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Abstracts

Articles

The “Gateway” Problem in International
Commercial Arbitration

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When an arbitration process is challenged, who decides whether the arbitration can proceed—and how should that question be answered? This Article discusses how and when courts should decide “gateway” issues in international arbitration, issues that go to the validity of the agreement to arbitrate. Using the examples of France and Germany, the author argues that the dominant Continental doctrines used to address such issues, the doctrines of Kompetenz-Kompetenz and separability, neither adequately explain courts' decisions nor provide a strong logical basis for them. In contrast, the more nuanced U.S. approach, which involves demarcating “gateway” and “non-gateway” issues, has strong explanatory and normative force. The author demonstrates how U.S. arbitration law addresses several areas that remain problematic under the Continental doctrine. The author then argues that recognizing U.S. arbitration law’s pragmatic balance between legitimacy and efficacy explains an otherwise confusing set of precedents. Finally, the author explains why the U.S. approach provides courts with a superior approach for responding to the Gateway problem.

International Law at Home: Enforcing Treaties in
U.S. Courts

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*While the landmark 2008 Supreme Court decision *Medellín v. Texas* upended the presumption that treaties creating private rights of action are self-executing, jeopardizing the judiciary's power to enforce several important international treaties, this Article explains why the *Medellín* decision does not sound the death knell for enforcement of treaties in U.S. courts. The Article begins by providing an account of the broader legal and historical context of *Medellín*—examining both the case law that led up to the decision and ways in which the lower courts have begun to respond to it.*

At the start of the twentieth century, the courts applied a strong presumption that treaties could be used by private litigants in court to press their claims. As international treaties—and international human rights treaties in particular—proliferated after World War II, however, the courts largely abandoned this presumption in favor of enforcement.

In response to this development, the authors identify and discuss the variety of ways in which international law can be enforced in U.S. courts—through “indirect enforcement,” “defensive enforcement,” and “interpretive enforcement”—that are often ignored in the scholarly literature about judicial enforcement of international law. With this broader historical and legal perspective in mind, the Article offers three proposals for addressing the uncertainty created by the Supreme Court: Congress could pass legislation providing for the judicial enforcement of some (or some subset) of Article II treaties; the Administration could adopt a clear statement rule, which the Legal Advisor’s Office of the State Department would apply to newly concluded treaties; and the Administration could seek injunctions against state and municipal agencies that risk placing the United States in violation of a treaty obligation.

Lawmaking by Nonstate Actors: Engaging Armed
Groups in the Creation of International
Humanitarian Law

Anthea Roberts & 107
Sandesh Sivakumaran

Academics and international lawyers look for the sources of international law in the treaties and customs created by states. Although nonstate actors have often been subject to international legal rules, they have seldom been seen as having a role in the formation of such rules. International humanitarian law is no exception. The authors argue that this “statist” exclusion of nonstate actors from international lawmaking is outdated and normatively questionable. The authors suggest that nonstate actors—and specifically, nonstate armed groups—should be understood as potentially having a role in the making of international humanitarian law. Giving nonstate actors such a role would require academics and lawyers to look beyond the treaties and customs of states when seeking potential sources of international law. The authors explore what these new sources of international law might look like, and what the benefits and limitations of accepting each of them might be.

The Article provides a framework for discussing the role nonstate entities play in international law. Instead of the typical dichotomy between states and nonstate actors, the authors propose distinguishing between states, state-empowered bodies, and nonstate actors. Whether and how a particular nonstate actor should participate in lawmaking depends on pragmatic considerations specific to the situation. These considerations should encompass the perspective of the international community as a whole. The authors then apply this approach to the role of armed groups in shaping international humanitarian law, arguing that there are good reasons to include these groups in the lawmaking process. They do not argue that these groups be given the same role as states, but instead seek to accommodate the groups’ practices within a less statist approach to the doctrine of sources. This lawmaking paradigm would allow for the constructive engagement of armed groups without downgrading the standards of international humanitarian law or treating armed groups as akin to states.

Note

This Note examines the relationship between coastal geography changes and maritime entitlements under international law. It argues that, despite considerable recent concern that negotiated settlements will not be able to cope with the effects of global climate change, current law is robust enough to accommodate these changes. Despite the lack of textual provision in UNCLOS, state practice has, arguably, accommodated ambulatory baselines. Moreover, the author maintains that changing coastlines will not lead to instability. They are not likely to be held to invalidate negotiated treaties under the principle of rebus sic stantibus, nor are they likely to create new rights for third parties under pacta tertiis. Since neither judicial decision nor state practice will likely alter existing rights and obligations, the Note concludes that changing baselines will not have the destabilizing effects that some commentators foresee.

