiveness programs loosely based on odious debt principles, to the use of odious debt style principles to launch global anti-corruption campaigns. However, developing states have come to see another basis for application of odious debt, one that turns the traditional analysis on its head. One of its principal architects has been Fidel Castro. Focusing primarily on the writing of Fidel Castro, as an important figure in shaping and lending legitimacy to these transformations, it suggests the way the doctrine of odious debt could be refocused on the institutionalized public and private international systems of capital markets. For that purpose, the paper examines Castro's notion of what this paper identifies as "systemic odiousness" as a basis for the repudiation of sovereign debt. The paper suggests how, for Cuba, this produces a curious result. It is possible that a successor regime to that currently installed in Cuba would argue that it has the right to avoid all of the debts of the prior Marxist-Leninist state on traditional odious debt grounds, while, at the same time, adhering to the odious debt principles of that discredited regime, it attacks the legitimacy of the current system of state lending on odious debt grounds.

I. INTRODUCTION

Sometimes it is as important to think about the "reality" of ideas and concepts that shape law and policy, as it is to determine the real facts underlying these. Ideas and frameworks for thinking about policy can sometimes take hold in a way that they alter the approaches people are willing to consider in shaping policy. In this respect, "ideas" can sometimes be more "real" than any underlying set of facts uncovered by diligent work. Over the course of the last half century, Fidel Castro and his ideas shop" in Havana have become a significant player in the production of ideas that serve as a framework for policy analysis. Since his guerilla days in the mountains of Cuba Fidel has considered the incarnation of the ideas of the Cuban Revolution, saved from death early in the revolution for this very purpose.

> "Recordaba aquello que decía el oficial que estaba al frente de los soldados cuando me capturaron después del ataque al Moncada, una frase que no sé de dónde la sacó, pero la sacó y la tenía bien en la cabeza --Sarría se llamaba, un oficial negro, alto, cuya conducta firme evitó que aquella gente ajustara cuentas con nosotros rápido--: "Las ideas no se matan, las ideas no se matan", lo repetía. Ahora se les puede decir a aquellos que estaban tan de fiesta y tan alegres cuando se derrumbaron la URSS y el campo socialista: "¡las ideas no se matan!"" (Castro 1995).

This is an anthem that is central to the production of "analysis" in the global market for knowledge frameworks, within which the Castro regime has competed well. (Castro 1999). Whatever the merits of the ideas advanced, whatever their "Truth", they become important when embraced by people and institutions beyond the borders of Cuba, and especially when embraced by individuals with the authority to act. (Backer 2006b). Indeed, to a great extent, it has been the ability to disrupt the factual triumph of the West—lurching toward democratic, open society, rule of law, more or less open market globally linked societies that has been one of the great intellectual triumphs of the Cuban Revolution. And that, indeed, is the point I will make here—control of frameworks tend to be as important as the generation of data and to have substantial policy effect—whatever the "real" merits of the ideas advanced. (Backer 2006a).

One of the more important areas in which Castro has sought to affect the framework for policy analysis (and for understanding the "facts" on which they are based) has been with respect to the global financial system in genera, and with the global system for lending to sovereigns in particular. Sovereign lending is generally understood as a legal problem of contract. (Bratton & Gulati 2004; Khoury 1985). To the extent sovereign lending presents a regulatory problem, its solution tends to be considered within a context of global markets for goods, services and capital requiring some sort of disciplinary mechanism for states and their creditors to ensure the integrity of markets. (Franck 1990, 145-48).

> The International financial community has long profited from the current framework of sovereign lending. It may engage in lending to any recognized regime, it may make such loans without any obligation to engage in any due diligence, other than that thought prudent for the protection of their investment. Such loans are negotiated with the agents of the state, but remain the primary obligation of the people. In the best of all worlds, this system works well enough. Citizens ought to be responsible for the actions of their agents. (Backer Feb. 16, 2007).

The doctrine of odious debt has provided a sort of safety valve for this system of sovereign lending. The odious debt doctrine traditionally focused on the circumstances under which a successor state or states could avoid the obligation to pay the debts incurred by a now-extinct predecessor state (Reina 2004, 592-99; Julliard 1998, 67-86). "Usually, repudiations occurred in the context of revolutionary regime changes. A typical example is the repudiation of the external debt contracted by the Mexican emperor Maximilian by the republican government of Benito Juarez in 1866 after the overthrow of Maximilian." (Sutter 1992, 81). or, less often, on the obligations of successor governments to repay the obligations of prior regimes (especially when succession occurred after civil wars, revolutions, or other contests for control of the state apparatus). (Volkovitsch 1992, 2165).

This doctrine had three principal effects. It reaffirmed a presumption of payment, shifted the burden of proving entitlement to relief onto successor governments, and limited the sort of conduct that could constitute grounds for avoidance. Essentially, public debt could be avoided when it could be shown that it was essentially private, but only if the lender had knowledge of the use of the funds. Nonetheless, governments have been tempted by the possibilities of this doctrine. The United States, for example, had sought to invoke the doctrine to avoid the debts of the Saddam Hussein regime (Anderson 2005, 431-41; Gelpern 2005, 400-02), and they have not been alone. And much discourse over the last twenty years has sought to significantly expand the reach of the doctrine to avoid debt, especially debt owed by developing states. This expansion involves a transformation of the doctrine form a tool to avoid retreating powers from imposing their debt on their victorious adversaries, to one grounded in notions of the advancement of human rights (understood in its increasingly legal sense), the avoidance of corruption and the implementation of an ethics of development. This discourse has focused on issues of public benefit, the responsibility of lenders to avoid loans to repressive regimes or to avoid becoming complicit in violations of human rights by such regimes, and an extension of the doctrine to a wider group of public contractual obligations. (Ochoa 2008).

Enter the notion of odious debt in a new guise, a principal architect of this new view is Fidel Castro's "ideas shop" in Cuba. The object is not so much to expand odious debt doctrine as to use it to discredit the current global financial system within which the doctrine operates. (Castro 1999). For that purpose, the idea has been developed that suggests that the focus of odious debt doctrine ought to be reversed. But the principles of odious debt doctrine have also been turned on the sovereign lending system itself. Some have argued that the modern system of private orderings, of global capital in the service of undefined global markets, serves to benefit creditor states to the ruin of borrower states. As an integral part of the modern system of economic globalization, sovereign debt is imposed as a coerced subsidy by developing states for global over-production at the heart of the so-called neo-liberal system, that is the contemporary system of global economic ordering. In its contemporary form, such sovereign lending is designed to produce a substantially infinite stream of payments, like that extracted from consumer credit card transactions with very high interest payment terms and very low monthly payment obligations. Sovereign lending also evidences an increasingly prevalent mode of legislating—through contract. The conditions to loan agreements have effectively constrained the sovereignty of debtor states. Loan terms have been said to effectively transfer control over public policy from the domestic polity to the international lending community—market, states or international lender organizations.

Rather than presuming legitimacy and requiring states to prove otherwise, they would look to the legitimacy of the loan itself. If the system of sovereign lending is part of a larger system that is itself tinged with illegitimacy, then debts generated under such system might be discredited as well. If sovereign loans are made principally for the benefit of the lender, and produces negligible benefit for the

coerced debtor state, then, it is suggested, such debts might be illegitimate as an obligation of those states (though not necessarily an illegitimate obligation of the functionaries who entered into such loans on behalf of those states). "Essentially, the doctrine shifts the focus of analysis from the borrowing regime (and its obligations to repay its debts) to the global financial systems through which lenders operate. It starts from the presumption that, like states, global capital systems must distinguish the system, which emanates ultimately from the people of the globe, from its apparatus (or governance system), which is legitimate only to the extent its authority is legitimately derived and used." (Backer 2007). It is in this context that the popular critiques of the control by the IMF, the World Bank, or global credit markets of debtor states acquires its legal form.

The merits of Castro's ideas are not the focus of this analysis. The point is to describe their character and potential effects. The irony is, of course, that this is occurring despite any "truth" about the merits, and the perversity that those who are most affected but it, the purveyors of the modern free markets based global system dismiss Castro's notion as meritless and then ignore it, even as Castro creates a strong framework for analysis alluring to those looking for any way to discredit the rising system of globalization. Indeed, whether or not Castro's economic analysis has any merit, the rhetoric of that analysis has struck a chord in the policy arena, and especially with important actors within developing states. While this form of odiousness in a new guise has not acquired a general acceptance, a number of its assumptions about the global system of sovereign lending have made their way into public discourse at the international level. Especially in the form of the effects of sovereign lending on the borrower, the democracy limiting effects of structural adjustments by contract, corruption, and the complicity of lenders in legal violations by borrower governments, the effect on sovereign lending regimes are likely to be felt in changing approaches to notions of legitimacy in lending, and the obligations of lenders in making sovereign loans.

