U.N. Dues: Default Ruse

Sabrina Haake*

 Admitted to practice, 1993. Private practice, civil litigation, Chicago, Illinois. Prior to becoming a lawyer, the author was a Governor's Fellow, Office of the Honorable Robert D. Orr, Governor of Indiana, and from there worked on legislative and agency matters for the State of Indiana. In 1993, she became General Counsel for an international beverage manufacturer located in Chicago, Illinois, where she focused on foreign trade law, with an emphasis on international trademark registration, litigation, and licensing throughout Eastern Europe, South America, China, and Mexico.

For the past eight years, the author has been a civil trial lawyer, representing both plaintiffs and defendants in civil rights cases with an emphasis on First Amendment claims. Currently she serves as Assistant General Counsel for the Board of Education of the City of Chicago, in the litigation division, defending primarily federal claims including First, Second, Fourth, and Fourteenth Amendment challenges, as well as Title VII employment cases, with limited pendant state claims.

Past publications include articles on criminal justice and international comparative antitrust.

I. INTRODUCTION

> "No U.N. institution . . . is competent to judge the foreign policy and national security decisions of the United States. American courts routinely refuse cases where they are asked to sit in judgment of our government's national security decisions, stating that they are not competent to judge such decisions. If we do not submit our national security decisions to the judgment of a Court of the United States, why would Americans submit them to the judgment of an International . . . Court?
>
> —Jesse Helms[1]
>
> For the government to say, we have violated our contract but have escaped the consequences through our own statute, would be monstrous.[2]

If it is true that the United Nations can only be as strong as the United States wants it to be,[3] and Jesse Helms' vision of an unchecked and uncheckable Congress is apt, the U.N. Charter is merely symbolic, a hortatory wish list of how nations would behave in a perfect but nonexistent world. If, on the other hand, multilateral pacts have the force of law, repeated congressional failure to appropriate funds as agreed in the U.N. Charter may be an unconstitutional and actionable breach of contract.

The U.N. financial debate has been tied to policy questions about the utility—or even the threat—of the United Nations to the United States.[4] Given the divergence of perspectives and the current fluidity of foreign policy forged from one president and two legislative houses, the middle room is an unsatisfactory no-man's-land where Washington has teetered since the mid-eighties. While the United States remains treaty-bound to an institution not always to its liking, withdrawal could have a more undesirable consequence, leaving the United Nations "intact but in the hands of others."[5] This Article examines whether the middle

---

1. Senator Jesse Helms, Address at the United Nations (Jan. 20, 2000), transcript *available at* http://www.garymcleod.org/helms.htm.

2. Norman v. Baltimore & O.R. Co., 55 S. Ct. 407, 427 (1935).

3. *See* William Luers, *U.N.'s Relevance Pays Off*, USA TODAY, Dec. 5, 2002, *available at* http://www.usatoday.com/news/opinion/editorials/2002-12-05-oppose_x.htm.

4. *See* Samantha Power, *United It Wobbles: Should We Blame the U.N. for Its Shortcomings, or the Countries that Make Up the World Body?*, WASH. POST, Jan. 7, 2007, at T03 (reviewing JAMES TRAUB, THE BEST INTENTIONS: KOFI ANNAN AND THE U.N. IN THE ERA OF AMERICAN WORLD POWER (2006); ADAM LEBOR, COMPLICITY WITH EVIL: THE UNITED NATIONS IN THE AGE OF MODERN GENOCIDE (2006)) ("Americans have generally seen the United Nations as a body more likely to curb U.S. power than to enhance it. . . . Poll data show that Americans are at last grasping that the major 21st-century threats—transnational terrorism, nuclear proliferation, global warming, public health calamities, large-scale refugee flows—cannot be met by individual nations.").

5. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 618 (2003).

ground—the product of congressional failure to appropriate funds committed by treaty—is a political impasse beyond the reach of the judiciary. After presenting the U.N. funding mechanics and a synopsis of U.S. compliance history, it examines the question first in the context of constitutionally mandated limitations on congressional powers, then in the context of three factually disparate cases, and concludes that the answer depends on how narrowly the question is drawn.

It is clear that the degree of U.S. involvement in the United Nations, including efforts to effectuate organizational change through diplomatic channels, are matters of foreign policy forever relegated to branches outside the judiciary.[6] While the nonjusticiability of foreign policy is inviolate under the political question doctrine,[7] this Article takes the position that the scope of that doctrine is not so broad as to proscribe consideration under a breach of contract theory. Moreover, the degree to which *lex posterior* rules allow Congress to abrogate earlier treaties is in dire need of examination. At a minimum, congressional language of U.N. abrogation has not been sufficiently clear to avoid problems of application, and, when in doubt about two conflicting actions, the judiciary must give effect to both.[8] At worst, congressional imposition of post-ratification "conditions" on compliance with funding mandates of the U.N. treaty blurs the constitutionally mandated separation of powers by transgressing executive treaty-making authority. Wholly independent of the constitutional question, under ordinary construction, the U.S. failure to appropriate funds committed by treaty gives rise to a claim sounding in contract.

Insisting that "bending" the law when it comes to U.N. dues is breaking the law,[9] this Article argues that the United States is liable to the United Nations for damages arising from its nonpayment and late payment of assessed contributions and that it will remain so until

---

6. Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988).

