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Abigail S. Reyes

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# Protecting the “Freedom of Transit of Petroleum”:

## Transnational Lawyers Making (Up) International Law in the Caspian

By  
Abigail S. Reyes\*

### ABSTRACT

Over the past decade, U.S.-based energy-sector law firms have negotiated the legal architecture, financing, and construction of Central Asia’s Baku-Tbilisi-Ceyhan (“BTC”) oil pipeline in fulfillment of an oil project that analysts have dubbed the “contract of the century.” Regional organizations decry the usual litany of economic, human rights, and environmental costs universally associated with big oil. The pipeline’s most striking feature, however, is the way the deal was made. Instead of using merely contract instruments, the law firms crafted an international treaty that invokes a “principle of the freedom of transit of Petroleum” which, *inter alia*, chills development of local regulatory regimes, dodges challenges posed by the recent surge in human rights cases following *Doe v. Unocal*, and upends international law’s central tenet of sovereignty through radically asymmetrical terms and wholesale transfer of land and other property rights.

Cumulatively, this article argues, these provisions have created a thousand-mile swath of militarized corporate sovereignty running from Azerbaijan’s Caspian shore to Turkey’s Mediterranean, the ramifications of which are sure to

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\* Law Clerk to the Honorable Richard A. Paez, United States Court of Appeals for the Ninth Circuit; A.B., Stanford University, 1996; J.D., Boalt Hall School of Law, UC Berkeley, 2004. An early version of this article was presented at the Law and Society Association Annual Meeting on June 5, 2005 during the “Law and Post-Coloniality in the Global South” panel moderated by Professors Mary Dudziak and Teemu Ruskola, who gave the author much appreciated feedback. The author would also like to thank Professors Richard M. Buxbaum, Angela P. Harris, and Kathryn Abrams for feedback and guidance over the course of this project; Dana Clark of the International Accountability Project, Nick Hildyard of The Corner House, and Doug Norlen of Pacific Environment for their invaluable early analyses of the BTC project agreements; and Alexandra Yates for superb editorial support.

be felt not only by communities living along this pipeline's path, but also by their counterparts around the globe. By internationalizing the "freedom of transit of Petroleum," the BTC consortium has begun the process of making international law, attempting to place protection of this industrial product on par with protection of human rights.

## I. THE BTC PIPELINE'S LEGAL ARCHITECTURE

### A. Introduction

This article examines the creation of Central Asia's Baku-Tbilisi-Ceyhan ("BTC") oil pipeline. Over the past decade, a handful of U.S.-based, energy-sector law firms have negotiated the legal architecture, financing, and construction of the BTC pipeline to carry oil from under the Caspian to the Mediterranean Sea over a thousand miles of Azerbaijan, Georgia, and Turkey for export to western markets. In anticipation of operationalizing the pipeline this spring,<sup>1</sup> it is currently being filled with crude from the Azeri-Chirag-Guneshli field, in fulfillment of what analysts had dubbed "the contract of the century."<sup>2</sup> Both the Clinton and Bush II Administrations pressed for the pipeline, one of the world's most ambitious,<sup>3</sup> to provide access to Caspian Sea oil reserves without going through the Persian Gulf or Russia.<sup>4</sup> Led by British Petroleum ("BP"), the BTC consortium<sup>5</sup> views the pipeline as an economical

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1. See *First Shipment from BTC Oil Line Set for May*, OIL & GAS J., Feb. 27, 2006, at 9.

2. The "contract of the century" was the 1994 Production Sharing Agreement ("PSA") between the Azeri state oil company, SOCAR, and a consortium of eleven international oil companies known as Azerbaijan International Operating Company ("AIOC"). See Daphne Eviatar, *Wildcat Lawyering*, AM. LAW., Nov. 4, 2002, at 83. This PSA was the first to open up the Azeri-Chirag-Guneshli field, estimated to contain 5.4 billion barrels of recoverable oil. The BTC pipeline is being built to provide a new export route for this oil. See Christopher P.M. Waters, *Who Should Regulate the Baku-Tbilisi-Ceyhan Pipeline?*, 16 GEO. INT'L ENVTL. L. REV. 403, 405 (2004); see generally BP Caspian website, <http://www.bp.com/lubricanthome.do?categoryId=6070>.

3. Project participants expect the BTC pipeline system to flow up to one million barrels per day, worth roughly eight billion USD per year. See BP Caspian website, <http://www.bp.com/lubricanthome.do?categoryId=6070>; Paul Starobin, *Opening the Caspian Oil Tap*, BUS. WK., Dec. 24, 2001, available at [http://www.businessweek.com/magazine/content/01\\_52/b3763128.htm](http://www.businessweek.com/magazine/content/01_52/b3763128.htm).

4. As U.S. dependence on Middle Eastern oil grows, relations between the U.S. and Turkey increasingly focus on energy. See Selma Stern, *Turning Towards Turkey: Its Importance as an Energy Distributor and Ally in Post-9/11 Stabilization*, 28 FLETCHER F. WORLD AFF. 201, 204 (2004). The U.S. was a main mover behind the BTC pipeline because of the U.S. being "generally circumspect about Russian-Iranian cooperation." *Id.*; see also Daphne Eviatar, *The Geopolitics of Picking a Path*, AM. LAW., Nov. 4, 2002, at 99 ("Strategically the United States wants a new pipeline to bypass Russia so that if U.S.-Russian relations turn sour, the Russian government can't completely halt the flow of Caspian oil to the United States."). The E.U. is also eager to diversify its oil sources by relying on increased access to Turkey's energy corridor. See Yigal Schleifer, *Pipeline Politics Give Turkey an Edge*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 6; see also Douglas Frantz, *Iran and Azerbaijan Argue Over Caspian's Riches*, N.Y. TIMES, Aug. 30, 2001, at A4.

5. The consortium is called the BTC Pipeline Company ("BTC Co."), whose shareholders are: BP (U.K.) 30.1%; SOCAR (Azerbaijan) 25%; Unocal (U.S.) 8.9 %; Statoil (Norway) 8.71 %; TPAO (Turkey) 6.53 %; Eni (Italy) 5%; Total (France) 5%; Itochu (Japan) 3.4 %; INPEX (Japan)

and environmentally safer way alternative to transporting Caspian oil by a combination of pipelines and tankers through the Turkish Straits.<sup>6</sup> Local peoples' organizations in all three countries and international non-governmental organizations ("NGOs") opposed to the pipeline decry the usual litany of social, economic, environmental, and human rights costs universally associated with "big oil."<sup>7</sup>

To attract the three billion dollar investment needed for this large-scale, high-risk<sup>8</sup> venture, BP, represented by the law firm Baker Botts, sought to ensure the most favorable terms for other interested oil companies. To do so, the Houston-based team crafted not only a series of "host government agreements" but also an intergovernmental treaty among the host states to "ensure the principle of the freedom of transit of Petroleum,"<sup>9</sup> a "freedom" that, *inter alia*, includes a virtual freeze of future developments in local regulatory law,<sup>10</sup> an expedited process for the expropriation of land needed for the pipeline,<sup>11</sup> and indemnification from liability for human rights violations resulting from pipeline security control.<sup>12</sup>

Stability and predictability are vital to investors, lenders, and other financial stakeholders in a megadevelopment project<sup>13</sup> like the BTC pipeline.<sup>14</sup>

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2.5%; ConocoPhillips 2.5% (U.S.); Amerada Hess 2.36% (U.S.). See BP Caspian website, <http://www.bp.com/lubricanthome.do?categoryId=6070>. The project is also referred to as the Baku-Tbilisi-Ceyhan Main Export Pipeline ("MEP").

6. See *id.*

7. Recent project controversies include: the monitoring of letters of Azeri activists; the alleged torture of human rights defender Ferhat Kaya in Turkey; the increased use of police forces to break up peaceful demonstrations held by villagers in Georgia; underpaid local construction workers and violations of International Labour Organisation standards; a number of BTC affected communities still waiting for compensation and widespread cases of corruption during the land compensation process; polluted drinking water sources despite the use of 'highest standards'; and the discovery of cracked pipes that could potentially cause massive environmental damage. CEE Bankwatch, Baku-Tbilisi-Ceyhan Pipeline, Caucasus (2005), <http://www.bankwatch.org/project.shtml?s=153907>. NGOs monitoring the project include CEE Bankwatch Network (Central and Eastern Europe), Amnesty International (U.K.), Friends of the Earth (England, Wales & Northern Ireland), Les Amis de la Terre (France), Green Alternative (Georgia), and National Ecological Center of Ukraine. See *id.*

8. As with most petroleum pipeline investment, BTC investors face various risks, from technology risks in pipeline development to "unforeseen changes in the investment policies and laws of the host country" (among other stability risks); risks "not associated with changes in the fiscal framework," such as "civil unrest or ethnic disturbances" (political risk); and risks that "environmental pollution and other tortuous [sic] acts" will diminish efficiency of the wells (operational risk). B.O.N. Nwete, *To What Extent Can Stabilization Clauses Mitigate the Investor's Risk in a Production Sharing Contract?*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 118, 128 (2005), available at <http://www.gasandoil.com/ogel>. Contributing to the BTC pipeline's high-risk profile is the fact that it cuts across roughly seven conflict zones through earthquake-prone terrain. See Baku-Ceyhan Campaign, Conflict, Militarization, Human Rights and the Baku-Tbilisi-Ceyhan Pipeline (2005), [http://www.bakuceyhan.org.uk/more\\_info/human rights.htm](http://www.bakuceyhan.org.uk/more_info/human%20rights.htm).

9. Agreement Among The Azerbaijan Republic, Georgia and The Republic of Turkey, <http://subsites.bp.com/caspian/BTC/Eng/agmt4/agmt4.PDF> [hereinafter IGA].

10. See Part IIIA1, *infra* (discussing economic equilibrium clause).

11. See Part VI, *infra* (discussing BTC's property rights provision).

12. See Part V, *infra* (discussing BTC pipeline security provisions).

13. Megadevelopment refers to a class of large-scale, high-risk projects that exploit energy

The BTC project agreements follow a decades-long tradition of seeking stability and predictability through stabilization clauses, as described in more detail below. This article posits, however, that the stabilization sought via this pipeline's project agreements moves far beyond the reach of typical stabilization clauses, and does so through a relatively unexamined combination of legal instruments.

The concept of using an intergovernmental treaty, or intergovernmental agreement ("IGA"), in conjunction with other, more typical project agreements in order to address structural complications anticipated in cross-border megadevelopment projects has existed for at least the last decade.<sup>15</sup> Few actual IGAs, however, have been disclosed to the public, making comparative analysis and comprehensive review of the field difficult. The BTC pipeline is thought to be only one of at least a handful of cross-border oil and gas projects in the Caspian region and West Africa to emerge in recent years that is structured around an IGA. For example, as the BTC pipeline came into existence, so too did the West Africa Gas Pipeline ("WAGP"), conceived by Royal Dutch Shell, Chevron, West African Gas Pipeline Ltd., and others to export gas from Nigeria through Benin and Togo to Ghana.<sup>16</sup> Although it is known that Ghana and Nigeria have signed a WAGP Treaty in conjunction with other project agreements, WAGP project participants have thus far declined requests by civil society actors to disclose the treaty.<sup>17</sup>

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or other natural resources of typically resource-rich, capital-poor countries. Megadevelopment is usually organized by consortia of transnational corporations, in cooperation with state authorities, and financed by a combination of private investors, bank loans, and international financial institutions. See, e.g., Peter Bosshard, Janneke Bruil, et al., *Gambling with People's Lives: What the World Bank's New "High-Risk/High-Reward" Strategy Means for the Poor and the Environment*, Environmental Defense, Friends of the Earth, International Rivers Network, Sept. 2003; William H. Fisher, *Megadevelopment, Environmentalism, and Resistance: The Institutional Context of Kayapo Indigenous Politics in Central Brazil*, 53 HUM. ORG.: JOURNAL OF THE SOCIETY FOR APPLIED ANTHROPOLOGY 220 (1994).

14. See Nwete, *supra* note 8, at 20 n.11 (citing S. Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401, 403 (1979) (describing importance of stability and predictability to investors, lenders, and other stakeholders in transnational investments)).

15. See Scott Sinclair, Note, *World Bank Guarantees for Oil and Gas Projects*, in PUB. POL'Y FOR THE PRIVATE SECTOR, Nov. 1998, available at <http://rru.worldbank.org/Documents/PublicPolicyJournal/157sincl.pdf> (recommending that private investors in large-scale, cross-border oil and gas projects in developing countries utilize an intergovernmental agreement as part of a bundle of available, albeit "unique type[s] of risk mitigation").

16. See Energy Information Administration, West African Gas Pipeline (WAGP) Project (Mar. 2003), <http://www.eia.doe.gov/emeu/cabs/wagp.html>.