In this short essay, parts of which incorporates prior work (e.g., Backer 2006; Backer 2006b), I will suggest the context and importance of these arguments about sovereign borrowing and its status as legitimate or illegitimate. I will suggest the ways these notions of legitimacy have become important in thinking about the extent of a state's power to repudiate its obligations, as well as the way illegitimacy notions have been conflated with anti-corruption and pro-democracy campaigns. These notions will play a greater role in sovereign financing in the years to come and use a post Castro Cuba as an example of the way in which such arguments could be deployed to absolve the state of both its pre and post Fidel Castro Cuban sovereign debt. I will also try to convince the reader that Fidel Castro of Cuba, and the rest of the current public standard bearers of the fight against the current norms of economic globalization in general, and its systems of financial capital in particular, will be good for business—that is good for the business of modern global capital markets in general, and for the business of lending to sovereigns, in particular. Section II begins the essay with a short summary of the current context in which odious debt doctrine is discussed. Section III describes Castro's gloss on the idea of sovereign and odious debt by the construction of notions of systemic illegitimacy.

Section IV suggests an application of these notions to the post-Castro context of Cuba. Section V ends with a discussion of the ramifications of Castro's attempt at this muscular redefinition of odiousness that may actually serve to strengthen the global system of sovereign lending.

II. TRADITIONAL ODIOUS DEBT DOCTRINE

Amplified by Alexander Sack, a émigré Russian academic in 1920s Europe, the odious debt doctrine traditionally focused on the circumstances under which a successor state or states could avoid the obligation to pay the debts incurred by a now-extinct predecessor state. (Sack 1927, 158-65). It focused as well, though less often, on the obligations of successor governments to repay the obligations of prior regimes (especially when succession occurred after civil wars, revolutions, or other contests for control of the state apparatus).

On the basis of his study of the history of public debt repudiation in the 19th and early 20th century, Sack developed a functional approach (id., at 21) based on a separation between state and apparatus. (Id., at 24) A debt is odious, then, not because of the nature or legitimacy of the state apparatus contracting the debt or because of any change in regimes ("Il est donc évident que la transformation politique de l'État débiteur ne change rien quant à ses dettes. Celles-ci sont des dettes de l'État et non du gouvernement. Elles doivent être prises en charge par le nouveau gouvernement de l'État." (Id., at 46)), but because of the absence of a legitimate relationship between the debt and the state itself. Legitimacy is based on demonstrating the application of the trust relationship between the state and its apparatus in relation to the debt. And debts odious to the state, as such, are not void; they merely change character from a state to a private debt, that is, they follow the agents of the apparatus that engaged in an illegitimate action in the name of the state. Thus Sack points to a connection between legitimacy and odiousness that parallels the construction of rule systems that distinguish between public and private obligations of "princes" now become public servants, in their role as such (Id., 41-45). For Sack, and during much of the 20th century, the doctrine of odious debt is a creature of the state system of international organization. Its foundations rest on notions of the territorial state as the source of legitimate public commitments and on principles of legitimacy of the authority of those who control the apparatus of state (its government).

For all the fuss, the ideas eventually synthesized by Sack proved useful once—absolving Costa Rica of its obligation to British creditors for debts of an overthrown dictator. (Tinoco Arbitration 1923). But the grounds of the arbitral decision were narrow, focusing on the physical manifestation of the sovereign will of the people and the peculiar nature of the use of the funds, as well as on the knowledge of the lenders, Chief Justice Taft, as arbitrator, was careful to avoid the idea of illegitimacy of the state apparatus, standing alone, as a basis for avoiding the obligation of the state to repay debts incurred in its name by that (even illegitimate) apparatus. (Id., 154). And he gave great weight to the knowledge of the creditors as

essentially complicit in a scheme to impose on the Costa Rican people the "retirement" arrangements of the former dictator. "The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose." (Id., 168).

And even Sack himself envisioned a doctrine narrowly applied. (Backer 2007; Sarah Ludington and Mitu Gulati 2008). Indeed, Sack suggested that the only way such a system would work would be to cause all states to be complicit in the repudiation on "odiousness" grounds. For that purpose, Sack had originally proposed the creation of an international mechanism for making such determinations. Sack was clear about the institutionalization of an international process meant to produce a general consensus among nation-states of the character of the sovereign debt at issue. First, the repudiating government would have the burden of proving before a duly constituted international tribunal both that the purposes for which the debt had been incurred was odious and that the creditors had knowledge of the odious purpose at the time of making of the loan. Second, the creditors will have to be unable to show that any part of the debt was used for the benefit of the state or its people. This system was not designed to make it easy either to permit unilateral characterization of debt as odious or to qualify as an odious debt. This was especially true with respect to a particular species of odious debt—war debt of a certain character, that is the debt of the loser in conflicts among, between and within states. (*Id.* at 166–70). Ironically, Sack's proposal finds its echo today in calls for the internationalization of legal systems for the management of sovereign debt, including, for example, the call for the creation of an international bankruptcy mechanism for sovereign debt based in the IMF. (Kreuger 2002, discussed in Backer 1006).

Over the course of the twentieth century, these concepts have broadened considerably within academic discourse, in the understanding of important elements of civil society, and much more reluctantly among the community of nations and the factors in sovereign capital markets. The nature of legitimate public commitments is no longer determined solely by the preference of the people of a state or its elites. Instead, the legitimacy of those preferences is increasingly measured against international human-rights standards. Likewise, the nature of the legitimacy of the state apparatus, and of those in control of that apparatus, has come increasingly to be measured against democratic theories of state organization. The farther from the democratic ideal, the less likely the acts of the apparatus may be deemed to reflect the will of or be undertaken for the benefit of the people. The identity of state and government becomes increasingly tenuous as the breadth of the doctrine of odious debt expands.

Likewise, by the end of the 20th century, the odious debt doctrine, both as conceived and applied, had begun to expand and migrate away form its original scope and purpose. (Gulati Buccheit & Thompson, 2007). The modern understanding of the doctrine of odious debt, increasingly revolves around notions of legitimacy. Legitimacy is increasingly measured by reference to motives for the debt (was it

incurred for the benefit the people of the debtor state), and its use (were the loan proceeds used to benefit the people of the debtor state), the rise of positive responsibilities of lenders to extend credit responsibly, and an extension of the applicability of the doctrine of odious debt to all public obligations, even those of sitting regimes. Though substantially broadened in the current literature, the odious debt doctrine remains focused on both of these projects: to protect the system of sovereign lending and to reinforce a particular culture of state governance norms and behavior. As reinvigorated at the end of the 20th century, this doctrine, at least within academic circles, appears to have the following characteristics:

1. A focus on the will of and benefits to territorial sovereigns—the people. "The problem is obviously a sensitive one, and there are requests to consider 'odious' any "debt that has been incurred by a government without the informed consent of its people, and one that is not used in the legitimate interest of the State," although this is by no means the present position of positive international law." (Acquaviva 2002, 188; Majot 1994, 35).

2. An adherence to the basic contractual context of the transactions and consequential emphasis on lender and borrower due diligence. (Paulus 2005, 90-91).

3. A shift of responsibility to lender, with a move away from state (and borrower) obligation to lender responsibility, and a greater willingness to tolerate imposition of significant penalties for failures of lenders to monitor the use of their funds. (Rasmussen 2004, 1177).

4. A deepening notion of the passivity of the polity and a greater willingness to excuse a failure to act in the face of oppression or illegitimate conduct on the part of those in control of the state apparatus; the people of a jurisdiction are required to do nothing to evidence their disagreement with the practices later used as the basis for repudiation. (Backer 2003).

5. An embrace of the idea, now rationalized, that odiousness is universal and not contextual; in some circumstances, even the populace may not legitimately undertake obligations to engage in certain activities funded by debt to which the state is later bound to repay. (Jubilee).

6. A sharpening the autonomy of and distinctions between the legal personalities of state (the popular political collective), the government (the apparatus of state), and functionaries (individual government officials), and a simultaneous openness to the possibilities that public and private persons have the power to engage in acts tinged with both public and private characteristics, the character of which will depend on the context in which individual decisions are made (World Duty Free, Ltd. V. Republic of Kenya 2006)); and

7. An extension of the applicability of the doctrine of odious debt to all public obligations, even those of sitting regimes. (Bolton & Skeel 2007).

These ideas have come to be bound up in the contemporary focus on corruption and democracy to legitimate the imposition of obligations on states. All of this is well captured in a recent corruption case out of Kenya (World Duty Free, Ltd. V. Republic of Kenya 2006, holding at ¶¶ 180-182). The arbitral tribunal of the International Center for Settlement of Investment Disputes (ICSID) determined that an individual businessman (a citizen of Canada based in Dubai) could not enforce a contract with the Republic of Kenya that he had secured by paying $2 million to former President Daniel arap Moi. The ICSID tribunal rejected the argument that the money constituted a personal gift, even one ostensibly intended for public use. Rather, it found, the money had been paid as a bribe to the president to ensure that he would cause the Kenyan state to enter into a contract that furthered the interests of the businessman and of the president in his personal capacity, but that might not have provided a benefit to the Kenyan state. The tribunal determined that it could not hold the Kenyan state liable on an obligation incurred for the benefit of the Kenyan head of state, and therefore tinged with illegitimacy in its inception. "[I]n the tribunal's words, he could not 'found a cause of action on an immoral or illegal act.' The tribunal thus ruled that, 'claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.'" Id. It was careful to distinguish between the acts of President Moi in his personal capacity (taking the bribe constituted a personal act) and as president (having authority under the Kenyan Constitution to bind the Kenyan state and its people to the obligations represented by the contract). "The tribunal rejected Mr. Ali's argument that Mr. Moi had been 'one of the remaining Big Men of Africa who, under the one party state Constitution, was entitled to say, like Louis XIV, that he was the State,' as unfounded since under Kenyan and English law, which Mr. Ali was relying on, the president was regarded as being bound by the law and the constitution." Id.