7. *Id.*

8. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (holding that the Court would not impute to the political branches an intent to abrogate a treaty without following the appropriate procedures set out in the treaty itself where the Executive Branch continues to maintain that the treaty is enforceable and Congress and the Executive Branch have not notified other signatories that the United States plans to abrogate the treaty); *see also* Weinberger v. Rossi, 456 U.S. 25 (1982); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Clark v. Allen, 331 U.S. 503, 510-11 (1947); Chew Heong v. United States, 112 U.S. 536, 550 (1884).

9. *See* Franck, *supra* note 5, at 610 (examining the U.N. Charter in the context of the U.S. Iraq invasion).

Congress either repudiates the U.N. Charter by withdrawal from that organization, or unequivocally modifies its treaty obligations with clear language evincing that intent. Part II discusses the U.N. funding mechanism, examining how Member States' regular article 17 contributions are assessed. This is followed in Part III with a brief history of the United States' late, conditioned, and nonpayment.[10] Part IV presents congressional limitations on funding as a transgression of treaty-making authority constitutionally reserved to the executive, and suggests the last in time rule is unworkable. Part V discusses article 17 regular, assessed contributions as a contractual obligation giving rise to damages for nonpayment. Part VI briefly discusses standing and jurisdiction. Part VII concludes that the United Nations should enforce its Charter, including funding mandates, in order to preserve it.

II. CONTRIBUTION ASSESSMENT LEVELS SET BY THE UNITED NATIONS

Signatory members to the United Nations agreed to share proportionate costs of the organization on the signing of the U.N. Charter, which vested ultimate authority for the U.N. budget with the General Assembly. In straightforward language, article 17 of the Charter governs approval of the budget, and sets the Member States' obligation of apportioned contributions toward it.[11]

The procedure for regular budget decision making is found in article 18, which provides each Member State one vote and, in article 18(2), requires a two-thirds majority vote for budget approval.[12] Although majority rule on budgetary matters would appear to present an imbalance, in that small-contribution members are effectively empowered to impose costs on large-contribution members, the allocation itself is the product of a series of economically sophisticated

---

10. This Article concerns itself only with the nonpayment and late payment of regularly assessed contributions, which are separate budget items from other U.N. programs, including voluntary contributions to various funds and programs including the U.N. Children's Fund (UNICEF), the U.N. Development Fund, and the World Health Organization.

11. *See* U.N. Charter art. 17, which provides, without adornment:

> 1. The General Assembly shall consider and approve the budget of the Organization.
> 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
> 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

12. *Id.* art. 18.

formulations designed to equalize payments on a global capacity-to-pay basis.

U.N. deliberations on how to apportion contribution levels among Member States take place largely in the Fifth Committee of the General Assembly, which apportions costs among members according to "capacity to pay,"[13] based on Gross National Income (GNI). For current assessment levels, Member States' shares of respective GNI were calculated based on the sum of average GNIs over a three- or six-year base period.[14] Next applied were a debt burden adjustment and low-income burden factors.[15] Following these adjustments, three sets of limits were applied. Those least-developed Member States whose adjusted share was less than the minimum level, or floor, of 0.001% were brought up to that level for an assessment rate of 0.01%.[16] To make up the difference, increases were then applied pro rata to other Member States, except the United States. The maximum assessment rate, or artificial ceiling, of 22% was then applied.[17] To make up the difference between the actual U.S. GNI of approximately 34%[18] and the 22% ceiling rate applied, a corresponding increase was then applied pro rata to other Member States.[19]

For 2006, the United States was assessed at 22% of the overall U.N. budget, or a total of $423,464,855.[20] While it is true that the United States bears the highest percentage contribution rate of Member States, at 22%, followed by Japan at 17%,[21] it is important to note that the 22% rate reflects an artificial ceiling adopted by the United Nations in response to pressure from the United States, a ceiling that does not apply to any other

---

13. *See* 1946-47 U.N.Y.B., 655 U.N. Sales No. 1947.1.8, *available at* http://unyearbook.un.org/unyearbook.html?name=194647index.html. The original Rules and Procedures provided for the Committee on Contributions to be elected by the General Assembly on the basis of qualifications and geographical representation, to advise the General Assembly on the apportionment of assessments, "broadly according to capacity to pay." *See also* Emilio J. Cárdenas, *Financing the United Nation's Activities: A Matter of Commitment*, 1995 U. ILL. L. REV. 147, 152 (1995).

14. *Report of the Committee on Contributions*, 42, *delivered to the General Assembly*, U.N. Doc. A/61/11 (June 2006) [hereinafter *Contributions Report*].

15. *Id.* at 44.

16. *Id.* at 45.

17. *Id.*

18. U.S. Mission to the United Nations, Fact Sheet: The United Nations—Myth and Reality of American Support [hereinafter Fact Sheet] (on file with author).

19. *See Contributions Report*, *supra* note 14, at 45.

20. *See* The Secretary-General, *Report of the Secretary-General on the Assessment of Member States Advances to the Working Capital Fund for the Biennium 2006-2007 and Contributions to the United Nations Regular Budget for 2006*, at 6, *delivered to the General Assembly*, U.N. Doc. ST/ADM/SER.B/668 (Dec. 27, 2005).

21. *Contributions Report*, *supra* note 14, at 18.

member.[22] If the United States were appropriated its share of the U.N. burden, using the GNI market and income principles applied to other Member States, its percentage contribution rate would be considerably higher.[23] Using an equal assessment method based on income, then, the United States is assessed at a relative rate that is *below* that of other Member States,[24] with a concomitant result that other Member States, to whom pro rata increases were applied to make up the difference, are subsidizing regular U.S. membership dues.