17. See Memorandum from Doug Norlen, Policy Dir., Pac. Env't, to Publish What You Pay Campaign 3 (Dec. 2005) (on file with author) (describing use of Freedom of Information Act ("FOIA") to compel disclosure of extractive and energy sector investment contracts, specifically, unsuccessful attempt to compel public disclosure of WAGP Treaty through FOIA requests to the U.S. Overseas Private Investment Corporation, a WAGP public financier). Project participants tend to be reluctant to disclose publicly any project agreements, not merely IGAs. See, e.g., *id.* (describing unsuccessful attempts by NGO to compel public disclosure of the Sakhalin II PSA, governing one of the world's largest integrated oil and gas projects in Russia and the Chad-Cameroon Pipeline's Conventions of Establishment); see generally <http://www.publishwhat>

In the case of the BTC, project participants only agreed to make public the IGA and some of the other key project agreements after significant public pressure from international civil society convinced the International Finance Corporation to pressure BP to publish them.<sup>18</sup> BP also released in tandem the IGAs governing the Caspian Sea's Shah Deniz offshore gas field and its export system, a gas pipeline that BP expects to run parallel to the BTC oil pipeline.<sup>19</sup> Aside from these documents, the BTC IGA and accompanying project agreements represent some of the first of this species to be publicly disclosed by project participants. As this article explores, when compared to terms found in more typical project agreements governing oil and gas production historically, it appears that the BTC project agreements represent substantially greater protections for the transnational project participants and substantially lower protections for human rights and state sovereignty. It may be that the BTC project agreements are merely representative in both form and content of other project agreements governing comparable megadevelopment endeavors that are currently being pursued. But without a more complete body for comparison, such assessment is difficult to make. In the meantime, by focusing on the BTC, this article seeks to contribute to the growing literature<sup>20</sup> examining the documentation that is available of recent innovations in megadevelopment's legal architecture.

### *B. Theoretical Context: The Struggle Between Pipeline Communities and Pipeline Lawyers*

International law seems to move in two inextricably related yet radically

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youpay.org (describing international campaign to pressure the oil, gas, and mining industries to disclose payments to host governments for the extraction of natural resources). *But see* Ian Rutledge, *The Sakhalin II PSA- a Production 'Non-Sharing' Agreement: Analysis of Revenue Distribution*, SHEFFIELD ENERGY & RESOURCES INFO. SERVS., Nov. 2004, available at <http://www.pacificenvironment.org> (analyzing Sakhalin II PSA after the document was leaked to NGOs); AMNESTY INTERNATIONAL, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT (2005), available at <http://www.amnesty.org> (analyzing Chad-Cameroon Conventions of Establishment, obtained independently of disclosure by project participants).

18. See Daphne Eviatar, *Transparent Motives*, AM. LAW., Nov. 2002, at 99; Telephone Interview with Doug Norlen, Pol. Dir., Pac. Env't (June 21, 2005); telephone interview with Nick Hildyard, Dir., The Corner House (June 30, 2005).

19. Much of the legal documentation for the BTC project, including the IGA and the Azerbaijan, Georgia and Turkish Host Government Agreements ("HGAs"), are available at <http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013492>. See also Overview of South Caucasus Pipeline, <http://www.bp.com/genericarticle.do?categoryId=9006670&contentId=7014371> (describing the South Caucasus gas pipeline project).

20. See, e.g., Ian Rutledge, *supra* note 17 (analyzing Sakhalin II PSA); see also AMNESTY INTERNATIONAL, *supra* note 17 (analyzing Chad-Cameroon Conventions of Establishment); AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE: THE BAKU-TBILISI-CEYHAN PIPELINE PROJECT (2003), available at <http://www.amnestyusa.org/business/humanrightsontheline.pdf> (providing early analysis of BTC project agreements); Waters, *supra* note 2; Matthew Nick, *Rethinking Multinational Corporate Governance in Extractive Industries: The Caspian Development Project and the Promise of Cooperative Governance*, 38 VAND. J. TRANSNAT'L L. 577 (2005).

separate worlds. In one world, local community organizations led by activists such as Manana Kochladze<sup>21</sup> and their national and international counterparts advocate for protection of basic economic, social, cultural, political, and civil rights through an admittedly problematic<sup>22</sup> framework of international human rights law. In the other world, transnational capital, hand-in-hand with first-world statesmen, combine public international law's legacy of positivism and sovereignty with private international law's foreign direct investment regime to open worldwide markets for megadevelopment projects in sectors ranging from highway infrastructure and tourism to mineral extraction and energy.<sup>23</sup> In both worlds, international law provides each side the bases for asking for what its constituency believes it deserves.<sup>24</sup> And in both worlds, colonization as a global phenomenon is a historical fact whose legacies and modern-day persistence intimately shape the interaction between the two worlds, sometimes overtly, but always at least as a subtext.

These worlds collide most dramatically when organized local communities stand, both ideologically and physically, in megadevelopment's path. Transnational lawyers<sup>25</sup> figure centrally in the response of both worlds to such collision. Tracking the tension between these competing sets of transnational lawyers is important to any thoughtful discussion of the broader tensions accompanying propagation of and resistance to economic globalization. While this article principally focuses on the work product of the BTC lawyers without pursuing their individual worldviews and motivations, it also attempts to maintain the reader's awareness of the context in which this kind of megadevelopment project forms. For example, here, teams of transnational

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21. Manana Kochladze is an environmental and public interest defender from Georgia who was awarded the Goldman Environmental Prize in 2004 for her work advocating against the BTC pipeline through the organization she founded, Green Alternatives. See Goldman Environmental Prize, Manana Kochladze (2004), <http://www.goldmanprize.org> (follow "Recipients" hyperlink; then follow "Manana Kochladze" hyperlink).

22. See generally MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) (critiquing human rights discourse for its origins in and perpetuation of imperialism).

23. See Jonathan Fox, *Introduction: Framing the Inspection Panel*, in DEMANDING ACCOUNTABILITY, xi, xvi (Dana Clark et al., eds., 2003) (noting the "two competing sets of rights").

24. For example, while both worlds employ notions of national sovereignty and development to advance their causes, they do so to radically different ends. See *id.*

25. Transnational lawyering is a nomenclature used to acknowledge that today's "lawyering practices and projects are intertwined with transnational institutions, processes and agendas" where the "parameters, constraints, and opportunities created by a single sovereign power [are no longer] assumed." Law and Society, Transnational Lawyering, <http://www.lawandsociety.org/> (follow "Collaborative Research Networks" hyperlink; then follow "Transnational Lawyering hyperlink"). Transnational lawyers include lawyers:

who work on commercial transactions involving multiple national jurisdictions; lawyers who work on relations among sovereign actors . . . and among supra-national actors, such as the WTO . . . or other similar institutions; lawyers involved in building supra-national legal regimes and institutions; and lawyers who mobilize across national borders to advance social, political and economic agendas, including lawyers working for international NGOs and other social movement organizations.

*Id.*; see also Harold G. Maier, *Forward: Some Implications of the Term "Transnational,"* 25 VAND. J. TRANSNAT'L. L. 147 (1992).

lawyers crafted the BTC project agreements over many years. During those years, other teams of transnational lawyers working with communities affected by or living along the pipeline path worked to gain public access to those agreements. How these two sets of transnational lawyers, and the interests they represent, interact as the pipeline begins operation is largely dictated by the terms that the first set of lawyers decided behind closed doors in conjunction with the international oil companies ("IOCs") and host statesmen they represent. This article thus focuses on those terms, while bearing in mind the human agency involved in their creation. Such awareness aims to assist in the effort of learning to see that economic globalization is not a force propelled by its own machinations toward an inevitable end, but rather a set of structures of power crafted, maintained, and wrought anew by human minds, one policy, project, and war at a time.<sup>26</sup>

Any examination of the tension between these two sets of transnational lawyers would be incomplete without a look at the changing role of the state in regulation of the global economy. In some post-colonial African nations, for example, governments rose to power that were very assertive about de-linking control of their countries' natural resources from transnational capital.<sup>27</sup> It is noteworthy that these governments, regardless of how quickly their efforts were extinguished, drew power from their historical alliance with the local social movements for rights protection. The people and the government were, for brief moments, aligned. Today, in a post-Cold War and post-structural adjustment world, all but a struggling handful of today's governing states in the developing world have, to varying degrees, accepted neoliberal economic development's continued designs on natural resources. In fact, Turkey, Georgia and Azerbaijan's warm welcome of the BTC Company's investment is emblematic of the more pervasive trend.

But as this article explains, after the warm welcome, transnational capital's request of the state is largely for it to get out of the way and to ensure that others do not get in the way.<sup>28</sup> Such a demand, enshrined here in the IGA, leaves local

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26. This article is the first of two to examine that subtext in the context of the way in which the BTC pipeline was intellectually constructed. This article principally explains how the BTC pipeline's legal architecture exemplifies if not surpasses traditional megadevelopment arrangements in its potential to curtail pipeline-affected communities' avenues of redress. The second article explains why the BTC project agreements raise eyebrows when examined against the backdrop of traditional sovereignty doctrine, but are hardly remarkable when examined against the backdrop of a post-colonial critical theory of sovereignty. It also fleshes out the concept of corporate sovereignty as applied to the BTC pipeline and examines how the BTC pipeline is in step with the rhetoric of "good governance," today's framework defining the agenda of donor states and international lending institutions. In so doing, these articles aim to contribute to the effort of articulating parallels between today's project of good governance and globalization, and the colonial project of civilization and commerce.

27. See Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 57-60 (2004) (characterizing efforts by third world host countries to subject foreign investment to their domestic laws as having been met with "profound hostility and resistance").

28. See, e.g., AMNESTY INTERNATIONAL, *CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT*, *supra* note 17, at 21 (observing that the Chad-Cameroon



social movements without a strong ally in the state. Experiences of pipeline communities in other regions bear out this thesis. This is so even where, as here, the host states also participate in the megadevelopment as equity partners and subcontractors.<sup>29</sup> For example, where a project agreement delegates to the host state responsibility for pipeline security, public forces often enjoy the oil consortia's financial and other support to carry out this responsibility. Abuse of that responsibility has turned out to be one of the most immediate threats to the lives and safety of communities living along Unocal's Yadana pipeline in Burma, Occidental Petroleum's Canon Limon pipeline in Colombia, and near ChevronTexaco's platforms in the Niger Delta region of Nigeria, among others.<sup>30</sup> Without power in national legislative or executive arenas and little to no effective recourse through national courts, many local communities turn instead to advocacy by international NGOs. The influence of these alliances on the development of human rights law over the past few decades has been important, albeit incremental. However, even in the most high-profile cases, such alliances have rarely been able to effect the lasting change demanded by local community partner organizations whose members' lives, sometimes literally, depend on halting megadevelopment as these projects currently tend to manifest.<sup>31</sup> This solution, therefore, seems to be a crucial, but insufficient means by which to address the profound absence of alignment between the state and local community interests.

This article does not suggest that pipeline communities, their lawyers, and states are merely at the mercy of pipeline lawyers. Over the past decade, several pipeline communities have brought actions in U.S. federal and state courts against international oil companies for, *inter alia*, environmental pollution and their alleged role in authorizing, and sometimes funding, the commission of human rights abuses along pipeline corridors including forced labor, rape and

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Pipeline project agreements "are designed to achieve two major objectives, [one of which is] to secure the smooth operation of the projects by eliminating interference with their activities").

29. The Azeri state oil company, SOCAR, is the project's second largest investor, while Turkey's TPAO is the fifth. Turkey's BOTAS also operated as the turnkey construction company that built the pipeline in Turkey. See BP Caspian website, <http://www.bp.com/lubricant/thome.do?categoryId=6070>.

30. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (Burma); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (Colombia); *Bowoto v. ChevronTexaco Corp.*, No. C99-02506 (N.D. Cal. filed May 27, 1999) (Nigeria).

31. For example, in India's Narmada River Valley, community activists and their international NGO counterparts have waged a highly organized campaign to stop a hydroelectric project involving 3000 dams on the Narmada River, the construction of which has already begun flooding myriad villages and farmland. Despite intermediate legal victories in national tribunals and a highly publicized international campaign, the Indian high court and public forces have nonetheless moved forward with dam construction in a way that continues to violate many established human rights of the affected communities as well as national and international laws and policies. See Friends of River Narmada, *Large Dams on the Narmada River*, <http://www.narmada.org/nvdp.dams/index.html#history> (last visited Mar.31, 2006). Over time, an exception to this general trend may emerge along the Thai-Burma border from the after-effects of the *Doe v. Unocal* settlement. See *infra* Part II (discussing *Unocal* case).

murder in the course of forced labor, genocide, and extrajudicial killing.<sup>32</sup> Of these actions, the first one filed, *Doe v. Unocal*, has gone the furthest.

The Burmese villager plaintiffs in *Doe v. Unocal* alleged that Unocal was secondarily liable for forced relocation, forced labor, rape, torture, and murder that their communities endured at the hands of security forces along the company's Yadana natural gas pipeline that stretches from the Andaman Sea over land to Thailand.<sup>33</sup> In December 2004, after eight years of litigation, on the eve of rehearing *en banc* by the Ninth Circuit Court of Appeals, and in anticipation of a nearing jury trial in California state court, Unocal agreed to settle the claims.<sup>34</sup> In bringing these actions, the transnational lawyers representing pipeline communities are not only shepherding their clients' human rights claims. They also are attempting to shape the legal framework of corporate accountability for human rights abuses—an area of international law with historically few teeth.

The BTC security agreements, which form one aspect of the pipeline's bundle of project agreements, provide a fascinating lens through which to examine some ways the transnational corporate lawyer may be responding to expressions of dissent by pipeline communities to international law's continued facilitation of first world extraction of the developing world's natural resources. Shortly after the plaintiffs filed *Doe v. Unocal*, BP negotiated the BTC pipeline agreements that, as discussed below, if enforced, could effectively indemnify the involved oil companies from future judgments against them for pipeline-related human rights violations.<sup>35</sup> This innovation in private international law seems to have emerged in response to the operational and political risks the *Unocal* litigation represents.<sup>36</sup> Baker Botts accomplished this step both through private

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32. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging, *inter alia*, genocide and crimes against humanity in Sudan); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (alleging participation in, *inter alia*, extrajudicial killing and torture in Nigeria); *Bowoto v. ChevronTexaco Corp.*, No. C99-02506 (N.D. Cal. filed May 27, 1999) (same); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (alleging participation in, *inter alia*, forced labor and rape and murder in course of forced labor in Burma); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (alleging, *inter alia*, extrajudicial killing in Colombia); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (alleging environmental and personal injuries in Ecuador); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (same). These actions are only some of an estimated three dozen actions brought under the Alien Tort Claims Act ("ATCA") by plaintiffs alleging claims arising out of alleged abuses by transnational corporations. See Lisa Girion, *Unocal to Settle Rights Claims*, L.A. Times, Dec. 14, 2004, at A1 (noting estimate of number of corporate ATCA cases).