On the other hand, courts have been careful to avoid embracing too great an expansion of the doctrine in the context of sovereign debt avoidance. (Donegal International v. Zambia 2007). In that case, the original 1079 loan, from the former Communist Romanian regime to Zambia to finance the purchase of tractors was purchased in 1999 by a speculator fund, Donegal International. There was evidence of corruption in the incurrence of the obligation and the use of funds. But the Zambian State entered into a Settlement Agreement with Donegal after the negotiation of the debt. The courts, though potentially willing enough to apply the doctrine with respect to the obligations of the primary parties, have shown a reluctance to extend protections beyond that, especially to post transaction settlements or to third party purchasers in good faith. (Backer, February 16, 2007). Indeed, in Donegal International v. Zambia (2007) the English High Court took great pains to apply doctrine in the protection of secondary markets in sovereign debts.

III. FROM A FOCUS ON THE DEBTOR TO A FOCUS ON THE LENDER.

While conventional development of odious debt doctrine has begun to broaden the potential applicability of the doctrine, another group of actors, led by Cuba, have embraced the expanded scope of odious debt doctrine. But they have refocused the analysis, conflating classic odious debt doctrine with current notions of illegitimacy and illegality as legitimate bases for debt repudiation in both a private (corruption) and public (violation of human rights norms) context. These new participants have turned current doctrinal developments on their heads. Rather than focus on the objects of lending, they focus first on the source of loans, and then on the system that rationalizes the rules under which those loans are made. Applying traditional doctrine in this direction, they attempt to make the case that the loan system itself is odious. It is odious as an integral part of a larger economic system designed to perpetuate the subordination of developing states to the economic and political instrumentalities of developed states.

The foundation for this approach is the embrace of a particular view of global economics that is bent to the purpose of showing a "reality" in which the system, while promising to make all better off, actually does the opposite. And in so doing works against the very set of international law principles on which it is based (development, human rights, democracy, transparency, etc.). (Backer 2006a). In earlier work, I identified the way in which Castro's work contextualizes sovereign debt issues within an anti-corporatist approach grounded in public law and the value of a command economy on an international scale. The anti-corporatist vision posits that the current regime of globalized financial markets produce rather than decrease poverty. Sovereign debt has the effect of ceding sovereignty from borrower to lender institutions. The dynamics of colonization reappear using the coercive power of economic globalization rather than the troops of an imperial power. (Backer 2006). From Castro's public work (e.g., Castro 1999: Castro 1985) I identified four principal characteristics of this systemic hypercycle producing an unavoidable need for developing states to borrow and their perpetual inability to repay those loans (Backer 2006).

> First, labor specialization shifts the most skilled and highest paying jobs to the developed states and away from developing states. . . . Second, overproduction shifts the benefits of misallocation of resources from the developing to the developed states. Overproduction depresses the price of these goods, making them more affordable in the developed world, where the highest paying jobs tend to be found, but remain unaffordable in the states where they are for the most part produced by workers whose wages are too low to pay for them. Third, the incentives to move capital freely tends to make it more difficult for developing states to tax consumption or income of the entities producing goods for the global market because wealth, like goods, tends to flow toward developed states and away from developing states. . . . Fourth, the propaganda of consumerism keeps the wheels of overproduction going and fuels a constant aspirational hope among those in developing states. The constant lack of satisfaction adds a

> level of need to the population – they want what individuals in the developed states appear to have, but they can neither afford it, nor their own basic needs.... (Backer 2006).

Labor specialization, targeted over production, capital migration to developed states, global consumerism to keep demand high and a resort to debt as a substitute for tax revenue (evidencing the absence of a taxable base) and as a subsidy for overproduction (by a system of temporary repatriation capital through loans) set up an infinite financial loop. States, without wealth to tax and with critical needs to meet, must borrow. Developing states borrow directly, in the debt markets, and indirectly, through the IMF, from developed states. In effect, developing states acquire as a debt obligation a portion of the wealth that represents the required subsidy of global production at the heart of the neo-liberal system. Thus the spiral deepens. Sovereign debt tends to be acquired under conditions designed to perpetuate the system – the conditions imposed on the debt contribute to an increasing inability of states to generate the wealth they need to repay, or loans are made to states whose leaders are satisfied to act as agents of the developing states and contribute to the subordination of their nations within the global economic system. Eventually, the loan framework within this system cannot be repaid. States must borrow additional sums of money to pay the portion of prior loans that are unpaid while meeting continuing need, or sell their wealth (in the form of natural resources or other wealth) in an effort to pay their loans. (Backer 2006).

The modern system of private orderings, of global capital in the service of undefined global markets, it is then argued, serves to benefit those states to the ruin of borrower states. It manages to reinforce the old international law system that sought to legitimate colonialism, and the unequal treatment of states without invoking such doctrines directly. The result is more than a problem of credit repayment terms (where low periodic payments and high interest rates and fees effectively stretch repayment to infinity). The difference is the public policy effects o adapting private contractual regimes to public sovereign debt. Such regimes, through their imposition of what might seem to be reasonable covenants and conditions on private parties, might appear to be inconsistent both with notions of democratic accountability and popular sovereignty. This is especially so when such conditions limit a state's flexibility with respect to economic policy, tax policy and the exploitation of publicly owned natural resources.

Fidel Castro nicely distilled this insight in the 1980s: "With the aid of mathematics, we have analyzed all of the variations suggested to resolve the problem of state debt: with actual interest rates or reduced interest rates, with new credits or without new credits, with limited payments associated to export levels or without such limits, with moratoria or without moratoria, and even on the assumption of a sustained accelerated rate of development that is itself utopian, the result of all of these analyses is that sovereign debt, like an enormous and monstrous cancer, whose malignant cells reproduce at an accelerating rate, tends to reproduce itself and grow without limit." (Castro 1986).

Amplifying the complaints of the post-colonial developing world, Castro suggests that in a world that had supposedly abandoned systems of hierarchy, subordination and hegemony after 1945 in favor of a system of horizontal equality among all states, the system of freely moving capital and its borrowing imperatives on developing states tends to impose again that system of hierarchy in fact. The nature of dependency is varied. Castro explains: "There is a bit of everything: depression in some countries, inflation in others, formulas and measures for destabilizing governments. Everyone on earth now understands that the IMF, for all the states it seeks to help, for all the states that it pretends to help, actually drowns those states economically and destabilizes them politically. There is no better way to put it than that the aid of the IMF is the devil's kiss." (Castro 1999, 24). And thus Castro sets the stage for his illegitimacy argument. Because the lending system itself appears to be designed to privilege creditors over borrowers, and to benefit creditors at the expense of debtors, then it appears that sovereign lending of this type might begin to lose its character of as loan and appear more to be a means of exploiting the less powerful. If the form of the loan masks an enterprise in which there is no benefit to borrower and all benefit flows to lenders, then perhaps the systems producing such loans can be characterized as odious (along with the individual loans) by reorienting the focus of traditional analysis. The illegitimacy, thus conceived, is not contextual, it is systemic. The stage is thus set for the main policy point.

It follows, for Castro, that state failure—essentially any state's inability to pay sovereign debt—ought to trigger an investigation to determine the nature of the debt, the conditions under which the debt was incurred, and the equities of continuing the obligation. In many cases, states should be free to repudiate debt without further consequence. "The debts of the countries with less relative development in a disadvantaged situation are unbearable and do not have a solution, and they should be canceled. The indebtedness is financially overwhelming the rest of the developing countries and that burden should be eased. The economic gap between developed countries and those countries which want to develop, instead of becoming smaller, is increasing and should be eliminated." (Castro 1985).

Systemic illegitimacy, then, should serve as the foundation, not only of a right to repudiate all sovereign debt—all such debt is odious in the sense that it was incurred for the benefit of the lender and to the detriment of the citizens of the debtor states—but also as the basis for the construction of an alternative system of global finance and integration. Sovereign debt is bound up in the illegitimacy of the current economic world order, the amelioration of which requires the erasure, not the cancellation, of sovereign indebtedness as the first step towards dismantling the system itself.