III. U.S. PAYMENT, NONPAYMENT, AND CONDITIONED PAYMENTS

A. U.S. Payment of U.N. Dues: An About-Face

The legally binding nature of the article on U.N. contributions has never been addressed within the U.S. judicial system, and has only been reviewed once by the International Court of Justice (ICJ). In 1962, following U.N. authorization of $200,000,000 in bonds to finance peacekeeping operations in the Suez and Congo areas,[25] the General Assembly requested that the ICJ issue an Advisory Opinion[26] on the matter of assessed contributions—specifically, whether disputed assessments for the Suez and Congo operations fell within article 17 expenses and as such were legally binding obligations of Member States who opposed those operations.[27] In a nod to multilateralism not since repeated, the United States took the initiative in seeking the Advisory Opinion from the ICJ.[28] As a staff consultant to the Committee on Foreign Affairs of the United States House of Representatives reported, the U.S. position to the effect that article 17 contribution requirements were legally binding was "*emphatic*."[29] Additionally, the U.S. position

22. *Id.* at 45.

23. Specifically, it would be 34%. *See* Fact Sheet, *supra* note 18.

24. This disproportionality in light of capacity-to-pay is nothing new. The first apportionment recommendation made by the new Committee on Contributions assessed the U.S. share at 39.89%. The representative of the United States, objecting on the grounds that this would "threaten to impair the sovereign equality of nations," agreed to pay up to 33% of the budget for 1947 only, as an emergency measure. *See* 1946-47 U.N.Y.B., *supra* note 13, at 217-19.

25. G.A. Res. 1739 (XVI), at 60, U.N. Doc. A/C5/907 (Dec. 20, 1961).

26. Advisory Opinions are obtained pursuant to U.N. Charter article 96 and the Statute of the International Court of Justice article 65, June 26, 1945, T.S. No. 993, and are not binding.

27. *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151. The ICJ found that the undertakings in the Congo and Suez were properly authorized under the U.N. Charter and concluded that the resulting costs apportioned to all the members were binding obligations within the meaning of article 17.

28. *See* Margaret E. Galey, *Reforming the Regime for Financing the United Nations*, 31 HOW. L.J. 543, 547-48 (1988). Dr. Galey was Staff Consultant, Committee on Foreign Affairs, U.S. House of Representatives.

29. *See id.* at 548.

was that the General Assembly should apply article 19 of the U.N. Charter—denying the vote—to states withholding or failing to pay their assessed contributions.[30] During this period, in comparison with the Soviet Union, and perhaps *because* of the contrast with the Soviet Union, the United States was a proponent of timely payments by U.N. members.[31]

Although during the 1960s Washington took the view that its dues were legally binding commitments arising from treaty obligations,[32] the U.S.-U.N. funding relationship changed drastically over the next twenty years, during which the congressional posture shifted from one of deference to outright hostility. In the 1980s, Congress began to link U.N. appropriations to wide-ranging policy mandates. While some of these were within the realm of foreign relations,[33] many later measures were not. For example, in 1994, to pressure the United Nations to deny observer status to a gay and lesbian organization, Congress ordered appropriations to the United Nations and its affiliated agencies to be cut by $118,875,000 until the President certified that "no United Nations agency or United Nations affiliated agency grants any official status, accreditation, or recognition to any organization which promotes and condones or seeks the legalization of pedophilia."[34] Congress also interjected the abortion debate into U.N. funding, with some conservatives wanting to deny funds to any U.N. agency that provided family planning or birth control services in overpopulated, underfed areas.[35] During this period, newly emergent proponents of the "Contract with America" described the United Nations in such derisive terms as "the longtime nemesis" of America, and "a totally incompetent instrument anyplace that matters."[36]

---

30. *Id.* See also *infra* note 54 for the text of U.N. Charter article 19 relating to General Assembly vote restrictions for nonpayment.

31. *See* Galey, *supra* note 28, at 547.

32. *Id.*

33. The Kemp-Moynihan Amendment to the U.N. appropriations bill denied funds to U.N. programs that supported the Palestine Liberation Organization or the independence movement in Namibia. Congress then enacted U.N. funding restrictions relating to the Palestine Liberation Organization, the South West Africa People's Organization, and certain other organizations in 1983. *See* Global Policy Forum, Background and History of the UN Financial Crisis, http://www.globalpolicy.org/finance/chronol/hist.htm (last visited Oct. 1, 2008).

34. Foreign Relations Authorization Act, Pub. L. No. 103-236, § 102(g), 108 Stat. 389 (1994); Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(o), 108 Stat. 4301 (1994). When faced with this threat, the United Nations was forced to withdraw consultative status to the organization.

35. *See Curb on International Family Planning Funds Is Lifted*, WASH. POST, Dec. 1, 1999, at A07.

36. *See generally* Strobe Talbott, *American Eagle or Ostrich? The Case for the United States in the United Nations*, 6 DEP'T STATE DISPATCH 179 (1995).