33. *Doe v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002).

34. See Edward Alden, *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES, Dec. 14, 2004, at 12.

35. *Doe v. Unocal* plaintiffs filed suit in 1996; Baker Botts commenced BTC security agreements with Turkey, Georgia, and Azerbaijan in 1998. Although it would be helpful to know whether other post-1996 pipeline agreements include similar indemnification provisions, the agreements governing many megadevelopment projects remain undisclosed. See *supra* Part IA (discussing disclosure of megadevelopment project agreements).

36. In fact, over a third of BTC's project investors have been defendants in recent or ongoing ATCA cases. See *Unocal*, 395 F.3d 932 (Unocal and Total as defendants); *In re South Africa Apartheid Litigation*, 2004 U.S. Dist. LEXIS 23944 (S.D.N.Y. 2004) (BP as defendant).

contracts with each involved host state and by facilitating an IGA among the host governments which, as a treaty, is, by definition, governed by public international law principles.<sup>37</sup> Just as the form of the agreements reflect the use of both private and public international law, so too does the substance. The security provisions could influence the development of substantive public international law regarding corporate accountability for human rights violations by halting the important trend begun in the *Unocal* litigation. If the security provisions were to prove enforceable, other megadevelopment projects would undoubtedly replicate them (if they have not already), a movement which could, in essence, nip in the bud aggrieved communities' efforts to vindicate human rights through meaningful litigation against the corporations themselves. Thus, while attractive to fellow oil investors, other stakeholders are uneasy about how such security provisions could compromise the ability of local communities in a pipeline's path to seek meaningful redress for pipeline-related violations of internationally protected human rights.

With this context in mind, Part II of this article briefly traces the historical development of megadevelopment project structure. The following four parts then explain the legal architecture of the BTC project agreements. The BTC project agreements overcome the local regulatory regimes (Part III), invent an "international" law principle of the freedom of transit of petroleum (Part IV), overcome liability for security-related human rights abuses (Part V), and challenge state sovereignty (Part VI). Part VII concludes with a discussion of how megadevelopment projects such as the BTC pipeline reflect what some call "corporate sovereignty," and the roles the transnational lawyer may play in remedying the inequities perpetuated by it.

## II.

### UNDERSTANDING MEGADEVELOPMENT PROJECT STRUCTURE

In many regards, the legal architecture of the BTC pipeline typifies today's megadevelopment project arrangements. In other ways, the BTC agreements significantly differ. This part first briefly sketches the evolution of the investment milieu within which today's megadevelopment project participants generally operate. The parts following then explain how the BTC project agreements seem to move beyond the limits of this investment milieu toward further investment stability and away from protection of state sovereignty and human rights.

Generally speaking, historically, an international oil company (IOC) that wanted to pump second or third world oil would enter into a service or concession contract with the host country that would include, *inter alia*, a foreign arbitration clause. If the host country decided to nationalize or otherwise

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37. See Vienna Convention on the Law of Treaties art. 2(I)(a) (May 23, 1969), U.S.T., 1155 U.N.T.S. 331, 331; 8 I.L.M. 679.

expropriate the oil project, the IOC could seek an arbitral award. However, the IOC often encountered difficulty enforcing an award against the host country. The IOC could not reasonably go to the host country itself for the payment, and third party countries in which the host country held assets were, for a time, loathe to honor the IOC's arbitration judgment because to do so would offend traditional international law notions of sovereign immunity. First world states partially ameliorated this problem in 1958 through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>38</sup> which gelled interstate friendliness to foreign arbitration awards. The problem of the host country's sovereign immunity defense, however, persisted until the fairly recent confluence of three major efforts by investing countries.

First, U.S. courts began accepting investors' argument that since a party's intent to aggravate a contract cannot be read in to the contract, the host country, in making the contract in the first place, must have impliedly waived sovereign immunity. Though courts were split on the argument,<sup>39</sup> the U.S. Congress eventually codified this rule of construction.<sup>40</sup>

Second, the notion that a supra-national body should be involved in regulating international arbitration awards took hold in the World Bank's creation of the International Center for Settlement of Investment Disputes ("ICSID") in 1966. The ICSID Convention, to which most all resource-rich developing countries have agreed, standardized the rules governing international arbitration and created a powerful weight on host countries to comply with arbitral awards. Now, most megadevelopment project agreements contain ICSID clauses.<sup>41</sup>

Third, under President Reagan, the U.S. Department of State took the lead in pioneering bilateral investment treaties ("BITs") with individual states, primarily in the developing world. These treaties are instruments created under public international law that spell out the states' mutual assent to terms designed to protect foreign investment aggressively, usually including the rules and definitions governing not only arbitration, but also tax stabilization, expropriation, and nationalization.<sup>42</sup> The treaties, which the U.S. enjoys now with almost fifty countries,<sup>43</sup> aim to protect investments of U.S. nationals

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38. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 9 U.S.C. § 201 *et seq.* (2006) (entered into force Dec. 29, 1970).

39. See, e.g., *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993); *Practical Concepts v. Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987); *Zernicek v. Petroleos*, 614 F. Supp. 407 (S.D. Tex. 1985).

40. 28 U.S.C. § 1605(a)(6) (2006) (addition to the Foreign Sovereign Immunities Act declaring that arbitral clauses include waivers of sovereign immunity).

41. The BTC project's ICSID clauses are found in article 18 of each HGA.

42. See Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000* (Aug. 2004) (U.C. Berkeley Public Law Research Paper No. 578961), available at SSRN: <http://ssrn.com/abstract=578961> or DOI: 10.2139/ssrn.578961; Mark S. McConnell, *Limitations Imposed by the Constitution and Treaties of the United States on the Regulation of Foreign Investment*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* § 1.30, 30 (John Byam et al. eds., 1993).

43. See United Nations Conference on Trade and Development website,

abroad.<sup>44</sup> Many BITs now contain umbrella clauses in which the sovereign agrees to honor any commitments it has made regarding investments.<sup>45</sup> The clauses are “designed to protect investors’ contractual rights against interference from a breach of contract or an administrative or legislative act.”<sup>46</sup> Under this regime, breaches of contract under domestic law are, in essence, elevated to violations of international law.<sup>47</sup> When a state agency of a host country that has signed a BIT with the U.S. breaches an agreement with a U.S. national (corporation), arbitration tribunals may construe the sovereign itself as having breached not only the contract with the corporation, but also the BIT with the U.S.<sup>48</sup> In response, the U.S. defends its treaty and its corporations by placing diplomatic and other pressure on the host country to remedy the breach as the dispute winds its way through *ad hoc* or ICSID arbitration.<sup>49</sup> Over the last two decades, developing countries have been willing to make a “trade of sovereignty for credibility”<sup>50</sup> by entering into BITs for the perceived promise of increased foreign direct investment.<sup>51</sup>

This increasing willingness is reflected in how the form and content of the oil contracts themselves have changed over time. In the mid-twentieth century, host governments began to perceive that the concession system was too generous to IOCs. By the late 1960s, riding the tide of the United Nations’ recognition of states’ permanent sovereignty over natural resources,<sup>52</sup> states began to replace the traditional concession contract with the production sharing agreement (“PSA”).<sup>53</sup> A PSA is a civil contract that sets the terms for an oil or

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<http://www.unctadxi.org> (listing all of the countries with which the United States has made BITs).

44. See McConnell, *supra* note 42, at 31.

45. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1532 (2005).

46. See *id.* at 1568-69.

47. See *id.* at 1571; Paolo De Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 MIAMI INTER-AM. L. REV. 41, 62 (2004).

48. *Id.*

49. Other first world countries employ bilateral investment treaties as well; the Europeans in fact started using BITs to protect foreign investment earlier than the U.S., albeit in a far less aggressive form. See Elkins et al., *supra* note 42.

50. *Id.*

51. This trend persists notwithstanding admissions by economists at the international financial institutions themselves that BITs do not necessarily increase the flow of foreign direct investment to a state. See Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, (June 2003) (World Bank Policy Research Working Paper No. 3121), available at SSRN: <http://ssrn.com/abstract=636541>; United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: The Shift Towards Services* (2004), <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3235&lang=1>; World Bank, *World Bank's Global Economic Prospects* (2004), [http://publications.worldbank.org/ecommerce/catalog/product?item\\_id=3426794](http://publications.worldbank.org/ecommerce/catalog/product?item_id=3426794).

52. See G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

53. See Hilda Yumiseva, *Can Production Sharing Contracts Promote Transparency in the Management of Oil Income? The Case of Equatorial Guinea*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 111, 114-15 (2005), available at <http://www.gasandoil.com/ogel>.

gas operation in which the host state typically receives a majority percentage of “profit oil,” or annual oil production after cost recovery, and the investor assumes all costs and risks associated with production.<sup>54</sup> In addition, a standard PSA specifies a fixed duration (typically twenty-five years), fixed exploration period (typically two years, after which the IOC has the option to terminate the PSA or proceed to developing the resource), the formula by which the cost oil and profit oil will be determined, the annual cap on how much cost oil can be recovered out of gross annual revenue, and the profit or income tax that the IOC is to pay to the host state.<sup>55</sup>

While the PSA may have emerged in an effort by host states to assert greater control over the terms of oil production by IOCs, over time, the potent feature of the PSA has come to be its arbitration and stabilization provisions.<sup>56</sup> As a contract, a PSA “override[s] any national or state laws which bear upon petroleum taxation or any other aspects of what may be termed the ‘eminent domain’ rights of the state” and “can only be changed by mutual agreement.”<sup>57</sup> The PSAs are “[pivotal legal instrument[s] in investment projects [that] aim to ensure that investing companies can operate under stable, predictable conditions.”<sup>58</sup> Rather than the municipal law of the host state, the international arbitration processes described above largely govern disputes arising out of the standard PSA, thus “internationalizing” the PSA contract.<sup>59</sup> Other state-investor agreements, known also as transnational investment agreements and host government agreements (“HGAs”),<sup>60</sup> typically share these latter characteristics, even when their commercial object is the transport of oil or gas rather than its exploration and production, as is the case here.

Most megadevelopment contracts involving first world corporations now operate under this investment friendly regime—a combination of rules governing foreign investment emanating from U.S. legislation, international financial institution agreements (i.e., the ICSID), international treaties, and internationalized contracts. To this extent, the “sovereign immunity problem” related to enforcement of arbitration awards has been effectively addressed from the perspective of the multinational corporation.

As the idea for the BTC pipeline entered into this investment milieu, megadevelopment still faced at least two major legal obstacles to their goal of

54. See *id.*; Nwete, *supra* note 8, at 131.

55. See Rutledge, *supra* note 17, at 13 (describing general features of “standard” PSAs); Yumiseva, *supra* note 54, at 115 (describing Equatorial Guinea’s model PSA).

56. S.W. Stein, *Non-Fiscal Elements in Petroleum Production Sharing Agreements in Developing Countries*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 132, 137-38 (2005), available at <http://www.gasandoil.com/ogel>.

57. Rutledge, *supra* note 17, at 13.

58. AMNESTY INTERNATIONAL, *supra* note 17, at 21.

59. Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT’L L.J. 317, 347 (1988).

60. AMNESTY INTERNATIONAL, *supra* note 17, at 21; See Waters, *supra* note 2, at 404-05 (noting that “[f]rom the beginning of post-Soviet oil exploration in the Caspian region, variations on this model have been used,” and characterizing the region’s first HGA as a PSA).

minimizing the legal exposure of their investments. One obstacle stemmed from the fact that most states, even developing and newly formed states (such as Georgia and Azerbaijan), have municipal health, safety, and environmental ("HSE") laws as well as international human rights obligations with which foreign developers must comply. The second obstacle stemmed from the aforementioned *Unocal* challenge: local communities harmed by megadevelopment projects had begun using international human rights law through the Alien Tort Claims Act ("ATCA") to sue the corporations for their alleged role in the violations.<sup>61</sup> The transnational lawyers crafting the BTC deal amply addressed these, and other, obstacles to investment, as Part III explains.

### III.

#### SEEKING "UNIFORM" APPLICATION OF INTERNATIONAL LAW: BTC OVERCOMES LOCAL REGULATORY REGIMES

The IGA is the BTC pipeline's umbrella legal document, a treaty among Georgia, Azerbaijan, and Turkey that is intended to be the "prevailing legal regime" for the pipeline project in each host country.<sup>62</sup> In addition to the IGA, the host states each entered into an HGA with the BTC Company, made enforceable by incorporation into the IGA. The IGA and HGAs are accompanied by other project agreements developed over time as needed.<sup>63</sup>

Whereas a typical investment treaty articulates the *general* terms of foreign investment by nationals of one country in a second, host country, the IGA governs only terms related to this specific megadevelopment project.<sup>64</sup> The U.S. and U.K., the countries from which most of the project's investors hail, each have BITs with Georgia,<sup>65</sup> Azerbaijan,<sup>66</sup> and Turkey.<sup>67</sup> The IGA invokes the applicability of these BITs in its preamble.<sup>68</sup> The only parties to the IGA, in turn, are the three countries through which the pipeline will run, not the

61. See Part I, *supra* (discussing *Doe v. Unocal*).

62. IGA, *supra* note 9, art. II (4)(i).

63. The IGA defines "other project agreements" as "all written agreements and documented commitments, other than [the IGA and HGAs], entered into by a State and/or any State Authority, on the one hand, and any Project Investors, on the other hand, with respect to the MEP Project, as any or all of the foregoing agreements may be hereafter entered into, amended, modified or extended in accordance with their terms." IGA, *supra* note 9, art I, definitions. As noted above, many project agreements are available at <http://www.bp.com/subsection.do?categoryId=9006628&contentId=7013420>.