> "And what is that which can give us that strength? Unity. And what can provoke that unity? Debt, the most immediate problem, crisis, catastrophe. Logic posits, given that we are on the edge of the precipice and must chose between struggle or death, that we decided to struggle against the debt, that is why this is a strategy, it is not about a slogan: we gather everything around the debt, the countries of

> Latin America and the Third World. With that force we can liquidate the debt, we can liquidate it—to liquidate does not mean to pay it, rather to erase it." (Castro 1985)

We move then from systemic illegitimacy to the foundation of the ideology of ALBA (Alternativa Bolivariana Para los Pueblos de Nuestra América), and state centered trade and financial dealings. For as Castro has sought to tear down the legitimacy of the international sovereign financial lending system (and its trade wing), he has also sought to lay the foundation for a "socialist" trade regime. This has proven appealing, at least in theory, to a host of recently elected governments in Latin America—from Bolivia, Nicaragua and Dominica, to Ecuador and Paraguay. (Backer July 30, 2008; Backer February 11, 2008).

But not all sovereign debt is tainted with this systemic illegitimacy. Castro makes a point of distinguishing between what he calls debts owing to "Third World" countries and other sovereign debt. Debts to Third World countries would not be illegitimate and ought to be paid—"We are even thinking that once we erase the debts, our policy with regard to the Third World countries—as creditors—would be different, and we would pay those debts." (Castro 1985). Moreover Castro too easily posits that because the debt benefits lenders it therefore provides no benefit to borrowers. But that cannot be true except in the most egregious circumstances—for example when loans are used by the state apparatus to suppress dissent and retain itself in power, or to commit violations of international human rights and humanitarian law. Even under the system described by Castro, it is plausible to suggest some (and perhaps some significant) benefit to borrower. Moreover, the notion of benefit is also elastic. While Sack might have initially suggested that even some small benefit to the borrowing state is sufficient to avoid repudiation, Castro suggest the opposite—that any connection with an illegitimate lending system taints all loans made thereunder, irrespective of the benefits to the borrower (and thus it permits repudiation of the whole). (Castro 1985).

Some academics in the United States have advanced suggestions that echo this approach from time to time in the form of a broadened method of constructing a binding global law of odious debt. (Chander 2004, 923). Chander would determine that any sovereign debt should be odious (and thus voidable at the option of the state) when incurred "(1) without the consent of the people; (2) not for the benefit of the people; and (3) both of the above with the knowledge of the creditors." (Id.). There is a conflation of repudiation on odiousness with notions of the illegitimacy of debt incurred through corruption, coupled with the sense that the borrower is in the best position to avoid such loans. (Udombanda 2005, 25; Khalfan, King & Thomas 2003, 100).

Ironically, members of the U.S. Senate have come closest to embracing the framework of Fidel Castro, but with a twist: Whereas Castro posits active complicity, the U.S. Senate amasses testimony suggesting that the complicity is passive. The focus of Americans is on corruption as a touchstone of illegitimacy. But it is clear that discussion that reinforces the idea that international lenders and the lending system is complicit, passively or actively in globally systemic corruption,

might well add substance to Castro's conceptions, especially as refined by academics and civil society elements outside of Cuba (and thus not tainted with Cuba's Marxist political orientation). (Mekay 2004; Giacomo 2004).

Indeed, the implications of Castro's systemic notion of global structural illegitimacy, combined with conflating notions of illegitimacy and odiousness, have potentially significant consequences for the legitimacy of all debt to developing states. Together, the notions crafted by Sack a century earlier are now inverted. Sack and those who came after focused on the *borrowers*—dictators, corrupt officials, rogue states—that use loans to fund militaristic behavior and human-rights violations. Castro and those who adhere to his conceptions of illegitimacy focus on the lenders—states, financial institutions, and the instrumentalities of global lending, including the IMF and the World Bank. These lenders are either complicit in the actions of illegitimate state borrowers, or, more likely, they engage in lending for their own benefit, rather than for the benefit of the people of the states who bear the burden of the debts incurred by their governments. The financial system makes it virtually impossible to borrow for the benefit of anyone but the lender. Thus inverted, odious (now illegitimate) *lending* can become a substantial weapon against the very lenders the doctrine was meant to protect. Rather than providing a narrow basis for avoiding repayment, the doctrine thus reconstituted becomes a means for imposing heavy obligations on lenders to ensure that loans maintain a certain character for which lenders, rather than the citizens of the debtor state, now must bear the risk of violation. By effectively shifting the burden of monitoring and supervision from citizen to lender, the doctrine would substantial reduce its protections to lenders.

Odious debt doctrine thus becomes bound up in the debate about the legitimacy of development lending. (Okeke 2001). Patricia Adams, an influential voice in this context, especially with respect to African debt (Adams 1991), reasons, "The argument is that, just as individuals do not have to repay if others illegitimately borrow in their name, the population of a country is not responsible for loans taken out by an illegitimate government that did not have the right to borrow 'in its name.'" (Kremer & Jayachandran 2002, 1). It also becomes bound up in the debate about lending to governments which violate global notions of human rights domestically or internationally. This, in part, served as the basis of the American argument for cancelling the Iraqi debt incurred by Saddam Hussein. It has found an echo in the recent attempts to regulate multinational corporations—by imposing on them an obligation to refrain from becoming complicit in the human rights or other legal violations of the governments of host states. (Backer 2006b). Moreover, this notion of complicity and illegitimacy might become an issue for the prosecution of global criminal law violations under the Rome Statue of the International Criminal Court. (Rome Statute 1998). To some extent, then, these efforts echo and are consistent with the view expressed by Castro's idea shop that the lending system itself is complicit in supporting illegitimate regimes for the purpose of expanding and preserving markets for foreign debt that benefit the developed world and their economic organs.

But that approach also serves to shift the focus of legitimacy (and odiousness)

as well as the basis for repudiation away from the system of institutional lending. Instead, the focus on the character of the debt (or of the governance apparatus of the debtor state) provides a means for lending institutions to assert greater power over debtor states. (Ben Shahar & Gulati 2007). The extension of the odious debt doctrine in this manner again turns the attention to the debtor state and away from the lending system. (Bolton & Skeel 2007). Lenders concentrate on the character of the debtor state and systems are constructed for the purpose of sorting potential debtor states into "creditworthy" and not "creditworthy" states on the basis of the criteria used to permit repudiation on odious debt grounds. In a larger sense, this suggests a necessary focus on reform of the sovereign lending system itself (including its IMF, World Bank aspects). Ironically this would prove Castro's point of systemic illegitimacy, or at least a sensitivity on the part of global markets to the power of such accusations.

The force of this system might be nicely exemplified, from the perspective of this approach to odious debt, by the difficulties Ecuador experienced in the early 21st century with respect to the loss of control of its natural resources, in particular its petroleum, to the global capital markets that required the use of those resources to service Ecuador's external debt. (Backer May 29, 2007). As a consequence, Ecuador is considering action in the face of public revelations that the World Bank extracted from Ecuador a series of secret terms that could be characterized as oppressive. These included an obligation that Ecuador pay its bondholders 70%of any spike in oil prices and that Ecuador set aside another 20% of such oil spike revenue as a reserve against contingencies—effectively preventing Ecuador from using the funds for other purposes. (Palast, 2007). The Ecuadorian president was quoted as suggesting "'If we pay that amount of debt. . . we're dead. We have to survive.'" (Palast 2007). There is already the echo of an argument based on the notion of systemic illegitimacy in general and the oppressiveness of the specific terms imposed by the World Bank in particular, to support Ecuador's determination to repudiate its debt obligations.

IV. Application to the Situation in Cuba (Backer 2007).

Cuba is the ideal place for the development of a normative system of global finance opposed to that developed under the influence of the Washington Consensus. (Stiglitz 2003). The United States and Cuba have been bitter political and cultural rivals almost from the inception of the success of the Cuban Revolution on January 1. 1959. The United States has imposed a substantially total embargo on Cuba since the early 1960s. (Haney 2005; Suchlicki 2000; Leyva de Varona 1994). A significant focus of the embargo is on Cuban goods and raw materials. The American blockage effectively embargos most transactions with or travel to Cuba without the permission of the federal government. The President may limit trade with an enemy nation during times of war or peace, and under which American Presidents issue annual reports on the Cuban state of emergency. (Trading With the Enemy Act of 1917). Under the Foreign Assistance Act of 1961 aid is provided to nations other than Cuba, which is expressly excluded from its provision as long as Cuba retains a Marxist-Leninist government (Foreign Assistance Act of 1961). Under the Cuban

Democracy Act of 1992 foreign aid is promised to Cuba once the Marxist-Leninist government is removed. (Cuban Democracy Act of 1992). Under the Libertad Act third country aid to Cuba is discouraged, democratic reform is encouraged an assistance plan to Cuba is suggested were a transition to a market economy to the liking of the United States is effected, property rights of U.S. nationals is protected, and all prior federal regulations involving Cuba are codified. (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995). Under regulations implementing the Trading With the Enemy Act, all unlicensed financial and commercial transactions by Americans with Cuba or Cuban citizens is prohibited, Cuban assets of Cuba in the United States are frozen, remittances to Cuban citizens limited, and travel to and expenditure of money in Cuba is prohibited. Trading With the Enemy Act of 1917).