By the late 1990s, the United States had earned the reputation of the U.N. deadbeat.[37] Faced with continued measures to align U.S. funding with internal U.S. policy, the United Nations began to look into alternative funding sources, including taxation, to alleviate its financial dependence on the United States. In response, in 2001, Congress again imposed a use restriction on its U.N. dues, prohibiting the United Nations from using any of funds paid by the United States for the "promulgation or enforcement of any treaty, resolution, or regulation authorizing the United Nations . . . to tax any aspect of the Internet or international currency transactions."[38]

Although the official Bush Administration tone changed from "barely tolerat[ing]" the United Nations to a more conciliatory approach following the events of September 11, 2001,[39] as of November 30, 2004, the United States owed over seventy-five percent of the U.N. total arrearage, or $530 million.[40] Near the end of 2005, and in spite of the massive U.S. arrears, U.S. Ambassador John Bolton threatened to block the two-year U.N. budget if the organization failed to approve all recommended management reforms by the end of 2005. The oft repeated threat "angered member states . . . who were fed up" with Washington's "bullying" of the United Nations.[41]

In 2007, the 110th Congress began the new year facing a cumulative U.S. structural debt to the United Nations of about $770 million.[42] Although the United States was not the first Member State to align payments with policy, or the first to pay its assessed contributions late,[43] the United States has done so most consistently, and the organizational impact has been disproportionate given the GNP—weighted financing structure.[44] Although Democrats took control of both

---

37. *See* John M. Goshko, *U.N. Officials, Members Are Uneasy over Clinton's Stance on Dues Bill*, WASH. POST, May 2, 1998, at A06.

38. Act of Nov. 28, 2001, Pub. L. No. 107-77, § 404, 115 Stat. 789 (2001).

39. Bill Nichols, *Tension Returns to U.S. Relationship with UN*, USA TODAY, Sept. 11, 2001, *available at* http://www.usatoday.com/news/Washington/sept01/2001-09-11-united-nations.htm.

40. *See* Press Release, General Assembly, Progress Made in Strengthening U.N. Financial Base, but Serious Problems Remain, Budget Committee Told, U.N. Doc. GA/AB/3637 (Oct. 22, 2004), *available at* http://www.globalpolicy.org/finance/docs/2004/1022progress.htm.

41. *See* Global Policy Forum, Chronology of the UN Financial Situation: July-December 2005, http://www.globalpolicy.org/finance/chronol/fin2005b.htm (last visited Oct. 13, 2008).

42. *See A Golden Opportunity: The U.S.-UN Relationship: Testimony Before the H. Comm. on Foreign Affairs*, 119th Cong. (2007), *available at* http://www.betterworldcampaign.org/assets/pdf/testimony/02-13-2007-tew_hfac_testimony_21307.pdf (testimony of Timothy E. Wirth, President, United Nations Foundation and the Better World Fund) [hereinafter Wirth Testimony].

43. *See supra* text accompanying note 28.

44. *See Contributions Report*, *supra* note 14.

congressional houses in 2007, and may alter the U.S.-U.N. debt structure before this Article goes to print, it is fairly certain that history will repeat itself as new administrations and congresses come and go, and military exigencies present and dissipate throughout the world. The U.S. payment of dues, and the resulting increase or decrease in U.N. effectiveness, will remain subject to political volleying unless and until nonpayment and conditional payments are legally challenged.

B. Internal U.S. Funding Mechanisms

Early legislative history evinces congressional intent to honor its funding commitments as set forth in the U.N. Charter without reservation. The first appropriations bill authorizing payment of U.N. assessments was passed in 1945, providing full payments, on an annual basis, in accordance with apportioned assessment levels as agreed to in the U.N. Charter.[45] In addition to the absence of restrictions in this authorizing legislation, it is important to note the evident intent that "necessary" funding, as determined by the United Nations General Assembly—not the United States Congress—be appropriated annually, not just in the year of enactment. Clearly, at least at inception, there was no equivocation in allowing deference to the United Nations General Assembly in setting and apportioning those expenses, the U.S. share of which—at more than 30%—was far more than it is today.[46]

Today Congress appropriates money for assessed contributions to the United Nations, as well as for other international organizations, through the Foreign Relations Authorization Act[47] as well as via lump sum appropriations to the Department of State. The U.N.'s regular assessments are funded out of the State Department's Contributions to International Organizations (CIO) account.[48] This account covers U.S. funding obligations arising from treaties, and includes funding for forty-four international organizations, including the United Nations.[49] It largely has been through these two instruments that Congress has

---

45. United Nations Participation Act of 1945, Pub. L. No. 264, § 7 (1945), 59 Stat. 621 ("There is hereby authorized to be appropriated *annually* to the Department of State, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment by the United States of its shares of the expenses of the United Nations *as apportioned by the General Assembly* in accordance with article 17 of the Charter, and for all necessary salaries and expenses of the representatives . . . ." (emphasis added)).

46. G.A. Res. 69, at 131, U.N. Doc. A/RES/69 (Dec. 14, 1946). In 1946, the United States was apportioned 39.89% of the first regular U.N. budget. *See id.*

47. Foreign Relations Authorization Act, Fiscal Years 1994-1995, Pub. L. No. 103-236, tit. IV, pt. A, § 404(b)(2), 108 Stat. 447 (1994).

48. *See* Wirth Testimony, *supra* note 42 at 10.

49. *Id.*

succeeded in tying unilaterally imposed policy considerations to funding mandates, so far without challenge.