64. See, e.g., Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 385 n.176 (2004) (observing that the subrogation and arbitration provisions in an IGA governing construction of an off-shore oil development in the Republic of the Congo "are usually contained in . . . BITs[ ]").

65. See U.S.-Georgia BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_georgia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_georgia.pdf); See also U.K.-Georgia BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_georgia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_georgia.pdf).

66. See U.S.-Azeri BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_azerbaijan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_azerbaijan.pdf); See also U.K.-Azeri BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_azerbaijan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_azerbaijan.pdf).

67. See U.S.-Turkey BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_turkey.pdf); See also U.K.-Turkey BIT, [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_turkey.pdf).

68. IGA, *supra* note 9, pmbl., para. 5.

investors' countries at all. In other words, the IGA is similar to a BIT because its provisions pertain to definitions and rules of investment, but it is unlike a typical BIT because it is specific to a single investment project and only the host countries are party to and bound by it. The IGA also differs from a typical megadevelopment project agreement by its very structure—it is a treaty rather than a mere contract. George Goolsby, head of Baker Botts's BTC project, explained the firm's choice: "Without having to amend local laws, we went above or around them by using a treaty."<sup>69</sup>

The BTC project agreements are also notable for how they were formed. In the domestic setting, it is common for interest groups—both public and private—to lobby states to employ international agreements instead of domestic legislation.<sup>70</sup> Interest groups often seize upon a treaty's ability to facilitate entrenchment past the sitting administration<sup>71</sup> and to circumvent the established legislative process,<sup>72</sup> two aims arguably met by the IGA. Here, however, the oil consortium's role in forming the IGA was not limited to lobbying. In fact, the oil consortium and the state seem to have swapped their traditional roles. Whereas a typical investment treaty between an investor country and a host country would be substantially negotiated by the foreign ministries of each country, in this case, Baker Botts, representing both BP—the project's principal investor—and the government of Azerbaijan, substantially drafted the IGA and led the instrument's negotiation.<sup>73</sup> With former Secretary of State James Baker at its helm, Baker Botts positioned itself well for this blurred role. The U.S. executive branch, in turn, performed the lobbying.

A special U.S. ambassador for Caspian energy issues frequently ran shuttle diplomacy among the host governments to facilitate the states' assent.<sup>74</sup> Through the U.S. Trade and Development Administration ("TDA"), an executive agency that "promotes American private sector participation by helping U.S. companies pursue business opportunities in developing and middle income countries,"<sup>75</sup> the executive branch also funded a grant to pay the Washington-based firm Dickstein Shapiro to sit across the table from Baker Botts to represent the interests of Georgia and Turkey during the negotiations.<sup>76</sup> President Clinton himself was present among fifty-five European, Central Asian and North American heads of state at the IGA signing ceremony in Bosphorus in 1999.<sup>77</sup>

69. Eviatar, *supra* note 4, at 83-84.

70. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 512-13 (2004).

71. See *id.*

72. See *id.* at 543.

73. See Eviatar, *supra* note 4, at 99.

74. See Eviatar, *supra* note 4, at 101; MICHAEL T. KLARE, *RESOURCE WARS* 51-68 (2001).

75. Press Release, Trade & Development Administration, TDA, Ex-Im and OPIC Extend Caspian Finance Center Thru FY 2003 (Oct. 5, 2001), <http://www.ustda.gov> (follow "Press Releases" hyperlink; then follow "2001" hyperlink).

76. See Eviatar, *supra* note 4, at 83-84.

77. See *id.* at 99; Michael T. Klare, *Symposium: Oil and the International Law: The*



### A. Becoming the "Prevailing Legal Regime"

The purpose of the IGA is "to give the Project's legal and commercial terms the support and framework of international law,"<sup>78</sup> in order to "ensure principles of freedom of transit of Petroleum."<sup>79</sup> To establish its binding nature under international law, the IGA also obligates each state to make the IGA "effective under its Constitution as the prevailing legal regime of such state respecting the MEP Project under its domestic law."<sup>80</sup> The host states also have warranted that "the State is not a party to any domestic or international agreement or commitment or lawfully bound to observe or enforce any domestic law or regulation, or international agreement or treaty, that conflicts with, impairs or interferes with this Agreement or limits, abridges or adversely affects the State's ability to implement this Agreement or enter into and implement any other applicable Project Agreement."<sup>81</sup> While the BTC pipeline does not mark the first time the Caspian states have agreed to such terms, the agreements are nonetheless emblematic of a trend emerging only in the post-Soviet era.<sup>82</sup> Dana Clark, a U.S.-based megadevelopment project analyst, notes, "[b]y making this warranty, the States are basically providing insurance to the consortium. It doesn't actually matter whether or not the above language is accurate—rather, the states are agreeing to subsume any such domestic or international agreements to the terms of the deal, and to indemnify the other parties to the contract if the above statement proves to be untrue."<sup>83</sup> Such insurance comes via the HGAs' economic equilibrium clause.

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*Geopolitical Significance of Petroleum Corporations: Essay: The Bush/Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy*, 36 N.Y.U. J. INT'L L. & POL. 395, 413 (2004). Blurring, or even inverting, the traditional roles played by the state and the private sector in megadevelopment negotiation is certainly not new. Articulating this dynamic, however, continues to aid understanding of the human agency involved in pulling together an arrangement like the BTC, and how policy priorities of donor countries bolster that work, while leaving entire sectors of the public that may have an equal, if not more, legitimate stake in the outcome unrepresented and under-capacitated in the process. Articulating this dynamic also provides a baseline for re-imagining what the role of the state vis-à-vis the private sector could be.

78. Host Government Agreement between and among the Government of the Republic of Turkey and the MEP Participants, pmbl., para. 5, <http://subsites.bp.com/caspian/BTC/Eng/agmt3/agmt3.PDF> [hereinafter Turkish HGA]; Host Government Agreement between and among the Government of the Azerbaijan Republic and [the MEP Participants], pmbl., para. 5, <http://subsites.bp.com/caspian/BTC/Eng/agmt1/agmt1.PDF> [hereinafter Azerbaijan HGA]; see, e.g., Host Government Agreement between and among the Government of Georgia and the MEP Participants, pmbl., para. 4, <http://subsites.bp.com/caspian/BTC/Eng/agmt2/agmt2.PDF> [hereinafter Georgia HGA].

79. IGA, *supra* note 9, pmbl., para. 4; see *infra* Part IV (discussing the "principle of freedom of transit of petroleum")

80. IGA, *supra* note 9, art. II (4)(i).

81. *Id.* art. II (6).

82. See Waters, *supra* note 2, at 405 (citing a past PSA of Azerbaijan as taking "precedence over domestic legislation, essentially constituting an opt-out for large oil interests from some aspects of the standard legislative regime").

83. Memorandum from Dana Clark, President, Int'l Accountability Project, to Doug Norlen, Pol. Dir., Pac. Env't 6 (Aug. 4, 2003) (on file with author) (conducting preliminary analysis of BTC pipeline HGAs and IGA).

### 1. *Maintaining the Economic Equilibrium*

The HGAs obligate the states to compensate project participants for failing to maintain the “economic equilibrium.” Economic equilibrium refers to “the economic value . . . of the relative balance established under the Project Agreements at the applicable date between the rights, interest, exemptions, privileges, protections and other similar benefits provided or granted to a Project Participant and the concomitant burdens, costs, obligations, liabilities, restrictions, conditions and limitations agreed to be borne by that Project Participant under the applicable Project Agreement(s).”<sup>84</sup> Each host state agrees to “provide monetary compensation . . . for any Loss or Damage which is caused or arises from: . . . (iii) any failure by the State Authorities, whether as a result of action or inaction, to maintain Economic Equilibrium.”<sup>85</sup>

Like any stabilization clause, an economic equilibrium clause is “usually inserted into contracts to boost the investor’s confidence and ensure that the long-term investment will yield the expected results, by shielding the contract from some of the many risks associated with the investment.”<sup>86</sup> It does not immunize the IOCs from change in the law, fiscal regime, or other acts of the state, “but guarantees the investor compensatory benefit, should such change or act affect the economies or financial premises of the project.”<sup>87</sup> A stabilization clause typically seeks to avoid the risks of nationalization or the effects of changes in tax rates. Here, in contrast, “the intention is much wider” because the host states have undertaken to compensate the consortium for any changes affecting the economic equilibrium, “includ[ing] measures having their origin in international treaties to which [the host state] is a party and measures aimed at improvements in environmental and social protection, except [when the intervention is justified by ‘imminent, material threats’ to health, safety, and environment].”<sup>88</sup> In addition, this stabilization clause is anticipated to stay in effect for the next forty to sixty years—double the average duration,<sup>89</sup> and does not provide for reciprocal compensation to the state, as a typical economic equilibrium clause would.<sup>90</sup> As Clark summarizes:

[a]ny changes to the status quo of laws that [adversely economically] affect the

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84. See, e.g., Azeri HGA app. 1, Certain Definitions. The economic equilibrium clause is found in the Georgian and Azeri HGAs arts. 7.1(x); and in the Turkish HGA art. 7.2(xi).

85. The clause requiring states to compensate the consortium for failure to maintain the economic equilibrium is found in the Georgian and Azeri HGAs arts. 9.1(iii); and in the Turkish HGA art. 10.1(iii).

86. Nwete, *supra* note 8, at 118.

87. *Id.* at 12.

88. AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 10.

89. See Rutledge, *supra* note 17, at 13 (noting that duration of typical PSA is twenty-five years); Waters, *supra* note 2, at 407 (observing that “the HGAs have the potential effect of freezing present-day standards for a minimum of forty years”).

90. See Nwete, *supra* note 8, at 131 (citing economic equilibrium clause of the Equatorial Guinea model petroleum production sharing contract of 1998, which “obligates the parties to agree to the adjustment, whenever the income of either party is materially altered as a result of any change in law, orders or regulations”).

pipeline project, including those designed to protect local people, workers, the environment, or provide revenue to the government, will cost the host governments money. If the governments choose to change—and dare to enforce—the law in their countries in a way that [adversely economically] affects this project, they could be required to compensate the consortium for any alteration in the ‘economic equilibrium.’<sup>91</sup>

The economic equilibrium clause is thus a powerful stabilization clause that effectively trumps conflicting local regulation and international obligations that the host states may otherwise call upon or develop to oversee project matters.

To establish this kind of economic equilibrium provision, the consortium lawyers drew upon public international law’s right to the protection of property,<sup>92</sup> which is usually applied in the commercial context to protect project participants from wholesale loss resulting from expropriation, abandonment, and the like, and extended it out to require compensation for a broad range of normal state regulatory activity. In so doing, it appears that “the consortium has been given a higher level of legal protection for its investment than human rights standards would normally afford, while employees, villagers, and others affected by the project might well find that they have less protection than human rights standards afford.”<sup>93</sup>

## 2. *Obscuring Standards in the Code of Practice*

In contrast to the HGAs’ economic equilibrium clauses, other provisions in the HGAs seem to acknowledge the applicability of evolving regulatory standards. The Code of Practice,<sup>94</sup> included as an appendix to each HGA,<sup>95</sup> gives the impression of setting a floor below which technical, environmental, health, safety, and social standards and practices shall not fall.

### a. *The Code of Practice on Health and Safety*

The Code of Practice specifies that the health and safety standards to be applied “shall conform to the health and safety standards and practices generally

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91. Memorandum from Dana Clark, President, Int’l Accountability Project, to Doug Norlen, Pol. Dir., Pac. Env’t 4-5 (Aug. 4, 2003) (on file with author) (offering preliminary analysis of BTC pipeline HGAs and IGA). Of course, as HSE technologies improve and the costs of implementing them decline, it is entirely plausible that over the next forty years a host state could implement a new HSE regulation that would not adversely affect the economic equilibrium established in 1999.

92. See AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, n.13 (citing European Convention on Human Rights, First Protocol, art. 1, which states: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest.”).

93. *Id.* at 11.

94. Although calling it a Code of Practice gives the impression that the BTC Project has adopted some consensual industrial standards, the Code of Practice is merely an invention of the project lawyers, specific to the BTC Project; it is not a code from an external industrial body. It sporadically references standards of the American Petroleum Institute and E.U. directives, though not coherently. See Waters, *supra* note 2, at 405 (making similar observations about the Code of Practice).