In addition, the United States has sought to cut Cuba off from all sources of global finance. First, American law requires the Secretary of the Treasury to "instruct the United States executive director of each international financial institution to use the voice and vote of the United States to oppose the admission of Cuba."(Cuba Liberty and Democratic Solidarity Act 2000, Section 6034(a)(1); Spadoni 2001). Second, the United States has aggressively pressured international lending institutions to avoid lending to Cuba. In addition, U.S. law requires U.S. contributions to specific international organizations—International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank—to be reduced to any amount granted by these institutions to Cuba. (Id. at 22 U.S.C. § 6034(b).

Before the collapse of the Soviet Union and its allies that goal had been difficult to achieve because of the steady support of the Soviet Union. This produced a massive debt held first by the Soviet Union and then by the states that emerged from out of the collapse of the Soviet Union. (Mesa-Lago 2001). Since the collapse of the Soviet Union, however, it has been much easier for the United States to cut Cuba off from international capital. Recently, however, the People's Republic of China has been more active in cultivating Cuba. But is unclear, however, the extent to which this friendship will serve as an effective counterweight to American plans for Cuba. (Backer 2004, 404-413; China to Discuss Cuba Investments 2004).).

Whatever the economic effects of the embargo, an important, if unintended consequence, has been the incentive it provided for the development of a series of idea that have proven influential outside the developed world. While Castro's effect on the global economy has been negligible, his importance on the development and exportation of ideas about the shape and nature of the global economy have been far more significant—not necessarily because he has spoken them but because these ideas tend to be replicated, expanded and championed by a host of global actors strategically placed throughout the developed and developing world. The inversion and transformation of odious debt doctrine serves as a piece in a complex construction of a framework meant to discredit the current global financial order

(Backer 2006) and suggest an alternative. In the case of odious debt, the result would produce irony. It might permit Cuba to avoid both current and prior debt.

Now consider a context for repudiation on the basis of both theories of odious debt—the contextual and the systemic. For this one might envision a Cuba four years after the death of Fidel Castro. Assume that Cuba has managed to avoid revolution or military intervention from the United States or its surrogates. Raul Castro is very ill and unlikely to survive long. Assume further that in the course of transformation, the surviving Cuban elites have managed to come to an understanding with various powerful cliques of the Cuban émigré community, but that Cuba needs additional sources of revenues. Indeed, during the period after Fidel Castro's death assume that Cuba began to borrow extensively in the private global financial markets. A significant amount of funds have been borrowed. Much of those funds were used to effect the transition to a free-market economy, though one still tightly controlled by the state. (Backer 2004).

On the eve of a change in government, ending in whatever form, over a half-century of dictatorship by the Castro family, the Cuban state might be in a position to argue convincingly, on the basis of the enlarged traditional, post-Sack theory of odious debt, that all contracts and debts incurred purportedly by or on behalf of the Cuban state are debts personal to its makers and illegitimate as obligations of the Cuban state. All such obligations would have been incurred to prop up a tyrannical regime (it would be argued to Western, and especially U.S., audiences) and used to oppress the people who are now asked to bear the burden of repayment or fulfillment of contractual obligations. And on the basis of traditional odious debt theory elaborated above, the Cuban State could make a strong case for this position. All obligations of the Cuban State, including those concluded with or through its socialist trading partners—Venezuela, Nicaragua, and Bolivia—could be repudiated on those grounds.

Simultaneously, the Cuban state could seek to repudiate all debts to private creditors incurred after the death of Fidel Castro on two grounds. First, the Cuban state might argue that the creditors were aware of the illegitimate uses of the funds. For this reason the lenders ought not be permitted to profit from their complicity in the non-public use of purportedly public loans. Second, the Cuban state might argue that the loans made by private financial institutions were void as presumptively illegitimate. The loans were made for the benefit of the lenders and to burden the borrower. They were a critical component of a system of financial dependence through which states like Cuba were made to divert their wealth to the production of income for the financial institutions of other states and indirectly for the governments in which those institutions reside. As such, the entire system of loans represents attempts both to oppress the indigenous population and to colonize the Cuban state. The colonization, to be sure, takes a form different from that of German colonization of seized Polish territory in the nineteenth century, but it amounts to colonization all the same: the wealth of Cuba is mortgaged for the benefit of others. The individuals in the Cuban apparatus who agreed to participate in this system of colonization profited individually from such agreements, and the

people of the Cuban state become bondmen and bondwomen in a never-ending cycle of dependence and obligation to global creditors.

To strengthen these arguments, the successor Cuba would focus on the corruption attendant on the loans, and the great gulf between the individuals leading the state and the population itself—after all, these successors might be tempted to argue, the Castro state apparatus was neither democratically elected nor did it provide a means of ascertaining popular preferences for policy choices. Last, a successor government would emphasize the coercive element in the obligations incurred. The Cuban state, weak and dependant from the time of the late period of Fidel Castro's rule through the end of the rule of Raul Castro, would be obliged to act in the interests of those foreign elements seeking to derive advantage from relationships with individuals with power in the state for legitimate or illegitimate aims.

But for all that, the ideas generated with respect to the global system may amount to just talk. Cuba, itself, has tended to advise its allies to pay their sovereign debts, even those incurred under prior dictatorial regimes with little benefit to the populace. Kremer and Jayachandran note that "although Anastasio Somoza was reported to have looted $100 million to $500 million from Nicaragua by the time he was overthrown in 1979, and the Sandinista leader Daniel Ortega told the United Nations General Assembly that his government would repudiate Somoza's debt, the Sandinistas reconsidered when their allies in Cuba advised them that repudiating the debt would unwisely alienate them from western capitalist countries." (Kremer & Jayachandran 2002). Indeed, even though the United States would be quite likely to wish to repudiate all of the Castro governments' debts at the time of the emergence of a friendlier regime, its own track record with Iraqi debt suggests the implausibility of any such repudiation—especially of debt to China. But the move from debt to finance in the construction of systems for limiting the legitimacy (and thus the collectability) of certain kinds of sovereign debt continues to spark at least the academic imagination in places well away form Cuba. (Ochoa 2008).

V. THE SILVER LINING.

For capital markets in general, and public and private lenders specifically, the reorientation of odious debt doctrine to focus first on illegitimacy as the touchstone of the doctrine, and second on creditors and the creditor market system as a source of illegitimacy, provides both a challenge and an opportunity. The challenge, of course, follows from the "nuclear" threat in the modern indictment of the system as illegitimate. That threat would see the system itself dismantled and replaced with something else. But this discussion better reveals what the moves in odious debt doctrine really suggest in terms of the future character of policy debates. These changes in the way public debt ay be understood will produce changes in behavior among lenders and borrowers, all of which may ultimately strengthen and increase he integrity of markets for sovereign debts. These changes will be consonant with a wider set of changes occurring the way in which states are

considered as legal actors, and in the conflation of private and public law in the context of state economic activity. (Backer 2008).

Let us look more closely at the ways in which the components of systemic illegitimacy notions of odious debts might be turned to make such debts more difficult to repudiate. The starting point are the normative components of that expanded odious debt doctrine itself. I have grouped them into six categories, each of which focuses on a different aspect of the problem of odious debt and the objective to which the application of the doctrine is aimed. (Backer 2007).

First, popular benefit (a democracy enhancing principle). The ideal of popular benefit, central to the traditional notion of odious debt as developed in the early part of the last century focuses on the use of funds, popular ratification, and presumptions of popular ratifications in democratic states. In this aspect, the doctrine of odious debt carries with it an implicit condemnation of non-democratic (authoritarian or dictatorial) regimes. The doctrine is thus to be used to further civilize states whose governance systems do not yet embrace universally accepted values for the construction of the apparatus of states—a set of universal values now being fashioned within the international community through its various organs. (Bolton & Skeel, 2007). The touchstone increasingly will be popular ownership of debt whenever incurred by popularly elected government free of systemic corruption. It will become increasingly risky to lend to dictators or in a context in which local law is broken. Not that such loans will not be made necessarily—but their costs to the borrower will increase dramatically depending on context.

Second, corruption (understood as a divergence of funds from public benefit or the incurrence of debt for a non public purpose). Corruption combines moral, ethical, political and aspirational norms. It focuses on distinctions between the state, its apparatus and the individuals who serve within that apparatus. Proceeding from a refined notion of the autonomy of the state from its apparatus, and the autonomy of the apparatus from the individuals who serve it, corruption notions serve as a proxy for the need of individuals to serve the apparatus above their own personal interests, and for the apparatus of state to serve the state above its own institutional interests. (Demott 2007).). Diversions of benefit from state to apparatus or from apparatus to individual, are corrupt because they indicate a breakdown of this basic rule of behavior. Corruption is a form of theft, the use of a power or position meant to benefit one entity for the benefit of another. (World Duty Free, Ltd., v. Republic of Kenya (ICSID October 2006). Again, the doctrine is to be used to discipline developing or debtor states—it rationalizes a series of behavior norms under the rubric "corruption" that is meant to create a stronger culture of policing the behavior of institutions and individuals acting in a representative capacity, as well as strengthening the legitimacy of systems based on actions in representative capacities.