In addition to clear abandonment of early congressional intent to comply with its U.N. treaty obligations, another noteworthy factor is the disjunction between executive and legislative policy respecting the United Nations. As mentioned earlier, in the 1980s, congressional action—as distinguished from presidential initiative—reduced the U.S. assessment to the United Nations through a series of amendments to the Foreign Relations Authorization Act.[50] Congress did so even when the cuts resulted in a contradiction of official foreign policy and funding requests from the President.[51] Notwithstanding, in what can only be described as unmitigated hubris, Congress dictated that all recipients of U.S. foreign aid have *their* U.N. accounts dues checked. 22 U.S.C.A. § 2370(u) provides:

> In any decision to provide or continue to provide *any* program of assistance to any country under the Foreign Assistance Act . . . there shall be taken into account the status of the country with respect to its dues, assessments, and other obligations to the United Nations; and where such country is delinquent with respect to any such obligations for the purposes of the first sentence of Article 19 of the U.N. Charter, the President shall furnish the Committee on Foreign Relations of the Senate and the Speaker of the House of Representatives a report setting forth the *assurance given by the government of the country concerned of paying all of its arrearages* and of placing its payments of such obligations on a current basis, or a full explanation of the unusual or exceptional circumstances which render it economically incapable of giving such assurance.[52]

In addition, the United States Congress has statutorily linked continuation of payments to the United Nations to suspension of U.N. voting rules and to a U.N. disclaimer of interest on unpaid arrearages.[53]

---

50. *See* Galey, *supra* note 28, at 561.

51. *Id.* For example, in 1985, the Reagan Administration had submitted a request for $495.2 million for assessed payments to various international organizations, including the United Nations. Congress through its appropriations power reduced the Reagan Administration's request to $463 million for international organizations for 1986 and 1987, resulting in a $32 million shortage.

52. 22 U.S.C.A. § 2370(u) (2004) (emphasis added).

53. Act of Nov. 29, 1999, Pub. L. No. 106-113, div. A, tit. IX, §§ 921(a)(5), 931(a)-(b)(1), 113 Stat. 1501, 1501A-479 to 1501A-480 (1999), provides:

> (a) . . . A certification described in this section is a certification by the Secretary of State that the conditions in subsection (b) are satisfied. Such certification shall not be made by the Secretary if the Secretary determines that any of the conditions set forth in section 921 are no longer satisfied.
>
> (b) CONDITIONS.—The conditions under this subsection are the following:

Specifically, the Secretary of State authorization provides U.S. payment only if "failure to pay amounts specified in the account *does not affect the application of Article 19* of the Charter of the United Nations."[54] This mandate amounts to no less than a unilateral congressional amendment of article 19 of the U.N. Charter, which restricts voting rights of all Member States with excessive arrearage accounts as specified, and completely dispenses with the amendment provision of the U.N. Charter.[55] The other funding mandate from Congress conditions U.S. payment of its U.N. dues on a prospectively applied prohibition against interest charges, at least as applied to the U.S. debt, providing funding only if the United Nations "has not . . . levied interest penalties against the United States or any interest on arrearages on the annual assessment of the United States."[56] Essentially, this mandates that the United States will only entertain payment of its dues as committed by treaty as long as the United Nations makes no claim of interest on the unpaid U.S.

> (1) CONTESTED ARREARAGES.—The United Nations has established an account or other appropriate mechanism with respect to all United States arrearages incurred before the date of enactment of this Act with respect to which payments are not authorized by this Act, *and the failure to pay amounts specified in the account does not affect the application of Article 19 of the Charter of the United Nations*. The account established under this paragraph may be referred to as the "contested arrearages account".
>
> . . . .
>
> (5) NO INTEREST FEES.—The United Nations has not, on or after October 1, 1996, levied interest penalties against the United States or any interest on arrearages on the annual assessment of the United States, and neither the United Nations nor its specialized agencies have, on or after October 1, 1996, amended their financial regulations or taken any other action that would permit interest penalties to be levied against the United States or otherwise charge the United States any interest on arrearages on its annual assessment.

Act of Nov. 29, 1999, §§ 921(a)(5), 931(a)-(b)(1), 113 Stat. at 1501A-479 (emphasis added).

54. *Id.* (emphasis added). U.N. Charter article 19 provides:

> A Member of the United Nations *which is in arrears* in the payment of its financial contributions to the Organization *shall have no vote* in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

U.N. CHARTER art. 19 (emphasis added.)

55. U.N. Charter article 108 reads:

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

56. Act of Nov. 29, 1999, § 921(a)(5), 113 Stat. at 1501A-479.

arrearages. In this way, the United States Congress has tied the U.N.'s hands by prohibiting the United Nations from seeking compensation for interest *it* has had to pay on funds borrowed to cover the gap caused by U.S. nonpayment.

It is hard to imagine with what other contracting entity, and in what circumstance, the United States would impose such unilateral, repudiating conditions (postsignature) and still expect for its contracting authority to have meaning. Through these acts, Congress has statutorily attenuated the legal force of the United States' own treaty signature, by trumping the rule of law with the power of the purse. Whether these actions fall within the purview of congressional authority as contemplated by the United States Constitution, or are in fact unauthorized and therefore constitutionally infirm, or whether they are actionable as breach of contract, is the focus of the remaining portion of this Article.