95. See, e.g., Georgia HGA, *supra* note 78, app. 3.

observed by the international community with respect to Petroleum pipeline projects comparable to the Project.”<sup>96</sup> The Code of Practice’s reference to “international community” standards makes it conceivable that these standards are dynamic and public (as opposed to frozen at the time of contract and private). However, the only health and safety standards the Code deems relevant are those that the international community observes with respect to comparable oil projects. Aside from describing what a comparable project would consist of (in terms of diameter of the pipeline and daily oil output),<sup>97</sup> the Code of Practice refers to no mutually agreed upon and specific comparable projects to which a host state or local community could look in order to monitor compliance by the consortium partners. In fact, BP has represented to Amnesty International that these standards and practices have never been formulated.<sup>98</sup>

*b. The Code of Practice on Environmental Regulation*

The Code of Practice defines the applicable environmental standards in a slightly more comprehensive way than it does health and safety standards. Although the environmental standards, like the health and safety standards, mainly derive from the ambiguously defined practices internationally observed on comparable pipeline projects, here the oil consortium agrees to refrain from using environmental standards that are “less stringent than the relevant standards and practices applied in the Netherlands (and, with respect to mountainous and earthquake-prone terrain as well as whenever the Netherlands has no relevant standard or practice . . . [those of] Austria) in respect of comparable projects.”<sup>99</sup> Notably, this environmental provision adopts the substantive standards set in these two European countries, but explicitly refrains from adopting liability standards that those countries use to ensure compliance with the substantive standards, and instead adopts the HGAs’ limitation of liability provisions which, *inter alia*, prohibit the consortium from being liable for punitive or exemplary damages.<sup>100</sup>

Further, the Code’s Article 3.1(iv) underscores that the environmental standards “do not include [any] beyond those applicable to Petroleum pipelines and pipeline operations.”<sup>101</sup> This provision would potentially complicate a challenge by a host state based on the Dutch or Austrian standards because the

96. *Id.* app. 3, paras. 3.1, 4.1. The environmental standards are more specific than the health and safety standards and are treated below. Other megadevelopment project agreements have used similar language to describe applicable technical, safety, and environmental standards. *See, e.g.*, AMNESTY INTERNATIONAL, CONTRACTING OUT OF HUMAN RIGHTS, *supra* note 17, at 24 (describing similar terms in the Chad-Cameroon pipeline project agreements); Waters, *supra* note 2, at 405 (describing same in 1994 Azeri-Chirag-Guneshli PSA).

97. Georgia HGA, *supra* note 78, app. 3, Definitions.

98. AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 10.

99. Georgia HGA, *supra* note 78, app. 3, para. 3.1; *see also* IGA, *supra* note 9, art. IV (representing that the technical, safety, and environmental standards “shall in no event be less stringent than those generally applied within member states of the European Union”).

100. Georgia HGA, *supra* note 78, app. 3, paras. 3.1(i), 3.1(ii); *id.* arts. 10.1, 12.3.

101. *Id.* apps. 3, para. 3.1(iv).

consortium could argue that this clause means that while the consortium is required to follow the Dutch or Austrian environmental standards, they are only required to follow them to the extent that the Dutch or Austrian statutes specify their application to pipeline projects. For example, say the Dutch have a statute regulating deforestation. In application, the Dutch may enforce the statute's standards in pipeline-affected areas, even if the statutory language makes no direct reference to its intended application over such areas. Nonetheless, in arbitration, BTC counsel could invoke Art. 3.1(iv) to contest the deforestation grievance by interpreting the Code of Practice to exempt BTC from compliance with the Dutch deforestation statute's substantive provisions based on the statute text's silence regarding pipeline areas. Such a strictly textual reading may go against the spirit of the Code of Practice, but the host states nonetheless face the risk that an arbitrator would read the Code in this way, given the Code of Practice's narrow language invoking the Dutch and Austrian environmental regimes.

### *c. The Code of Practice's Elusive Standards*

As stated above, the Code of Practice remains vague about what the environmental, health, safety, and social standards and practices "generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project"<sup>102</sup> are. The objective standards are illusory. The host states' range of autonomous regulatory actions is thereby seriously diminished. As a result, the Code of Practice creates the potential for what would otherwise be seen as unexceptional regulatory behavior in other megadevelopment contexts to become contestable. Because the project agreements require international arbitration, any dispute arising out of the Code's vagueness would have to be resolved in arbitration, an arduous and expensive process. The host states' covenant to compensate the consortium for disturbance to the economic equilibrium similarly chills state enforcement actions under the Code by decreasing the likelihood that a state would attempt to enforce any norms that may exceed the practices vaguely laid out there for fear of upsetting the economic equilibrium. In effect, the Code of Practice places its elusive standards above municipal and international law's reach and chills the host states' regulatory impulses, even if those impulses are toward protecting pipeline workers or the health or environment of neighboring communities.

### *3. Further Obscuring Standards in the Human Rights Undertaking*

It seems that the economic equilibrium clause chills—if not freezes—development of local regulatory laws (by requiring compensation) while the Code of Practice acknowledges the applicability of evolving standards of the international community. When pressed by international environmental and

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102. *Id.* apps. 3, 4.1.

human rights advocates for clarification,<sup>103</sup> the consortium responded by publishing two additional instruments. In May 2003, the consortium and host states issued the Joint Statement on Human Rights and Security,<sup>104</sup> a project agreement<sup>105</sup> that acknowledges the applicability of evolving human rights and environmental standards, notwithstanding the HGAs' language to the contrary.<sup>106</sup> Four months later, the BTC published another instrument, the BTC Human Rights Undertaking ("HRU"),<sup>107</sup> which affirmatively states that the consortium will not assert claims against the host governments under IGA and HGA provisions in a manner "inconsistent with regulation by the relevant Host Government of the human rights or health, safety and environmental ('HSE') aspects of the project."<sup>108</sup> The consortium undertakes this promise to the extent that such local regulation is required by applicable international and domestic law and "is no more stringent than the highest of European Union standards," select World Bank standards, and standards under applicable international labor and human rights treaties.<sup>109</sup> The consortium also undertakes not to dispute an interpretation of the project agreements which would hold the applicable human rights and HSE standards to be dynamic and evolving in accordance with the "highest of international standards."<sup>110</sup> In essence, BTC undertook *not* to invoke the IGA/HGAs' compensation clauses when faced with a host state's new laws on human rights or HSE. The HRU "clarification" may, at first blush, seem to mitigate some of the NGO advocates' concerns. However, the stabilization clauses remain problematic for at least three reasons.

To begin with, although BTC warrants that the HRU constitutes a legal, valid, and binding obligation,<sup>111</sup> the consortium stops short of characterizing the instrument as a project agreement, thus potentially removing the document from the bundle of project instruments that a dispute resolution body would consult.<sup>112</sup> In addition, BTC made the HRU as a deed poll, which is, by

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103. See Press Release, Baku Ceyhan Campaign, Groups File Claim Against BP and Pipeline Partners in Five Countries: "Green" Company Violating International Norms in Controversial Caspian Oil Pipeline (Apr. 29, 2003), [http://www.baku.org.uk/press\\_releases/news.03.htm](http://www.baku.org.uk/press_releases/news.03.htm); see also AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20 (representing one of the most comprehensive international NGO reviews of the BTC project agreements calling for clarification).

104. Joint Statement on the Baku-Tbilisi-Ceyhan Pipeline Project (May 16, 2003), <http://subsites.bp.com/caspian/Joint%20Statement.pdf> [hereinafter Joint Statement].

105. *Id.* para. 9.

106. *Id.* paras. 7, 8.

107. BTC Human Rights Undertaking (Sept. 22, 2003), <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf>.

108. *Id.* para. 2(a).

109. *Id.*

110. *Id.* para. 2(b).

111. *Id.* para. 3(a).

112. The IGA defines a project agreement, other than the IGA and HGAs as one that is "entered into by a State and/or any State Authority, on the one hand, and any Project Investors, on the other hand." IGA, *supra* note 9, Definitions. Because the HRU is a representation made by only one party, it is not a project agreement by this definition. The IGA is unclear about the effect of a document that is not characterized as a project agreement. See *id.* (definition of "Other Project

definition,<sup>113</sup> unilateral. Only BTC signed the instrument; the host states are therefore not bound by its terms. As a result, although the consortium undertakes not to construe the IGA and HGAs in the manners feared by pipeline opponents, nothing in the HRU prevents the host states from reverting to a different interpretation of the IGA and HGA stabilization provisions.<sup>114</sup> A host state might find it advantageous to override its own regulations if doing so would help the state meet its economic goals or circumvent otherwise burdensome human rights or HSE obligations.<sup>115</sup> Given the political and economic power of the consortium over the host states, if the consortium genuinely sought to protect human rights along the BTC pipeline, it could have used the HRU to create binding contractual commitments with the states as a way to influence the host states to honor their already existing municipal and international human rights obligations.

Next, third party rights under the HRU and the Joint Statement remain unclear. On one hand, under Art. 2(c) of the HRU, BTC agrees not to “make” third party claimants comply with the project agreements’ arbitration clauses.<sup>116</sup> On the other hand, because BTC has crossover rights against the host states, if a third party, such as members of an adversely affected pipeline community, were to sue BTC in local municipal courts under, say, tort, BTC could swiftly bring the dispute directly to international arbitration in order to seek compensation for the disturbance to the economic equilibrium caused by the tort suit. Depending on how the arbitrator reads the HGA dispute resolution clauses,<sup>117</sup> this move also could push the third party claimant’s dispute out of the courts and into arbitration.<sup>118</sup>

Lastly, the HRU adds another layer of confusion to the labyrinth of instruments comprising the BTC pipeline’s prevailing legal regime. As the NGO advocates observe,

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Agreements”).

113. A deed poll is a deed made and executed by only one party. BLACK’S LAW DICTIONARY 339 (2000).

114. See Waters, *supra* note 2, at 407 (noting this concern of pipeline critics).

115. See Baku Ceyhan Campaign, Statement in response to the BTC Human Rights Undertaking 2 (Nov. 6, 2003), <http://www.baku.org.uk/statementondeedpoll.doc>. To counter a host state’s argument that the deed poll created no obligations for the state, one could argue that because the state did not contest the HRU when BTC signed it, that the state agrees with the limitations and interpretations therein.

116. This promise is without substance since, even without this assurance, the HGAs’ arbitration clauses, cannot bind third parties who are not party to the contract to mandatory arbitration. See, e.g., Turkish HGA, *supra* note 78, art. 18. Nonetheless, it must be noted that it is unlikely any third party could raise claims directly against BTC arising directly out of the project agreements, since courts usually uphold that kind of third party claim only when the third party is a clearly discernable beneficiary to the contract predictable at contract formation. Instead, anticipated third party claims directly against BTC would more likely arise out of tort.

117. See discussion *infra* Part IIID.

118. There are other contexts in which third parties have been indirectly pulled into arbitration. See, e.g., *E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187 (3d Cir. 2001) (limiting the doctrine requiring non-signatories to go to arbitration).

the existence of one set of agreements which gives the consortium powers, followed by another which commits not to use some of them, inevitably creates more ambiguity over how they are to be applied than would a single set of agreements. It would have given all parties much greater clarity to have amended the original agreements, rather than appending the Deed Poll.<sup>119</sup>

The legal labyrinth, exacerbated by the HRU, actually undermines the stated rationale of BP in creating the IGA/HGA project agreement structure in the first place, which was to replace what the oil company characterized as cumbersome, confusing, and potentially “discriminatory” domestic regulatory frameworks.<sup>120</sup> The effect of this confusing governing structure is that different project instruments (whether project agreements or not) refer to alternative, possibly applicable standards to which the consortium and/or host states shall be held.<sup>121</sup> Because of the asymmetrical rights between the states and the consortium with respect to dispute resolution,<sup>122</sup> the question of which standards ultimately apply is largely in the hands of the BTC consortium.

#### 4. *Complicating Matters by Severing State Compensation Obligations*

As explained above, the economic equilibrium clause, Code of Practice, and HRU contain contradictory provisions. Which instrument would prevail in resolving a dispute remains unclear. To complicate matters further, the host states have agreed to compensation provisions in the HGAs that apparently commit them to compensating the consortium for failure to maintain economic equilibrium even if the economic equilibrium compensation obligations were to prove unenforceable. As discussed above, Article 9 of the Georgian and Azeri HGAs and Art. 10 of the Turkish HGA obligate the host states to provide monetary compensation for loss or damage arising from:

- any failure of the State Authorities, whether as a result of action or inaction, to fully satisfy or perform all of their obligations under all Project Agreements;
- any misrepresentation by the State Authorities. . . ;
- any failure by the State Authorities, whether as a result of action or inaction, to

119. Baku Ceyhan Campaign, *supra* note 8, at 2.

120. Telephone interview with Nick Hildyard, Dir., The Corner House (June 29, 2005). See also IGA, *supra* note 9, pmbl., para. 5 (evoking the need for “uniform, nondiscriminatory application of international law standards protecting investment and nondiscriminatory treatment of investors”).

121. In light of this confusion, and under pressure from NGOs, the public finance institutions insisted the consortium name which standards will apply. Telephone interview with Nick Hildyard, Dir., The Corner House (June 29, 2005). Despite this demand, the standards applicable to each entity remain unaligned. See, for example, the Environmental Standards Table annexed to the Environmental and Social Action Plan (a plan required by the international financial institutions funding the pipeline). This matrix delineates the land, air, water, and noise standards applicable to the pipeline. In eighteen pages, the table reveals that, despite Baker Botts’s effort to create an overarching supranational legal regime, each state is bound to different local and lender standards. BTC Pipeline – Matrix of Environmental Standards and Guidelines, Annex B, Part I, of Operations Phase Environmental and Social Action Plan (Mar. 2003), [http://www.bp.com/liveassets/bp\\_internet/bp\\_caspian/bp\\_caspian\\_en/STAGING/local\\_assets/downloads\\_pdfs/xyz/BTC\\_English\\_Operation\\_Plan\\_ESAP\\_Content\\_FINAL\\_BTC\\_Operations\\_ESAP.pdf](http://www.bp.com/liveassets/bp_internet/bp_caspian/bp_caspian_en/STAGING/local_assets/downloads_pdfs/xyz/BTC_English_Operation_Plan_ESAP_Content_FINAL_BTC_Operations_ESAP.pdf).