Third, coercion (as a use of funds issue, especially when the proceeds are used to prop up an authoritarian government or otherwise for the perpetuation of a regime). Like corruption, coercion focuses on unfairness. It targets the function or

effect of lending. It condemns an abuse of process or of power to unfairly derive benefit form another in a way that, like corruption, van appear, in effect, to amount to theft. Implicit in this limitation is notion is the attempt to reduce the legitimacy of assertions of power to enable bad conduct on the part of debtors or to repudiate such enabled loan by successor regimes. (Tai-Heng Cheng (2007)). The object here is to prevent a threat to the system from the actions of creditors; loans must be made to be repaid and debtors must be subject to terms which they will, however reluctantly, be willing to pay. Moreover, in the long term, the system must be capable of regenerating loans. A system based on the constant streams of making, paying and remaking loans, cannot afford debtors who are unable or unwilling to borrow, or to repay. It is a method by which, though appearing to limit the logic of traditional notions of subordination, actually strengthens subordination by softening its hardest edges.

Fourth, complicity (understood as facilitating bad behavior, enabling or worse). Complicity values focus on the relationships between lenders and the state, its apparatus and the individuals who serve within that apparatus. In this aspect, the odious debt doctrine carries with it an implicit condemnation of loans that the lender knew or should have known were to be used for personal, rather than state, benefit. (Gray 2007). The object, in part, perhaps, is focused on enlisting creditor states, and their instrumentalities, in a more positive role in policing the behavior of debtor states and their apparatus. (Ginsburg & Ulen 2007). But the object is also to maintain the hierarchy of power inherent in the state system. Creditor states or their instrumentalities that become complicit in the actions of the debtor state apparatus or of that state's functionaries, threaten the order of power by causing such creditors be appear to be acting like the partners of such apparatus or individual. It suggests weakness on the part of creditor states and creates the potential for weakening framework within which payment compulsion is maintained. It also suggests the possibility of control by lenders (despite its anti-democratic character). Lenders can use contract to ensure the sort of monitoring and the inclusion of such terms and conditions that limit complicity in the use of funds.

Fifth, monitoring (understood as a mandatory use by lenders of their leverage to observe and discipline borrowers through the contractual mechanisms of the loan—a structural adjustments approach limited by its anti-democratic consequences). Monitoring serves a civilizing function. It is based on a presumption that actors will behave badly, and that such an inclination to bad behavior can be reduced by exposing their conduct to the observation of others. These ideas are well known in the United States. (Backer 2004a). In a sense monitoring transfers governance and accountability functions from the polity to those states, groups or instrumentalities on which is placed the function to monitor. But this transfer is in accord with a normative value set that simultaneously views political communities as essentially passive, the principal beneficiaries of actions undertaken by a state apparatus and as the ultimate source of all political power. That power, usually vested in the government, is now to be shared among the state, its apparatus, and a host of non-state actors increasingly responsible for ensuring that the state is run

appropriately. The sovereignty of creditor states is thus ensured by reducing its sovereignty to those outsiders more capable of serving the interests of the state. "[T]here is nothing alien, or even novel, in proposing to use private law concepts to articulate limits on the legitimate powers of states." (Purdy and Fielding 2007, 202). Monitoring also serves to deepen the structures of such subordination to non-state and transnational actors. In particular, it serves to transfer public functions to lenders as a principal stakeholder in the functioning of the state and the use of borrowed funds.

Sixth, transparency (understood in its role as a legitimating device). Transparency is related to but not the same set of values as monitoring. Transparency is an anti-subordination device, meant to function as a means of inclusion by making exposing the action taken by decision makers and the information used to arrive at such decisions. It makes popular response more efficient. It is thus tied to popular determinations of public benefit, as well as to efficiency issues in policing against corruption, complicity and coercion. It thus disciplines markets and advancing ideals of anti-subordination in state to state relations within global capital markets. (Shahar & Gulati 2007). But it does so within the parameters of values and behavior norms which serve to reinforce the legitimacy of those markets. It has great value, whether or not transfers to debtor states are made as private "loans" or state to state "transfers", however denominated. (Gelpern 2007).

These six components could as easily serve to buttress the current system o global sovereign lending as it could be used to discredit it. Each can be used as a foundation for specific modifications in approaches to the specifics of such lending: origination, maintenance, and monitoring of such loans. "[I]llegitimate debt is not yet a well defined and generally accepted term. Differences between illegitimate and other types of debts, such as odious or legal debts, must be clarified" (Raffer 2007). I highlight four categories of specific changes which might be made to insulate loans from attack on illegitimacy grounds—(1) mandatory terms, (2) presumptions of benefits and burden of proof shifting, (3)responsibility shifting versus repudiation, and (4) complicity limits.

Mandatory Terms and Safe Harbors. Academic discourse, at least, as well as the discourse of the political leaders of the developing world, have advanced the notion that sovereign debt, as a class, may be odious or illegitimate (and thus subject to repudiation by the state, but not by the individuals who entered into the agreements) because the terms of such debt are inherently coercive or occasionally so. Consequently, such loans serve to provide no benefit to the people of the state upon which liability for the debt is sought to be imposed. Just as the Cubans were not required to pay Spanish war debts that benefitted Spain (but not Cuba), so any state may repudiate an obligation to pay debts that benefitted some one other than the debtor state itself.

But the systemic illegitimacy of public benefit can be managed sufficiently in a number of ways that can serve to deepen the legitimacy of the current system, at

least in this respect. Drawing on analogies from commonly understood usury notions and doctrines of unconscionable conditions, but both grounded in principles of international human rights norms, it is possible to craft a series of "universal" rules and principles of construction of sovereign loans that effectively insulate such loans against characterization as not benefiting the people of debtor countries thus preserving such loans, as a class from effective repudiation on these grounds. (Dickerson 2007). Such mandatory terms could include mechanisms for limiting interest and repayment terms, distinguishing between permissible and impermissible covenants and other loan conditions, and creating safe harbors protecting certain lender actions against charges of meddling or control claims. Omri Ben Shahar and Mitu Gulati make a stab in this direction (Ben Shahar & Gulati 2007). Contract, then, can create a system of "trade practices," "trade expectations," common terms and definitions that would provide a basis for lenders to more effectively insulate individual loans from attacks on grounds of coercion or lack of public benefit. Most importantly, perhaps, such an approach could effectively generate a system of something like "*jus cogens*" principles of legitimate debt terms and practices. Proceeding from general principles to application is not unfamiliar to civil law practitioners.

Presumptions of Benefit. Sovereign debt is presumptively illegitimate within the discourse of systemic illegitimacy because it provides no benefit to the people on whom the burden of repayment is placed. But drawing on analogies of democratic theory in the construction of loans can substantially reduce the efficacy of arguments of systemic illegitimacy by appearing to meet the popular benefit, monitoring, complicity and transparency. For example, it would be possible to construct a series of presumptions of legitimacy that would shift burdens of proving illegitimacy. Debt undertakings by democratically elected governments would be presumed to serve a substantial public benefit, unless the state itself could show no benefit. In addition, in such circumstances, the state would have to show that the lender, rather than it, ought to have the burden of seeking compensation or payment from those (individuals within its apparatus) who diverted funds away from publicly beneficial functions. On the other hand, debts to undemocratic governments might give rise to a presumption that such loans do not benefit the public. Such debts would shift the burden of showing public benefit to the lender, who then would bear the burden of recovery from those individuals with whom it dealt in placing the loan. In addition, it would be possible to construct systems of safe harbors against repudiation for lenders who are responsible for a certain well defined quantum of monitoring and tracing of funds. (Shafter 2007). Such systems would require the generation of universally accepted lists of uses with a public benefit, and transparency enhancing systems.

From Repudiation to Responsibility Shifting. The "nuclear option" of systemic illegitimacy theory is the call for wholesale debt repudiation from out of which a new system of wealth transfers to developing states might be created (perhaps along the lines of the now abandoned U.N.'s New Economic Policy). But the increasing focus on the consequences of a more acute recognition of the autonomy of the actors who have a hand in the acquisition of sovereign debt might well provide a basis for

ameliorating this option in favor of systemic changes that enhance the power of the current system at little cost to it. Thus, the current development of global systems of monitoring and enhanced transparency in connection with financial crime and anti-terrorism campaigns can be easily deployed to the odious debt context. The problem of odious debt, reconceived as a matter of criminal activity on the part of individuals, thus lends itself to easy control within the current systems of global sovereign lending. The focus thus shifts from systemic illegitimacy to personal responsibility for actions and obligations that cannot be ascribed to the state as an autonomous actor. For this purpose, the developing global systems of chasing and retrieving illicitly diverted funds can be useful as a basis for diverting attention from system to actor. And indeed, most financial institutions are already devoting a certain amount of effort to reorienting their operations to this new reality of transnational operation. For these purposes, private law doctrines like equitable subordination might prove useful. (Feibelman 2007). They might also apply in the context of state-to-state transactions, which might be characterized as either debt or "something else" as well. The discursive parameters thus shift from a simple binary—pay/no pay—to a more complex analysis involving issues of who pays, when and in what order.