IV. CONGRESSIONAL IMPOSITION OF FINANCING CONDITIONS ON REGULAR ASSESSED CONTRIBUTIONS VIOLATES ARTICLES I AND II OF THE UNITED STATES CONSTITUTION

Once a treaty has been ratified and becomes law, congressional picking and choosing among articles, including postratification imposition of policy considerations in exchange for already-agreed-to concessions, is tantamount to a congressional line-item veto, which has been ruled unconstitutional when exercised by the executive for the same reason: it violates separation of powers by blurring the executive function with that of the legislative.[57] It is urged that congressional incursions into treaty negotiations, and in particular the U.N. funding mandate, blur constitutional boundaries in a way that distorts intended checks and balances.

The Constitution clearly vests treaty-making power first with the President and secondarily with the Senate, limited to advice, consent and ratification.[58] Treaty-making authority is set out exclusively in Article II,

---

57. Clinton v. City of New York, 524 U.S. 417 (1998).

58. United States Constitution Article II, Section 2, reads in pertinent part:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
>
> *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties*, provided two thirds of the Senators present concur; and he shall nominate, and

which defines presidential powers. The word "treaty" does not appear at all in Article I, which sets out legislative powers.[59] As such, Article II contemplates that the highest level of foreign engagement[60] be reserved in the executive; the language in the remainder of the Article, granting the Executive Branch exclusive commanding authority over the military, bears that out. The language is not equivocal. After the Senate advises and concurs, the only other action allowed is to ratify or reject the treaty. There is no language authorizing postratification amendment or renegotiation, and there is absolutely *no* language extending Senate authority to ratify to Congress as a whole.[61] The Constitution's silence on the role of the United States House of Representatives in making, negotiating, and modifying treaties, taken in conjunction with the provision singling out only *the Senate* to advise and consent,[62] can have but one meaning.

When taken in context with the provision granting the President the sole power to make treaties, the two functions—namely, negotiation as distinguished from ratification—are constitutionally separate. Within the contours of Article II, then, once the Senate ratifies or rejects a treaty, its duties have been discharged and it can go no further. For this reason, as long as the United States remains engaged in the treaty, Congress does not have the authority to renegotiate treaty terms, for as the Supreme Court has held, altering or amending a treaty is the same exercise of power as making a treaty.[63] Just as the judiciary is constitutionally

---

> by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2 (emphasis added).

59. Excepting Section 10 which pertains only to states rights, forbidding state-made treaties.

60. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("[T]he President [has] a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.").

61. Given the difference in size and length of service between those legislative bodies, limiting the power to the Senate was no accident.

62. *See* U.S. CONST. art. 11, § 2.

63. *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power . . . . It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having

prohibited from inserting new clauses or conditions into treaties,[64] Congress should be similarly restrained. While it is true that any legislative act clearly must be signed by the President before it becomes law, withholding presidential signature risks the appropriations package for the entire fiscal year, because it is all or nothing. Although an argument can be made that appropriations are the intended check that restores balance to executive treaty-making authority, the reality is an annual budgetary compromise that leaves foreign affairs subject to a collective, mixed will that divvies up the pot among divergent and often conflicting exigencies.

As discussed, Congress has interjected everything—from abortion to Israel to the denial of gay observer status to a suspension of internal U.N. voting rules—into the U.N. appropriations package.[65] In effect, Congress has blended its own appropriations authority found in Article I Section 8,[66] with executive treaty-making authority, bootstrapping the former into the latter. The fact that U.S. compliance with article 17 of the U.N. Charter requires funding does not elevate congressional power to appropriate the power to negotiate the treaty itself, for it is hard to imagine *any* treaty which would not require at least some modicum of funding, even if it is just for staff to monitor compliance.

While U.S. courts have not addressed any constitutional question with respect to U.N. funding mandates, the "last in time rule" is a fairly well-known canon. Under the last in time rule, an act of Congress shares full parity with a self-executing treaty, and when a statute passed subsequent to the treaty is inconsistent with that treaty, the statute renders the treaty null as to those inconsistent portions.[67] To the extent the U.N. Charter was not self-executing, Congress clearly adopted it, as well as its funding mandates, in 1945.[68] However, this rule as applied to the U.N. Charter proves an unworkable compromise with results so unpredictable they render the distinctions under Articles I and II of the United States Constitution virtually nonexistent. Depending on the timing, the last in time rule can render an international treaty meaningless, because it will

---

found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.").

64. *Id.*

65. *See supra* Part III. This list is representative and is by no means exhaustive.

66. United States Constitution Article I, Section 8, reads: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

67. *See* Reid v. Covert, 354 U.S. 1 (1957); *see also* Whitney v. Robertson, 124 U.S. 190 (1888).

68. 22 U.S.C.A. § 287e (2004).

endure only until such time as Congress decides to revoke it. In this way, a treaty which has taken decades of delicate (or not so delicate) diplomacy to come to fruition may be cancelled virtually overnight, or worse, it can be modified, and the modifications themselves may be cancelled or modified. This unpredictability subverts the stability intended by the distinct diplomacy powers articulated in Article I.