122. See IGA, *supra* note 9, art. 18; *infra* Part IID(1) (discussing asymmetrical rights).



maintain Economic Equilibrium. . . ;

...

any act of Expropriation. . . .<sup>123</sup>

This state obligation is a central concern to pipeline critics—the concern BTC attempted to quell in the HRU, reassuring advocates that the consortium will not apply the economic equilibrium clause to assert the right to compensation for measures taken by host states to fulfill obligations under international treaties on human rights, labor, or HSE. The HRU, however, leaves untouched other provisions in Articles 9 and 10 that, if enforced, could undermine the host states’ ability to critique the consortium under the Code of Practice’s HSE standards. Art. 10.5 of the Turkish HGA, for example, reads:

The Government’s obligation to provide monetary compensation to the MEP Participants under this Article 10: (i) is several, independent, absolute, irrevocable and unconditional and constitutes an independent covenant and principal obligation of the Government, separately enforceable from all other obligations (including monetary compensation obligations) of the State Authorities under the Project Agreements, *without regard to the invalidity or unenforceability of any such other obligations*.<sup>124</sup>

In other words, suppose that Azerbaijan halted oil transit because of a violation of the Code of Practice’s environmental standards, and the consortium responded by demanding compensation for the state’s disruption of the economic equilibrium. Azerbaijan might then argue that the Code of Practice should trump the economic equilibrium clause and that the HRU indirectly affirms this interpretation. Under HGA Arts. 10.1 and 10.5(i), the consortium could counter-argue that Azerbaijan agreed to compensate for the disruption regardless of the validity or enforceability of the economic equilibrium clause in light of the Code of Practice and HRU.

*B. Hypothetical Application of the Economic Equilibrium Clause, Code of Practice, and Human Rights Undertaking*

Suppose Georgia had a gorge famous for its mineral waters. Also suppose that the BTC pipeline ran through this region, that during pipeline construction advocates both within and outside of Georgia expressed concern over mineral water contamination, and that pipeline construction nonetheless proceeded apace in accord with then-existing environmental and safety guidelines.

Now imagine it is ten years later. The pipeline is fully operating. The environmental impact on the mineral water region is both better understood and more grave than anyone knew when the pipeline was constructed. The affected community demands relocation of the pipeline. The government of Georgia agrees with the community and brings the environmental grievance to the consortium. Georgia argues that the consortium is not maintaining the pipeline

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123. Turkish HGA, *supra* note 78, art. 10.1 (i)-(v).

124. *Id.* art. 10.5(i) (emphasis added).

in accordance with Dutch environmental law pertaining to oil pipelines and has therefore breached the Code of Practice.

The IGA allows the consortium to bring the dispute to international private arbitration without exhausting any Georgian fora.<sup>125</sup> The arbitrator would then make all factual and legal determinations, including: 1) whether and to what extent the cited Dutch environmental laws were truly applicable to the BTC pipeline (interpreting the vague language of the Code of Practice); 2) if so, whether there factually existed a violation of the Code of Practice; and 3) whether Georgian state authorities contributed to the violation.<sup>126</sup> If the arbitrator found for Georgia, the consortium would undoubtedly seek to resolve whether, despite a violation of the Code of Practice, the project agreements' compensation provisions required Georgia to compensate the consortium for any change in the economic equilibrium that would be caused by implementing Georgia's request. Georgia, in turn, would seek to resolve whether the consortium's promises in the HRU would estop the consortium from making its compensation claims. How an arbitrator would interpret these conflicting project instruments would most likely turn not on any astute textual reading, but rather on the strength and preparedness of the disputants, and the degree of investor-friendliness of the forum. These latter considerations lead our hypothetical into the more likely realities of how a host state's dispute with the consortium would be resolved.

We need not look too far for a real test case. In July 2004, Georgia's Environment Ministry suspended construction on a seventeen-mile stretch of pipeline, citing environmental safety concerns that had emerged over water contamination in the Borzhomi gorge, a Georgian region known for its mineral water.<sup>127</sup> With the suspension, Georgia sought a new and independent safety inspection. However, within two weeks of the stop, construction resumed after a surprise visit to Georgia by the U.S. Assistant Secretary of State, Elizabeth Jones, and simultaneous talks in Washington, D.C. between Georgian leaders and U.S. Secretary of Defense Donald Rumsfeld.<sup>128</sup> The project agreements do not address the role diplomatic pressure should play in disputes between the host states and the consortium. In the Borzhomi gorge case, diplomatic resolution prior to formal arbitration might be considered a favorable outcome. However, it raises questions about whether or to what extent the host states truly retain power under the project agreements. The next article in this series explores this question in the context of colonial treaties between trading companies and the colonized, where what is written is rarely considered the most salient guide to dispute resolution in conflicts over natural resource development.

125. See *infra* Part VI(A) (discussing exhaustion).

126. State contributory liability would limit BTC's liability as discussed *infra* Part V.

127. See *Georgia Suspends Construction of BTC Pipe on its Territory*, PRIME-TASS BUS. NEWS AGENCY, July 23, 2004; see also Waters, *supra* note 2, at 415-17 (tracing the controversy surrounding how the Borzhomi region was chosen for the pipeline path).

128. See Saeed Shah, *Rumsfeld Intervention Rescues \$3BN BP Pipeline*, THE INDEPENDENT (London), Aug. 9, 2004.

#### IV.

#### MAKING UP INTERNATIONAL LAW: BTC INVENTS THE PRINCIPLE OF FREEDOM OF TRANSIT OF PETROLEUM

The project agreements use rights language to describe the host states' obligations, not only to the consortium, but seemingly to the "petroleum" itself. The project is guided by the IGA Preamble's commitment among the states to "ensure the principles of freedom of transit of Petroleum."<sup>129</sup> The IGA also creates a peculiar obligation of the states to ensure the safety and security not only of all personnel associated with the project, but also the security of "all Petroleum in transit."<sup>130</sup> The provision reads as though the oil were in need of the kind of protection under international law that, for example, a displaced person in transit requires. Further, each state agrees that if its actions interrupt or otherwise impede the flow of petroleum, the state shall use "all lawful and reasonable endeavors, taking into account democratic, economic, and commercial principles, to eliminate the threat and rectify any interruption or impediment."<sup>131</sup> This language reifies petroleum as though it were a rights and duties bearing subject under international law.

Evoking rights language to establish protections for commerce is not a new move for U.S. industry. During the *Lochner* era, capitalists and the pro-industry Supreme Court routinely invoked the "freedom of contract" to strike down state and federal congressional attempts at health and safety regulation.<sup>132</sup> Since the New Deal, courts have largely rejected corporate attempts to "borrow [the] armor" <sup>133</sup> of the Commerce Clause to restrict governmental regulation of industry practices. However, some legal scholars are today reviving the notion with vigor and success.<sup>134</sup> Significantly, they do so by cloaking the doctrine with a natural law pedigree, arguing for the protection of "the fundamental natural right of freedom of contract."<sup>135</sup> Drawing authority from natural law mimics international law's traditional articulation of human rights. It may come as no surprise, then, that the conservative doctrinal trend away from social regulation of industry in the United States finds its international parallel in treaty language treating protection of the transit of oil as a natural right.

Although evoking rights language to establish protections for commerce is

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129. IGA, *supra* note 9, pmbl., para. 4.

130. *Id.* art. III (2) (note capitalization of "Petroleum").

131. *Id.* art. VII (4).

132. *Lochner v. New York*, 198 U.S. 45, 57 (1905) (striking down New York regulation of the ten hour workday and articulating the general right to make a contract in relation to one's business); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1923) (striking down Nebraska state regulation of bread loaf size as arbitrary interference with private business).

133. RICHARD M. BUXBAUM & KLAUS J. HOPT, *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* 44 (1988).

134. See Adam Cohen, Editorial, What's New in the Legal World? A Growing Campaign to Undo the New Deal, *N.Y. TIMES*, Dec. 14, 2004, at A30.

135. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

nothing new, attempts to assert standing on behalf of inanimate natural objects have been rejected by the United States Supreme Court.<sup>136</sup> The seminal case, *Sierra Club v. Morton*, rejected the notion that conservationists should be able to enjoin commercial development of a river valley when they had not shown themselves to be “adversely affected” by the proposed development.<sup>137</sup> The conservationists were improper plaintiffs and the river valley did not enjoy its own standing to sue. In his dissent, Justice Douglas suggested simplifying the standing issue by “conferring standing on environmental objects to sue for their own preservation.”<sup>138</sup> He would have conferred that standing on “valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.”<sup>139</sup> Justice Douglas reasoned that “[t]he river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.”<sup>140</sup> Though “petroleum in transit” is an environmental object, it is unlikely that Justice Douglas would accord it the same status. The cultural relationship between communities living on a river contrasts sharply with most conceivable cultural relationships communities are likely to have with flowing petroleum.<sup>141</sup> Protecting the mobility of petroleum by engendering the substance with legal personality strays far afield from even the outer limits of the Court’s treatment of standing for inanimate objects of nature.

More significantly, while there exists a freedom of transit of persons, baggage, and goods,<sup>142</sup> there is no principle of the freedom of transit of petroleum in international law. The Texas team of transnational lawyers made

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136. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (rejecting *Sierra Club*’s attempt to assert standing to seek declaratory judgment against proposed ski resort based on anticipated aesthetic and environmental harm to “scenery, natural and historic objects, and wildlife” of the Sequoia National Park).

137. *Id.* at 739.

138. *Id.* at 742 (Douglas, J., dissenting); see also Christopher Stone, *Do Trees Have Standing?*, 45 S. CAL. L. REV. 450 (1972) (positing the theory Justice Douglas took up in his dissent in *Sierra Club v. Morton*). The author would like to thank Professor Mary Dudziak for suggesting this comparison.

139. *Sierra Club*, 405 U.S. at 743 (Douglas, J., dissenting).

140. *Id.*

141. First, so-called “pipeline communities” are usually *adversely* affected by the flowing of petroleum through their territory and would therefore not be likely spokespersons for the oil. Second, the community of oil investors who have an interest in the unfettered flow of petroleum cannot be said to have a meaningful cultural relationship to the petroleum. A variation that could conceivably fit within the vision of Justice Douglas’s dissent, however, would be the case of the indigenous U’wa community of Colombia, to whom the oil is considered sacred, and the flowing of the oil *under the ground* is considered the healthy flowing of the “blood of the mother earth.” PROJECT UNDERGROUND, BLOOD OF OUR MOTHER: THE U’WA PEOPLE, OCCIDENTAL PETROLEUM, AND THE COLOMBIAN OIL INDUSTRY 1(1998).

142. See U.N. Convention on the Law of the Sea arts. 124, 125, Apr. 30, 1982, 1833 U.N.T.S. 397; General Agreement on Tariffs and Trade, Oct. 30, 197, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. V.

the doctrinal leap without reference to plausible precedential roots. One danger of Baker Botts's use of a treaty is that by incorporating a principle of the freedom of transit of petroleum therein, it begins the process of making international law, since one source of international law looked to by international jurists is the extant body of international treaties and conventions.<sup>143</sup> Customary international law is made incrementally over time as state practice and the sense of state obligation to conform to given practices emerge.

The move to protect the freedom of transit of petroleum is a tricky one. To be sure, human rights advocates also seek to elevate rights not heretofore universally recognized under international law. For the most part, however, they do so through public fora involving representatives from many states, whether through the statements issued at periodic international conferences of treaty-based organs of the United Nations, or the decisions of the several regional human rights courts. The Inuit, for example, are currently petitioning the Inter-American Commission on Human Rights to declare that the United States violates the Inuits' human right to a stable climate through the U.S.'s disproportionate contribution to and intractability on global warming.<sup>144</sup> In contrast, Baker Botts surely did not float the principle of the freedom of transit of petroleum to an intergovernmental panel meeting in a public forum. After all, it did not need to do so. Instead, Baker Botts could lean on the private international law legacy of the PSA to keep only certain actors in the negotiating room while simultaneously borrowing from public international law both its historical protection of the right to property and its flagship form, the treaty. In this protective framework, very little could prevent these transnational lawyers from getting creative with international law.

## V.

### DODGING THE *UNOCAL* CHALLENGE: BTC ATTEMPTS TO OVERCOME LIABILITY FOR SECURITY-RELATED HUMAN RIGHTS ABUSES

In addition to its surprising treatment of the local regulatory regimes and international law, the BTC's legal architecture also goes beyond the typical megadevelopment investment arrangement through its agreements concerning liability for security-related human rights abuses. Both the IGA and individual HGAs set the general framework for pipeline security: Each state's public forces will provide pipeline security personnel and services during all stages of the project, including during land acquisition (in some cases involving resettlement of local people).<sup>145</sup> They are charged with securing "the Rights to Land, the

143. See Statute of the International Court of Justice art. 38(I)(a), June 26 1945, 59 Stat. 1055.

144. See Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, <http://www.earthjustice.org/news/documents/12-05/FINALPetitionICC.pdf>.