Limiting the Bite of Complicity While Managing its Occurrence. Complicity concerns tend toward issues of self regulation within an industry whose long term best interests are maximized by an avoidance of appearing to run an amoral system geared to exploit the weak by leveraging the power of the powerful developed states from which they operate to subordinate the people of debtor states by effectively contributing to the governmental lawlessness of debtor states. This self-monitoring, once confined perhaps to the realm of state to state relations now appears more and more able to reach private entities as well. And international organizations are attempting to use private entities and individuals to discipline state and other international actors. (Backer 2006b). There is an economics to this program as well—one which seeks to impose of the parties that take fewest steps to avoid loss to bear it.

Lenders can avoid charges of systemic illegitimacy as well as powerful arguments for repudiation by applying, for example, principles of joint tortfeasor or conspiracy rules from private law to fashion a series of limiting principles and norms that define, with sufficient particularity, conduct that avoids and conduct that embraces complicity (and its resulting obligations vis a vis sovereign debt). Transparency and monitoring efforts can de defined in a way to produce a sufficient effective system of behavioral safe harbors. Complicity thus defined can include a substantive element (what conduct constitutes complicity) and a process component (what systems must be created and efforts made to avoid characterization of conduct as complicit). Necessarily defining complicity narrowly affords the last bit of protection to lenders and the lending system.

Normalizing Systems of Management of Global Debt in Global Institutions. One of the great ironies of the odious debt doctrine—among both its defenders and critics—is the consensus that debate on this topic appears to generate with respect to the solution of the "problem" however conceived. And that solution has changed

little in general form from that proposed by Sack in the 1920s. Few theorists are willing to leave matters to the private market, though many are satisfied to import private law principles to whatever mechanism they advocate. Even fewer are willing to leave resolution to the current disordered system of territorially bounded states, split between creditors and debtors. What most propose are some form or another of international or supranational organization for the resolution of disputes about debt, and more precisely, for its enforcement as against states otherwise unwilling to pay. Thus, along with Anne Krueger of the IMF (Krueger 2002). there are many proposals for a supra national system of insolvency to which all sovereign states would be bound. These systems have been characterized as efforts to reduce political considerations from sovereign debt relief (for the reasons such reduction is necessary in American corporate law restructuring) (Rasmussen 2007). . They might incorporate human rights values in discussion of debt payment obligations (Dickerson 2007). Such systems might reduce systemic incentives toward bad behavior among the individuals clothed with public power in debtor states (Raffer 1993). Whatever the system chosen, the result will be the same, the production of an autonomous transnational system for the disciplining of states through the leverage of its indebtedness, into conformity with globally coercive behavior norms. Odious debts doctrine, and the systems its spawns, are in this sense, a means to a greater end.

VI. CONCLUSION.

By now one gets the essential point. Odious debt is a horse with many saddles. I have sought to describe the traditional notion, to remind the reader of its origins as a very narrowly tailored international instrument for repudiation. I have also described its attempted expansion to a doctrine focused on current concerns of market integrity, corruption, ethical development and public benefit. Though still more theory than reality for the moment, its effects are slowly being felt within policy arenas. I then described the transformation of the doctrine in the works by Castro, as part of Cuba's broader efforts to discredit the global markets for state finance. Embracing expanded notions of the rationale for debt repudiation on odiousness grounds, he has sought to refocus the analysis from borrower to lender, and from contextual transaction to the system of lending in its entirety. Have shown how both the expanded traditional contextually based notion of odiousness and Castro notion of systemic illegitimacy could be used to support a repudiation by Cuba of all of its foreign debt upon a transition to a post Castro government—and ironically to a post Castro government that might well retain a certain strong authoritarian bent. Though that scenario is unlikely to play out, it does suggest the ways in which the expanded doctrines could well be shape changes to sovereign lending. For that purpose, I suggested the specific likely long term effects on the way in which markets for sovereign debt ordered and function. These changes, which will go a long way to solidifying the integrity of sovereign lending markets without reducing their private character, will serve both as a reality to confront future Cuban governments and as evidence of the power of the current government to shape international "reality" frameworks.

Odious debt doctrine now serves as an umbrella concept to illuminate a great problem of the state system as it interacts with emerging global capital markets. It pits older hierarchical notions of the state system with the rising network of multiple public and private global but functionally differentiated systems of governance. Odiousness debt doctrine exposes creditor as well as debtor. Its broad application, at least in theory, will not likely do much to destabilize the rising system of global capital. But it may produce a series of "structural adjustments" (with conscious irony here pointed in the direction of IMF frameworks for lending to developing states (International Monetary Fund 1999)) in the way that system operates that might be of value to debtor states even as it strengthens that system and provides a mechanism by which it can emerge autonomous from the state system which it services.

REFERENCE LIST

Guido Acquaviva, *The Dissolution Of Yugoslavia And The Fate Of Its Financial Obligations*, 30 DENV. J. INT'L L. & POL'Y 173 (2002).

PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY (Earth Scan Publ'ns Ltd. 1991).

Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2005 UTAH L. REV. 401.

Larry Catá Backer, *The Private Law of Public Law: Public Authorities As Shareholders, Golden Shares, Sovereign Wealth Funds, And The Public Law Element In Private Choice of Law*, 82 TULANE LAW REVIEW (2008).

----------, *Paraguay's New President and Ex-Bishop: Reform, Religion, and Constitution*, LAW AT THE END OF THE DAY, July 30, 2008, available http://lcbackerblog.blogspot.com/2008/07/httpwwwbloggercomimggllinkgifrevolving.html.

----------, *Alternativa Bolivariana Para los Pueblos de Nuestra América (ALBA): A Summary of the 6th Summit of Member*, States LAW AT THE END OF THE DAY Feb. 11, 2008, available http://lcbackerblog.blogspot.com/2008/02/alternativa-bolivariana-para-los.html.

----------, *Advancing the Application of Odious Debt Doctrine in Ecuador: Unconscionable Terms, Illegitimate Debt and the Obligation to Repay Sovereign Debt,* LAW AT THE END OF THE DAY, May 29, 2007, available http://lcbackerblog.blogspot.com/2007/05/advancing-application-of-odious-debt.html.

----------, *Odious Debt and "Vulture Funds": Making a Case for Repudiation of Sovereign Debt*, LAW AT THE END OF THE DAY, Feb. 16, 2007, available http://lcbackerblog.blogspot.com/2007/02/odious-debt-and-vulture-funds-making.html.

----------, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes,* 70 DUKE JOURNAL OF LAW & CONTEMPORARY PROBLEMS 1 (2007).

----------, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN STATE INTERNATIONAL LAW REVIEW 497 (2006).

----------, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41(4) TULSA LAW JOURNAL 541 (2006a).

----------, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUMBIA HUMAN RIGHTS LAW REVIEW 287 (2006b)

----------, *Cuban Corporate Governance at the Crossroads: Cuban Marxism. Private Economic Collectives and Free Market Globalism,* 14 TRANSNAT'L L. & CONTEMP. PROBS. 337, 404-413 (2004).

Larry Catá Backer, *Surveillance and Control: Internal, External and Governmental Monitoring of Corporate Insiders After Sarbanes-Oxley*, 2004 MICHIGAN STATE DCL LAW REVIEW 327 (2004a)

----------, The Führer Principle of International Law: Individual Responsibility and Collective Punishment, 21 PENN STATE INTERNATIONAL LAW REVIEW 509 (2003).

Omri Ben-Shahar and Mitu Gulati, *Partially Odious Debts?,* 70 LAW AND CONTEMPORARY PROBLEMS 47 (2007).

Patrick Bolton and David Skeel, *Odious Debts or Odious Regimes*, 70 LAW & CONTEMPORARY PROBLEMS 83 (2007).

William W. Bratton and G. Mitu Gulati, *Sovereign Debt Reform and the Best Interests of Creditors,* 57 VANDERBILT L. REV. 1 (2004).

Fidel Castro Ruz, *Una revolucion solo puede ser hija de la cultura y sus ideas,* Discurso pronunciado por el Presidente del Consejo de Estado de la Républica de Cuba, Fidel Castro Ruz, en la Aula Magna de la Universidad Central de Venezuela, 3 Feb. 1999, available at http://www.cuba.cu/gobierno/discursos/1999/esp/f030299e.html (hereafter FCR 1999 Speech), available http://www.cuba.cu/gobierno/discursos/1999/esp/f030299e.html.

----------, Conclusiones Del Comandante En Jefe Fidel Castro Ruz, Primer Secretario Del Comite Central Del Partido Comunista De Cuba Y Presidente De Los Consejos De Estado Y De Ministros, En La Clausura Del X Foro De Ciencia Y Tecnica, Efectuado En El Palacio De Las Convenciones, El 21 De Diciembre De 1995, "Año Del Centenario De La Caida De Jose Marti", available http://www.cuba.cu/gobierno/discursos/1995/esp/f211295e.html.

----------, Discurso pronunciado por el Comandante en Jefe Fidel Castro Ruz, Primer Secretario del Comite Central del Partido Comunista de Cuba y Presidente de los Consejos de Estado y de Ministros, en la VIII Conferencia Cumbre del Movimiento de Países No Alineados, celebrada en Harare, Zimbabwe, Sept. 2, 1986, available http://www.cuba.cu/gobierno/discursos/1986/esp/f020986e.html.