Additionally, simultaneously with the last in time rule, the Supreme Court has also stated that an ambiguous federal statute must be construed in such a way as to *not* abrogate a treaty. Under both the last in time rule and *Franklin Mint*, only a clear, unambiguous abrogation of the U.N. Charter would trump it; to the extent of ambiguity in an inconsistent federal statute, the treaty must be enforced.[69] A search for statutory ambiguity does not take long, as Congress has kept the statutory authorization to fund article 17 assessed contributions—*as apportioned by the U.N. General Assembly*—on the books[70] while passing subsequent restrictions which are limited in scope and purpose without rising to the level of a clear abrogation of the U.N. Charter.[71]

If the United States does not want to honor its funding commitments made by treaty, it must exit the treaty. Otherwise, where, as here, congressional exercise of appropriations authority is mere rubric for the exercise of executive treaty-negotiating functions, it is a grave constitutional transgression of power. Only the President can negotiate treaties,[72] for the "President alone has the power to speak or listen as a representative of the Nation. He *makes* treaties with the advice and consent of the Senate; *but he alone negotiates*."[73]

Nor can Congress amplify its own powers through legislation, in this case through the various Foreign Appropriations Acts or through "congressional mandates" to the President to act in certain ways with respect to the United Nations treaty[74] without offending Article II, because congressional amplification of its own authority is not possible without amending the Constitution.[75] If there is to be a new mechanism

---

69. 466 U.S. 243 (1984).
70. *See* 22 U.S.C.A. § 287e.
71. *See infra* Part III.
72. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
73. *Id.* (emphasis added).
74. *See, e.g.*, 22 U.S.C.A. § 287 (2000).
75. The Supreme Court made this clear when striking down a congressional attempt to expand presidential power:

> [*T*]*he fact that Congress intended [the Line Item Veto Act to authorize the President* to effect the repeal of laws, for the President's own policy reasons, without observing the procedures set out in Art I, § 7] *is of no moment. . . . Congress cannot alter the procedures set out in Art I, § 7, without amending the Constitution*.

under which the Congress will play a role in determining the text (meaning application, attenuation, or selective modification of the United Nations treaty), such change must come not by appropriations legislation but through the amendment procedures set forth in Article V of the Constitution.[76]

To better illustrate the constitutional challenge, *Clinton v. City of New York*[77] is instructive. In *Clinton*, the Supreme Court struck down the line-item veto, ruling that the President had no constitutional authority to pick and choose among budget items that had already become law.[78] The Court rejected the congressional expansion of presidential authority, notwithstanding the inherently political[79] considerations behind the Line Item Veto Act.[80] In striking down the presidential line-item veto as unauthorized, the Court looked to Article I under which the President signs, or vetoes, proposed legislation.[81]

> The constitutional return [of proposed legislation] takes place *before* the bill becomes law; the statutory cancellation [authorized by the Line Item Veto] occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part .... [T]he Constitution . . . is silent on the subject of unilateral Presidential action that either repeals or amends *parts* of duly enacted statutes.[82]

As the Court made patently clear, for the President to selectively pick and choose among separate legislative items for postenactment veto was an encroachment of the legislative function.

Just as the Constitution is silent on the subject of unilateral presidential ability to repeal or amend *part* of a *statute*, it is equally silent on the subject of unilateral congressional ability to repeal or amend *part* of a *treaty*. Congressional selection among treaty provisions is the reverse corollary of a presidential line-item veto and is unconstitutional for the same reason. Presidential power is restricted in Article I to signing or vetoing legislation. Under *Clinton*, there is no room for

---

Clinton v. City of New York, 524 U.S. 417, 445-46 (1998) (emphasis added).

76. *But see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995).

77. 524 U.S. 417.

78. *Id.* at 448.

79. *See* discussion *infra* Part V.

80. The Line Item Veto Act gave the President the power to cancel in whole three types of provisions that had been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit," if he determined with respect to each cancellation, that it would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." Pub. L. No. 104-130, 110 Stat. 1200 (1996).

81. 524 U.S. at 438.

82. *Id.* (emphasis added).

renegotiating, or finding middle ground after the legislation is passed, without encroaching upon the lawmaking authority vested in the legislature. So too with treaty ratification: Article II provides, very succinctly and with no more, that the Senate—not Congress as a whole—advises, consents and ratifies treaties. Once a treaty is ratified, it is the law. Accordingly, the "constitutional return" of a treaty can only be done in the context of ratification or rejection of a treaty. Similar to the line-item veto, postenactment selective compliance with—or rejection of—one treaty provision,[83] while actively engaging in other treaty provisions, is rejection of part of a treaty, which is just as infirm as a presidential veto of a part of legislation. Once a treaty is ratified, it is the law until it is clearly repudiated. As long as the United States remains a member, and the United Nations Treaty remains in effect, Congress cannot retroactively select portions of the treaty—in this case, article 17—for modification, renegotiation, or disregard.

Separation of powers sounds simple, an elegant device to keep one branch of government from encroaching on the powers of another, all with the purpose of diluting excessive (and dangerous) concentration of power.[84] Though the constitutional underpinnings sound and appear simple, their application is not. In the context of deciding whether to decide at all, the courts make great effort to avoid review of matters deemed political questions, which would involve judicial review of matters left to the Executive and Legislative Branches. However, review of questions that are political in nature becomes more compelling when the Executive and Legislative Branches are in disagreement and proffered solutions to the disagreement require a blending of constitutionally extant functions; in this case, through congressional modification of a current U.S. treaty. Under Article II of the Constitution, treaty ratification is materially different from postratification renegotiation of portions of the same treaty, and the distinction must be deemed deliberate, for how could any country enter into a treaty with the United States if a disjunctive and diverse Congress has

---

83. *See, e.g.*, Foreign Relations Authorization Act, Fiscal Years 1994-1995, Pub. L. No. 103-236, tit. IV, pt. A, § 404(b)(2), 108 Stat. 447 (1994).