145. The land acquisition process caused both physical and economic displacement impacts

Facilities and all Persons. . .involved in Project Activities” against any loss or damage “resulting from civil war, sabotage, vandalism, blockade, revolution, riot, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organized crime or other destructive events.”<sup>146</sup> In addition to the security provided by state public forces (“government security”), the project agreements leave room for the consortium to utilize its own private security forces (“private security”).<sup>147</sup>

The states assume full responsibility for the provision of government security. Each HGA provides that

the Government shall be solely liable for the conduct of all operations of the security forces of the State and neither the MEP Participants nor any other Project Participants shall have any liability or obligation to any Person for any acts or activities of the security forces of the State or be obligated to reimburse the Government for the cost and expense of providing security.<sup>148</sup>

On its face, this clause basically states that the host states will not ask the consortium to pay for government security. However, the language of this clause also appears to insulate the oil companies from any potential liability resulting from the abusive actions of public forces. It would not be unthinkable for one of the host states, for example, to use its expansive pipeline security mandate as a way to justify use of public forces against insurgents present in the pipeline path, and against civilians suspected of being sympathetic to the insurgents. Oil companies often have turned a blind eye to this kind of abuse by militaries assigned to pipeline security in other regions, but have not always remained immune to suit.<sup>149</sup> This clause seems to attempt to preclude consortium liability for such abuses by public forces. However, it is important to note that the clause cannot bind the rights of third parties to claim against the oil consortium under secondary liability theories. At most, this clause may open the door to the argument that, should the BTC Company be found liable to third parties for the acts of public forces, the states have agreed to indemnify the company against any damage claims arising from this liability.

In addition to the HGAs’ general security provisions described above, at

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on local people. See Green Alternatives, Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts 4-7, <http://www.baku.org.uk/missions.htm> (follow “Georgia & Turkey, September 2005” hyperlink).

146. Azerbaijan HGA, *supra* note 78, art. 11, 11.1.

147. Protocol between the Government of Georgia and BP Exploration (Caspian Sea) Limited on the Provision of Security for the BTC Pipeline Project, art. 1.2 [hereinafter Georgian Security Protocol], <http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20Security%20Protocol%20EN.pdf>.

148. Turkish HGA, *supra* note 78, art. 12; Georgia HGA, *supra* note 78, art. 11; Azerbaijan HGA, *supra* note 78, art. 11.

149. See, for example, the case of the Colombian public forces security detail for Occidental Petroleum’s Canon Limon pipeline in northeastern Colombia, *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (plaintiff victims alleged, *inter alia*, crimes against humanity by Occidental Petroleum for secondary liability in the dropping of a cluster bomb on a civilian village in 1998 by Colombian public forces assigned to pipeline security who were allegedly targeting insurgents).

least one state, Georgia, has also completed an additional security protocol with the consortium. This Protocol delineates government security procedures for, among other things, the use of force, hiring and training of security personnel, monitoring, and communicating about security issues with the consortium. The Protocol stresses the goal of “promoting respect for and compliance with internationally-recognized human rights principles” as set forth in a bundle of international human rights instruments dubbed the “Security Principles.”<sup>150</sup> It invokes the Universal Declaration of Human Rights, the European Convention on Human Rights (“ECHR”), the United Nations Code of Conduct for Law Enforcement Officials, the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials, and the U.S. State Department and Foreign and Commonwealth Office’s “Voluntary Principles on Security and Human Rights,” as well as applicable domestic legislation and the other relevant intergovernmental agreements among the three BTC host countries related to security.<sup>151</sup> In article 3.1 of the Protocol, Georgia covenants to follow security procedures regarding, *inter alia*, use of force, hiring and training in a manner consistent with national legislation and the “specific guidelines set out in the Security Principles.”

That the consortium compiled and acknowledged the existence of this bundle of potentially applicable human rights norms in a binding project document could reflect megadevelopment’s increasing concern over allegations that link security of their projects to human rights abuses against local communities. Indeed, the Protocol reads like a textbook example of the U.S. Department of State’s new Voluntary Principles on Security and Human Rights, a code developed by the energy sector, Department of State, and human rights advocates delineating voluntary best practices for public and private security forces protecting energy development projects.<sup>152</sup> Acknowledging human rights norms in the security provisions of a megadevelopment project of the BTC’s magnitude and profile is a positive step toward actualizing the human rights aspirations contained therein. However, when one reads the security provisions in the broader context of the other project agreements, it appears the consortium and host states stopped short of fully utilizing the security provisions to create meaningful and actionable protections of human rights on the pipeline path.

Other than the ECHR, none of the instruments that delineate the Security Principles create enforceable rights or state obligations.<sup>153</sup> Taking even this one duties-creating instrument, if government security operated in *compliance* with the rights respected in the ECHR and in so doing interfered with the economic

150. Georgian Security Protocol, *supra* note 147, pmb., para. 2.

151. *Id.*

152. Voluntary Principles on Security and Human Rights, <http://www.state.gov/g/drl/rls/2931.htm> (last visited Feb. 15, 2006).

153. See Georgian Security Protocol, *supra* note 147, pmb., para. 2. The other instruments are voluntary principles and U.N. General Assembly resolutions.

equilibrium clause, the consortium would have the right under the terms of the IGA and HGAs to seek compensation from the state for the economic disturbance.<sup>154</sup> In contrast, if government security *violated* the rights respected in the ECHR, even if the economic benefit of doing so accrued to the consortium, theoretically, only the state would stand responsible for the violation.

Indeed, the overriding thrust of the Protocol is not its treatment of international human rights instruments. It is the Protocol's clear reiteration of the consortium's abdication of responsibility for the behavior of host government security forces. This arrangement stands even though the security exists for the private benefit of the consortium's project and the consortium is partially paying the Georgian state for it. The same day the consortium announced the Protocol, it also announced an agreement to provide the state with "a range of necessary and non-lethal items, including vehicles and accommodation for government security personnel. . . as well as maintenance support" to the tune of 6 million USD now and 40 million USD more over the expected project lifetime.<sup>155</sup> The Protocol ends by re-invoking the IGA and HGAs' provisions on state responsibility for security: "For the avoidance of doubt, the Parties confirm that the Government is solely responsible for the provision of Government Security."<sup>156</sup>

In sum, security agreements such as the Georgian Security Protocol represent a positive step toward discouraging pipeline security measures that would lead to human rights abuses. To this extent, such measures should be encouraged. The BTC's overall security agreements, however, reflect that the consortium and host states have so far stopped short of using such agreements to take more affirmative and substantive steps to prevent and take responsibility for pipeline-related abuses.<sup>157</sup>

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154. The Human Rights Undertaking, discussed *supra* Part III(A)(3), could be construed by a court to estop BTC from seeking this kind of compensation, but whether the instrument is a true project agreement binding the consortium and/or the host states remains unclear.

155. Press Release, BTC, BTC Announces New Protocols (Oct. 21, 2004), *available at* <http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20Security%20Provision%20Protocol%20EN.pdf>.

156. Georgian Security Protocol, *supra* note 147, art. 12.8. Further, it delineates a process for generating reports about alleged human rights abuses, but specifies that such reports will not necessarily be made available to the public. *Id.* art. 9.1.

157. *See, e.g.,* AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 27 (recommending that the consortium use project agreements to ensure that pipeline security personnel "pose minimal risk to the human rights of local populations" through mechanisms that include penalties for non-compliance).



## VI.

SELECTIVELY APPLYING INTERNATIONAL LAW'S CENTRAL TENET: BTC EVOKES  
AND EVISCERATES STATE SOVEREIGNTY

The BTC project undermines the two traditional theories of state sovereignty. The first theory, prevailing at the turn of the eighteenth century, is one of internal state sovereignty, which defines "law as the general commands of a sovereign, supported by the threat of sanctions."<sup>158</sup> In other words, with respect to the relationship of the rulers to their subjects within a state, the rulers are identified by their rules as backed by enforcement.

This first theory of state sovereignty falls away in most discussions of international law since it regards intrastate power relationships. Nonetheless, it is still helpful in explaining the positivist notion of the primacy of the state in international law, "that states are the principal actors of international law and they are bound only by that to which they have consented."<sup>159</sup> The idea that sovereign states rule because they have the means to enforce their rules and that, as such, the sovereign is the entity with whom other states should engage in order to fashion international rules is a basic premise of the international legal system. As explained below, the BTC project agreements undermine this premise.

The second theory of state sovereignty describes the external relationship of a ruler or the state itself toward other states. It is the key international law principle that each state is on equal footing with other states. A sovereign state is not a dependent of another state:<sup>160</sup> "The doctrine of sovereign equality of states makes not only small states the juridical equal of larger ones, but also reduces the ambit of community power and influence of a larger state to the presumptive global reach of a single small state."<sup>161</sup> This second theory regarding how states interact with one another, as opposed to with their subjects, describes international law and discourse's central reliance on the fiction of formal equality among the states.<sup>162</sup> The BTC pipeline's legal architecture used this doctrine of external state sovereignty as the foundation for the Intergovernmental Agreement. Under this theory, Turkey, Azerbaijan, and Georgia are merely three sovereign states freely contracting with one another.

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158. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 17 (2000) (7th ed.).

159. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 3 (1999).

160. See generally MALANCZUK, *supra* note 160; Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT'L BLACK L.J. 1, 2 n.23 (2003) (citing Stephen A. Kocs, *Explaining the Strategic Behavior of States: International Law as System Structure*, 38 INT'L STUD. Q. 535, 539 (1994) (describing "sovereign equality of States as one of three central principles of Westphalian legal order")).

161. Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 39 (2003).

162. See Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 6.

Yet allowing state sovereignty to coexist with the BTC project also posed challenges to the consortium.

The project agreements overcome barriers presented by state sovereignty in two principle ways: 1) by building in radically asymmetrical rights, and 2) by transferring powers related to land and property rights to the consortium.

#### *A. The Project Agreements' Asymmetry of Rights*

The project agreements allocate radically asymmetrical rights. The asymmetry is most prevalent not in the IGA, to which only the host governments are parties, but rather in the HGAs, to which the consortium is also party. The HGA provisions regarding cancellation, for example, provide that "under no circumstances whatsoever"<sup>163</sup> shall the host government cancel or terminate the project agreements "as a result of *any breach by the MEP Participants* or any other Project Participants."<sup>164</sup> This highly unusual provision is matched in its peculiarity only by the HGAs' provision that the agreement "may be terminated at any time by the MEP Participants giving their written notice of termination to the Government and shall be of no further force or effect for any purpose as of the date specified by the MEP Participants in said notice."<sup>165</sup> The consortium can terminate immediately with written notice, but the host governments cannot terminate even if the consortium breaches its duties under the project agreements. This asymmetrical arrangement enfeebls any sense of sovereignty these host states may have had going in.

The other provisions delineating liability for breach also demonstrate severe asymmetry. Article 11 of the Turkish HGA, for example, provides for consortium liability to state authorities<sup>166</sup> and third parties<sup>167</sup> for loss or damage caused by consortium breach of the project agreements or applicable law to the extent that such loss or damage is not caused by state authorities.<sup>168</sup>

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163. Turkish HGA, *supra* note 78, art. 11.4.

164. *Id.* (emphasis added).

165. *Id.* art. 3.2.

166. "The MEP Participants shall be liable to the State Authorities for Loss or Damage caused by or arising from (i) any breach by them of any Project Agreement or (ii) any breach by them of any applicable law; provided, however, that the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority." Turkish HGA, *supra* note 78, art. 11.1.

167. "The MEP Participants shall be liable to a third party (other than the State Authorities and any Project Participant) for Loss or Damage suffered by such third party as a result of the MEP Participants' breach of the standards of conduct set forth in the Project Agreements; provided, however, that the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority." Turkish HGA, *supra* note 78, art. 11.2.

168. Article 11.2's limited liability clause appears an attempt to bind third parties from bringing suit. However, this clause, in and of itself, cannot do so. To prevent third parties from bringing suit against the consortium for loss or damage suffered as a result of a consortium participant's breach, the host states would have to fulfill their obligation under the IGA to make domestic implementing legislation to effectuate these provisions. In that case, third parties could find themselves prevented from suit.

Article 11's exception for contributory liability seems, at first glance, fairly standard. The provisions' asymmetry comes into focus when one plays out how a host state's claim for breach would look: the state's likelihood of prevailing on its claim would turn in large part on who would make the factual determination of contributory liability. Normally, an agreement subject to the ICSID Convention's rules for arbitration requires the parties to exhaust local remedies before bringing disputes to the ICSID arbitration.<sup>169</sup> The HGAs, however, supersede ICSID's exhaustion requirement.<sup>170</sup> Whether a state judicial entity or the investment-friendly ICSID arbitrator would determine contributory harm would depend on the enforceability of this provision.<sup>171</sup> Under this provision, if, for example, a state sought to hold the consortium liable for breach through its own municipal apparatus, and the consortium defended against the claim by pointing to state contribution to the harm, the HGA provides that any contracting party could forego the municipal adjudication of the claim and initiate the ICSID arbitration process.<sup>172</sup> Leaping from a municipal judicial system to arbitration in Geneva<sup>173</sup> may be unconventional in a matter such as this, but the HGAs do not make clear what other process would be respected.

If a dispute were to go through ICSID, some observers worry an arbitration tribunal would not likely be independent of the consortium.<sup>174</sup> The exclusion from arbitration of any language other than English places the states at a disadvantage, as does the fact that only English law binds the Tribunal.<sup>175</sup> These rules raise the bar for states' effective participation; not only do the state representatives need to be fluent in the English language, but also English commercial law.<sup>176</sup> Further, with each side bearing its own costs, the ICSID process is often prohibitively expensive for developing states.

Moreover, the HGA also grants contractors and any other project participants<sup>177</sup> working for the BTC rights under the HGA, including arbitral

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169. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, art. 26, 17 U.S.T. 1270, 29.