----------, Clausura del dialogo juvenil y estudiantil de america latina y el caribe sobre la deuda externa, celebrado en el palacio de las convenciones, el 14 de Septiembre De 1985, "Año Del Tercer Congreso," delivered Sept. 14, 1985, La Habana, Cuba, available at http://www.cuba.cu/gobierno/discursos/1985/esp/f140985e.html , and translated as "Castro 15

Sep. Comments on Latin American Debt" at http://www1.lanic.utexas.edu/la/cb/cuba/castro/1985/19850915 (University of Texas "Castro Speech Database) [hereinafter FCR 1985 Speech]

----------, Speech by President Fidel Castro at the Continental Dialogue on the Foreign Debt held at Havana's Palace of Conventions Aug. 4, 1985, available at http://www1.lanic.utexas.edu/la/cb/cuba/castro/1985/19850804 (Castro 1985a).

----------, Discurso pronunciado a Delegados a la Conferencia Sindical de Los Trabajadores de América Latina y el Caribe sobre la Deuda Externa, durante la Sesión de Clausura del Evento, el día 18 de Julio de 1985, available at http://www.cuba.cu/gobierno/discursos/1985/esp/f180785e.html) (Castro 1985b).

Anupam Chander, *Odious Securitization,* 53 EMORY L.J. 923 (2004).

Tai-Heng Cheng, Renegotiating the Odious Debt Doctrine, 70 Journal of Law and Contemporary Problems 7 (2007).

China to Discuss Cuban Investment, BBC News Online, November 22, 2004, available http://news.bbc.co.uk/2/hi/business/4034081.stm.

Deborah A. Demott, *Agency by Analogy: A Comment on Odious Debt*, 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 157 (2007).

Mechele Dickerson, *Insolvency Principles and the Doctrine of Odious Debts: The Missing Link in the International Human Rights Debate*, 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 53 (2007)).

Donegal International Ltd. v. Republic of Zambia, Case 2005-190, [2007] EWHC 197 (Comm.), available http://www.bailii.org/ew/cases/EWHC/Comm/2007/197.html.

Adam Feibelman, *Equitable Subordination and Sovereign Debt*, 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 171 (2007)).

THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 145-148 (1990).

Anna Gelpern, *What Iraq and Argentina Might Learn From Each Other*, 6 CHI. J. INT'L L. 391 (2005).

Carol Giacomo, *World Bank Corruption May Top $100 Billion,* GLOBAL POLICY FORUM, May 13, 2004, http://www.globalpolicy.org/socecon/bwi-wto/wbank/2004/0513corrupt.htm.

Tom Ginsburg and Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development and Democratization,* 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 115 (2007).

David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt,* 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 137 (2007).

Mitu Gulati, Lee C. Buchheit, and Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE LAW JOURNAL 1201-1262 (2007).

PATRICK J. HANEY, THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY (2005),

Inter-American Development Bank Debt Relief A Smoke Screen, ODIOUS DEBTS ONLINE (Dec. 12, 2006), http://www.odiousdebts.org/odiousdebts/print.cfm?ContentID=16758.

International Monetary Fund, The IMF's Enhanced Structural Adjustment Facility (ESAF): Is It Working? (September 1999) available http://www.imf.org/external/pubs/ft/esaf/exr/index.htm.

Jubilee, The Concept of Odious Debt, available http://www.jubileeusa.org/truth-about-debt/dont-owe-wont-pay/the-concept-of-odious-debt.html

Patrick Julliard, *The Foreign Debt of the Former Society Union: Succession or Continuation?*, *in* DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 67–86 (Brigitte Stern ed., Kluwer Law Int'l 1998).

ASHFAQ KHALFAN, JEFF KING & BRYAN THOMAS, CTR. FOR INT'L SUSTAINABLE DEVELOPMENT LAW, ADVANCING THE ODIOUS DEBT DOCTRINE, (2003) available http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

Sarkis J. Khoury, *Sovereign Debt: A Critical Look at the Causes and the Nature of the Problem, in* ESSAYS IN INTERNATIONAL BUSINESS (1985).

Michael Kremer & Seema Jayachandran, *Odious Debt*, April 2002, available http://www.imf.org/external/np/seminars/2002/poverty/mksj.pdf.

Anne O. Krueger, A New Approach to Sovereign Debt Restructuring, International Monetary Fund, Apr. 30, 2002, available http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf.

ADOLFO LEYVA DE VARONA, PROPAGANDA AND REALITY, A LOOK AT THE U.S. EMBARGO AGAINST CASTRO'S CUBA (1994).

Sarah Ludington and Mitu Gulati, *A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts*, 48(3) VIRGINIA JOURNAL OF INTERNATIONAL LAW 2008).

JULIETTE MAJOT, THE DOCTRINE OF ODIOUS DEBTS, IN FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 35 (1994).

Emad Mekay, *Poorest Pay for World Bank Corruption—US Senator*, COMMONDREAMS.ORG, May 14, 2004, http://www.commondreams.org/headlines04/0514-07.htm.

Carmelo Mesa-Lago, *The Cuban Economy in 1999-2001: Evaluation of Performance and Debate on the Future, in* 11 CUBA IN TRANSITION 1, 4 (2001).

Christina Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARVARD JOURNAL OF INTERNATIONAL LAW 109 (2008) available http://www.ciaonet.org/pbei/bi/krm01/krm01.pdf.

Chris N. Okeke, *The Debt Burden: An African Perspective,* 35 INTERNATIONAL LAWYER 1489 (2001).

Greg Palast, *Ecuador Gets Chavez'd* (May 11, 2005), available at http://www.gregpalast.com/ecuador-gets-chavezdrn-bush-has-someone-new-to-blame/ (accessed May 15, 2007)

Christoph G. Paulus, *Odious Debts vs. Debt Trap: A Realistic Help?,* 31 BROOK. J. INT'L L. 83 (2005).

Jedediah Purdy and Kimberly Fielding, Sovereigns, Trustees, Guardians: Parivate –Law Concepts and the Limits of Legitimate State Power, 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 165 (2007).

Kunibert Raffer, *Odious Debt, Illegitimate Debt, Illegal or Legal Debts—What Difference Does it Make for International Chapter 9 Debt Arbitration?*, 70 JOURNAL OF LAW AND CONTEMPORARY PROBLEMS 221 (2007).

----------, *What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency, in* FROM CANCÚN TO VIENNA, INTERNATIONAL DEVELOPMENT IN A NEW WORLD 68 (Bruno Kreisky Forum for International Dialogue ed., 1993).

Robert K. Rasmussen, *Odious Debt and the Essential Political Character of Sovereign Debt Restructuring*, 70 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 249 (2007)

----------, *Integrating A Theory Of The State Into Sovereign Debt Restructuring*, 53 EMORY L.J. 1159 (2004).

Volinka Reina, Note and Comment, *Iraq's Delictual And Contractual Liabilities: Would Politics Or International Law Provide For Better Resolution Of Successor State Responsibility?* 22 BERKELEY J. INT'L L. 583, 592–99 (2004).

ALEXANDRE N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES 158–65 (1927).

Jonathan Shafter, The Due Diligence Model: A New Approach to the Problem of Odious Debts, 21 ETHICS & INT'L AFF. 49 (2007).

Paolo Spadoni, *The Impact of the Helms-Burton Legislation on Foreign Investment in Cuba, in* 11 CUBA IN TRANSITION 18 (2001).

Joseph Stiglitz, Globalization and its Discontents (New York: W.W. Norton & Co., 2003).

JAIME SUCHLICKI, THE U.S. EMBARGO OF CUBA (2000).

CHRISTIAN SUTER, DEBT CYCLES IN THE WORLD-ECONOMY: FOREIGN LOANS, FINANCIAL CRISES, AND DEBT SETTLEMENTS, 1820-1990 81 (Boulder, CO: Westview Press, 1992).

Tinoco Arbitration. Great Britain v. Costa Rica, 1 R. Int'l. Arb. Awards 375 (1923), reprinted as *Arbitration Between Great Britain and Costa Rica: Opinion and Award of William H. Taft, Sole Arbitrator,* (Washington, D.C., Oct. 18, 1923), 18 AM. J. INT'L L. 147 (1924).

Nsongurua J. Udombana, *The Summer Has Ended And We Are Not Saved! Towards A Transformative Agenda For Africa's Development*, 7 SAN DIEGO INT'L L.J. 5 (2005).

Michael John Volkovitsch, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2165 (1992).

World Duty Free, Ltd., v. Republic of Kenya (ICSID October 2006) available http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf.

Statutes

Cuban Democracy Act of 1992, 22 U.S.C. § 6001 *et seq*.

Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. § 69A), at 22 U.S.C. § 6034(a)(1) (2000) (the Helms Burton Act).

Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq*,

Rome Statute of the International Criminal Court, 17 July 1998, available http://www.un.org/law/icc/index.html.

Trading With the Enemy Act of 1917, 50 U.S.C. §§ 5 *et seq*.,