170. See, e.g., Turkish HGA, *supra* note 78, art. 18.1.

171. The enforceability of the provision superseding the exhaustion requirement is questionable under the Vienna Convention on the Law of Treaties, which provides that a party to a treaty, such as ICSID, cannot later make another treaty that purports to abrogate the earlier treaty's provisions without being in breach of the earlier treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 30(2), 1155 U.N.T.S. 331 ("When a treaty specifies that it is subject to . . . an earlier or later treaty, the provisions of that other treaty prevail."). A state could argue that the provision superseding exhaustion is unenforceable because no sovereign would have agreed to be subject to the power of the ICSID without the exhaustion of local remedies requirement.

172. Turkish HGA, *supra* note 78, art. 18.1.

173. *Id.* art. 18 (designating Geneva as the place of arbitration).

174. See Campagna per la Riforma della Banca Mondiale, International Fact-Finding Mission Preliminary Report 24 (Aug. 2002), <http://www.baku.org.uk/missions.htm> (follow "Turkey, August 2002" hyperlink).

175. See, e.g., Turkish HGA, *supra* note 78, art. 18; Georgian Security Protocol, *supra* note 149, art. 12.7.

176. See International Fact-Finding Mission Preliminary Report, *supra* note 174.

177. Project participants are defined as "any and all of the MEP Participants and any Affiliates thereof, the Interest Holders, the Operating Companies, the Contractors, the Shippers, the

dispute rights.<sup>178</sup> Contractors, like affected communities along the pipeline route, are third parties to the project agreements. Yet only the third parties working for the consortium are granted rights under the HGA. In contrast to the HGA Article 4.2's clear grant of rights to contractors, the project agreements are either utterly silent about or eschew third party community rights through oblique and partial references.<sup>179</sup> The contractors' arbitral dispute rights are thus an additional example of the asymmetry of rights between the consortium and the public interests the host states *should* represent.

The host states also have given away their sovereignty through asymmetrical terms by agreeing to allow the consortium to view any project agreement breach by any state agency as a breach by the sovereign itself, regardless of which agency actually breached. In the HGAs, the governments guarantee that if their agencies fail to carry out the project agreement provisions, the consortium may hold the state itself liable, regardless of which agency failed.<sup>180</sup> The host governments have, in essence, agreed to an exorbitant concept of alter ego, a theory against which other sovereigns have fought in the courts in both the U.S. and Britain.<sup>181</sup>

#### *B. The Consortium's Exclusive Use of the Land and Other Property Rights*

The pipeline corridor stretches from the Caspian to the Mediterranean Sea over a thousand miles of mountains, desert, and agricultural land, criss-crossing numerous rural villages and at least seven zones of armed conflict. In Turkey alone, the project is estimated to have so far displaced approximately 20,000 families. The families are displaced because each host state agreed to exercise "such powers of taking, compulsory acquisition, eminent domain, or other similar sovereign powers"<sup>182</sup> needed over private lands in order to transfer the "exclusive rights to the land"<sup>183</sup> to the consortium. In Azerbaijan and Turkey, these rights include the "unrestricted property right (other than ownership) to use, possess, control, and construct" on or under the state and private land designated for the pipeline corridor and to restrict or allow such actions by others.<sup>184</sup> The comparable provision in the Georgian HGA appears to allow for consortium ownership of private land and does not specifically prohibit the consortium from gaining ownership rights to the public land there.<sup>185</sup>

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Lenders, and the Insurers." Turkish HGA, *supra* note 79, app. 1, Certain Definitions.

178. See, e.g., *id.* art. 4(2) (granting project participants "the benefit of all rights, exemptions and privileges as are provided under any Project Agreement.").

179. See, e.g., Human Rights Undertaking, *supra* note 108, art. 2(c) (discussed *supra* Part III(A)(3)).

180. See, e.g., Turkish HGA, *supra* note 78, art. 5.3(ii).

181. See, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983); *C. Czarnikow, Ltd. v. Rolimpex*, [1979] A.C. 351.

182. Turkish HGA, *supra* note 78, art. 7(2)(vii)(4).

183. IGA, *supra* note 9, art. II(4)(iv).

184. Azerbaijan HGA, *supra* note 78, art. 4.1(iii); Turkish HGA, *supra* note 78, art. 4.1(iii).

185. Georgia HGA, *supra* note 78, art. 4.1(iv).

Georgia also granted each project participant “such status and powers of taking, compulsory acquisition, eminent domain, expropriation or other similar delegated powers of the State” to enable each project participant to manage its own interactions with local private land owners in the pipeline’s path.<sup>186</sup> These “rights to land” provisions require Georgia not only to exercise eminent domain but also to turn over that fundamentally sovereign power to the consortium.<sup>187</sup>

In addition to the rights to land provisions in the individual country contracts, the overarching Intergovernmental Agreement also contains provisions that seem to grant the consortium property rights. Article II(8) of the IGA declares that the project agreements “shall not be characterized or treated. . . as a concession contract or a special administrative contract granting a concession.” In the same article, the states unambiguously represent and warrant that the BTC pipeline project is not being executed in the public interest.<sup>188</sup> This article raises sovereignty concerns.

By agreeing to refrain from characterizing the project agreements as a special administrative contract, the states have potentially given up the prerogative that states retain under that particular species of contract to alter their commitments for the benefit of the public interest.<sup>189</sup> When pressed to clarify whether this provision would, indeed, prevent the host states from regulating human rights or HSE aspects of the project by invoking the public interest, BTC responded in the HRU that the consortium would not interpret this section of the IGA (Section II(8)) inconsistently with relevant host state regulations as long as the regulations were “no more stringent than [*inter alia*] the EU standards. . . referred to in the Project Agreements.”<sup>190</sup> This clarification only mitigates the sovereignty concern to the extent that the E.U. standards referred to in the project agreements, namely those referred to in the Code of Practice found attached to the HGAs, are discernable and agreed to by both the BTC and the host states. That such agreement could be found is far from certain.<sup>191</sup>

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186. *Id.* art. 4.1(iii).

187. In the domestic state sovereign immunity setting, the Supreme Court has refused to allow a state to contract out of its core sovereign power of eminent domain, even if the state’s intent to do so was unmistakable. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924); *see also* Michael D. Ramsey, *Acts of state and Foreign Sovereign Obligations*, 39 HARV. INT’L L.J. 1, 91 (1998); Campagna per la Riforma della Banca Mondiale, International Fact-Finding Mission 60-84 (June 2003), <http://www.baku.org.uk/missions.htm> (follow “Turkey-March 2003 Report” hyperlink) (indicating that the compensation regime designated in the project agreements was not being followed for most displaced land owners and users and raising concern generally over the exercise of eminent domain in that country).

188. IGA, *supra* note 9, art. 11(8).

189. *SEE AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE*, *supra* note 20, at 11 n.18 (citing CANE, INTRODUCTION TO ADMINISTRATIVE LAW 145 (3d ed. 1996) (explaining that the state retains ability to alter commitments under “special administrative contracts granting a concession”)).

190. Human Rights Undertaking, *supra* note 107, 2(a).

191. *See supra* Part III(A)(3) (discussing Human Rights Undertaking); Part III(A)(2) (discussing Code of Practice).

*C. Squaring the BTC Legal Architecture with the Doctrine of Sovereignty*

The IGA evokes international law as the foundation for the project agreements. Yet, it is doctrinally difficult to square the BTC legal architecture with the international law concepts of state sovereignty given the manner in which the project agreements strip the host states of most traditional roles of the sovereign. To do so, it becomes important to remember that the theory of formal equality among sovereign states, along with international law more generally, developed in the context of colonization and its aftermath. Through this historical lens, post-colonial legal scholars show how the sovereignty doctrine—the idea that each state is independent of and equal to every other state—has been selectively applied by international lawyers and jurists as a way to rationalize continued power by colonizing forces even after the end of formal colonialism.<sup>192</sup> The traditional idea of sovereignty (independence and equality) has never really been borne out for those from the non-colonizing countries: “strategies from two centuries ago that developed to support colonial domination. . . have carried forward into present international legal process.”<sup>193</sup> The colonizing states that built the international law framework guiding the BTC project agreements drew from their geopolitical and intellectual roots in the colonialist discourse. This perspective aids in understanding how the consortium’s counsel may doctrinally reconcile the BTC legal architecture with the concept of sovereignty.<sup>194</sup>

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192. The three host countries to the BTC pipeline were not colonized, but they were not colonizers, either. The former Soviet Republics and the transitional economies of Europe are rarely viewed as members of the developing world, but rather as belonging in a different global category. Ruth Gordon explains this liminal treatment: “International law divided the world into European and non-European realms with rights accorded only to the former; thus, duties were owed only to those of the same race—to other Europeans.” Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 15; see Antony Anghie, *Civilization and Commerce: the Concept of Governance in Historical Perspective*, 45 *VILL. L. REV.* 887, 887-93 (2000) (explaining role of white supremacy in international law). The development project, arising in the aftermath of post-colonial failures, “confirms and validates racial hierarchy, which explains in part why after the disintegration of the USSR, Eastern Europe and the former Soviet Republics—whether industrialized or not—were immediately understood to be in a different global category than the developing third world.” Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 *WIS. INT’L L.J.* 1, 5 n.13 (2004); see also Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 15. Whether or not Georgia, Azerbaijan, and Turkey actually escape categorization as third world, and regardless of the historical fact that these three states are not former colonies of the West, the economic policies (and their attendant regulatory regimes) that the states’ seated leaderships embrace today nonetheless place the Caspian states within the ambit of the development project’s language, rules, and awkward distribution of power. See UMA KOTHARI & MARTIN MINOGUE, *Critical Perspectives on Development: an Introduction*, in *DEVELOPMENT THEORY AND PRACTICE CRITICAL PERSPECTIVES: CRITICAL PERSPECTIVES 4-5* (Uma Kothari & Martin Minogue eds., 2002); Gordon and Sylvester, *supra*, at 5 n.13 (arguing that the development project expanded into the transitional economies of Europe and the former Soviet Republics).

193. Henry J. Richardson, III, *supra* note 161, at 50; see Anghie, *Civilization and Commerce*, *supra* note 192, at 909.

194. The next article further explores the implications of this attempted doctrinal reconciliation by explaining how traditional notions of sovereignty and formalism serve as the theoretical entry for the consortium’s transnational lawyers to utilize an international treaty as the governing pipeline document. Through this lens, it becomes possible to nuance the critique of the

The project agreements accomplish several shifts of power over land from the states and their citizens to the consortium. They bind the hand of the state to cancel or terminate. They shift the project from concession to property. They first grant an exclusive use of property and then also the power of eminent domain itself. In these ways, the pipeline route belongs to the oil consortium. Along that route, more so than Georgia, Azerbaijan, and Turkey, BP can lay claim as the sovereign power. The PSAs employ international law to create a thousand mile swath of militarized corporate sovereignty.<sup>195</sup>

## VII.

### CONCLUSION: MEGADEVELOPMENT'S LAWYERS AS "HANDMAIDENS OF GLOBALIZATION"

In light of the increasingly visible (though certainly not new) influence of transnational corporations, their mercenaries, and contractors in international conflicts over natural resource control and exploitation, this article analyzed the Caspian region's BTC pipeline project agreements to demonstrate the extreme to which today's megadevelopment consortia have taken this influence. The analysis has necessarily included a peek into the changing role of the state. International law's agility (or lack thereof) in shaping and responding to the course of economic globalization in the "twilight" of state sovereignty depends on the savvy (or lack thereof) of transnational lawyers.<sup>196</sup> Philip Alston argues that "[i]nternational lawyers have, in many respects, served as the handmaidens of the changes wrought by globalization. Indeed, the characteristics of sovereignty have changed so much partly because of the role they have played in facilitating many of those changes."<sup>197</sup> Anne Marie Slaughter adds that economic globalization is being implemented less by any "disappearing" hierarchical state institutions than by "bankers, lawyers, businesspeople, public-interest activists, and criminals" who interact with the "disaggregate[ed]" state institutions of the first world as represented by "securities regulators, antitrust or environmental officials, judges[, ] legislators," or the like.<sup>198</sup> While Slaughter views the disaggregated first world state as flexible and effective at meeting economic globalization's challenges,<sup>199</sup> during this period of flux in the role of

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transnational lawyers who put such deals together: Yes, they have innovated their means of undermining most forms of societal regulation of their industrial activity, but the fact that the innovation draws its form from international law is nothing surprising. It is, in fact, very much in step with the way industry and international law have danced from the beginning.

195. Cf. Waters, *supra* note 2, at 406 (citing one pipeline opponent in the Turkish context as observing the pipeline as "a strip running the entire length of the country, where BP is the effective government.").

196. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435, 435 n.4 (citing Walter B. Wriston, *THE TWILIGHT OF SOVEREIGNTY* (1995)).

197. *Id.* at 435.

198. Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997).

199. *Id.*

the state, transnational lawyers representing megadevelopment concerns often have operated in weakened, facilitative host states without due critical attention. The legal architecture of the BTC pipeline, for example, was designed over the better part of the last decade fairly quietly, utilizing concepts and authority from international law where convenient and discarding others where not.

To better comprehend the extent and gravity of this handiwork, it will be important to tease out further the implications of the changing role of the state vis-à-vis megadevelopment and the narratives of public international law by which the transnational lawyers who craft such arrangements must abide. Understanding these narratives might help us question and ultimately renegotiate allegiance to the discourses in public international law from which human rights advocates have traditionally drawn (namely human rights, development, and more recently good governance) in order to imagine anew how to be better allies to communities on the frontlines.

BP's handmaidens crafted the BTC pipeline's legal architecture in the late 1990s. While some may herald it as a worthy continuation of "the contract of the century," they must mean the last century; the oil consortium's outmoded reliance on and manipulation of an unsustainably inequitable international legal regime surely cannot represent any kind of tenable vision for just transnational lawyering into the twenty-first century. Transnational lawyers can do better than this.