84. *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." (citing THE FEDERALIST No. 47, at 301 (James Madison) (C. Rossiter ed., 1961) (internal quotations omitted))).

subsequent authority to modify portions of it unilaterally?[85] As the Constitution contemplates, treaty-making power equally distributed among one Executive Branch and two legislative houses of government would render all treaties mere greeting cards with affectations of good intent but no real meaning.

V. BREACH OF CONTRACT ARISING FROM FAILURE TO APPROPRIATE

> *The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.*[86]

Setting aside the Part IV question of whether congressional acts in derogation of treaty commitments are constitutionally firm, this Part examines whether the United States can be liable for *damages* as result of nonpayment, under common law breach of contract principles. As discussed below, federal courts have faced this narrow question in a number of diverse fact patterns and have answered in the affirmative.

Because the binding nature of U.S. financial obligations committed by article 17 of the United Nations treaty has never been examined by any U.S. court, precedent in this Part is presented for logical and legal analogy rather than factual parity, both in the political question Subsection and in the Subsection addressing congressional failure to fund. Selected precedent appears in the context of three factually disparate claims. These claims involved funding of the Nicaraguan Contras, the enormous federal thrift bailout, and agreements with Native American tribes, all of which provide tools of analysis that could be employed in a putative U.N. claim for nonpayment of assessed contributions. As will be seen, the probability of success on the merits depends wholly on how the issue is cast.

A. The Political Question Doctrine

The first area of inquiry is whether and to what extent the political question doctrine bars judicial review of U.N. Charter obligations. Any claim must be narrow enough to avoid judicial criticism, debate, or comment on issues that are strictly matters of foreign policy. On this, the

---

85. This concept should not be confused with the right to terminate a treaty. The doctrine of *rebus sic stantibus* does recognize that a nation that is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its obligations under the treaty, *see* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984), but the United States has not invoked this excuse.

86. Sinking Fund Cases, 99 U.S. 700, 718 (1878).

Court has been clear for over 200 years: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[87] If a putative complaint seeks only to enforce the ideas embraced in the U.N. Charter, or has as its purpose the strengthening of the United Nations, without more, judicial review would be precluded on the grounds that such inquiries have, at their base, political questions and policy implications forever beyond the reach of the judiciary.[88] However, the term "political" as applied in this context is not so broad as to preclude all questions that touch on the political, or the answers thereto, which would have foreign policy implications, so as to forever preclude all review of congressional acts in derogation of preexisting agreements or treaties. In fact, it is expressly the province of the judiciary to determine what the law is,[89] and such a determination is not barred because it turns in part on what effect should be given to international obligations and treaties.

The political question doctrine has separation of powers at its core, and attempts to set a formulation for determining whether judicial review of questions involves the courts in matters specifically delegated to other branches[90]—specifically, whether the Constitution commits the issue to a coordinate political department.[91] However, because the judiciary—and only the judiciary—can make a determination of whether a coordinate branch of government has exceeded its powers,[92] the constitutional challenge posed in Part IV may alone elevate this matter from a political question to a constitutional question that falls exclusively within the purview of the judiciary, as questions involving whether a branch of

87. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). In over 200 years, this decision has never been disturbed.

88. *Id.*

89. *Id.* at 177.

90. See *Baker v. Carr*, 369 U.S. 186, 217 (1962), for the "political question" formulation most often cited:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

91. *Id.*

92. U.S. CONST. art. III.

government has exceeded its constitutional authority are only rarely deemed political.[93]

Within the context of the political question doctrine, it is important to keep in mind that a U.N. claim for nonpayment of dues is fundamentally a *property* claim arising from *contract* rather than a political claim. The overlay of property claims in a political question setting would not be a new one. In *Citizens in Nicaragua v. Reagan*,[94] plaintiffs alleged that U.S. support of military actions by Nicaraguan Contra rebels violated customary international law, and article 94 of the U.N. Charter which, plaintiffs asserted, required the United States to comply with a decision by the ICJ instructing the United States to abstain from involvement in Nicaragua.[95] Plaintiffs further challenged congressional funding for the Contras in light of the ICJ decision that the United States was in derogation of international law.[96] Although the plaintiffs' reliance on the ICJ ruling was misplaced (because the United States never conceded to ICJ jurisdiction on the matter and article 94 by its terms applies only to parties properly before the ICJ[97]), the court made clear that *property* claims, as distinguished from claims brought to enforce foreign policy, were justiciable, even when they implicated foreign policy. In this ruling, the court heeded the admonition from the United States Supreme Court that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial

---

93. Hopson v. Kreps, 622 F.2d 1375, 1378 n.4 (9th Cir. 1980) (citing Sarnoff v. Connally, 457 F.2d 809 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972) (constitutional challenge to executive war making); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973)).

94. Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

95. Article 94, U.N. Charter, provides:

> 1. Each Member of the United Nations undertakes to comply with the decision of the international Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The Nicaraguan plaintiffs alleged that the United States violated this provision by maintaining actions in Nicaragua in spite of and in derogation of a decision by the ICJ condemning the actions. *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 932. Specifically, the ICJ held that the United States' support of military actions by the Contras and against the Government of Nicaragua violated both customary international law and a treaty between the United States and Nicaragua. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 149 (June 27). The ICJ concluded that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations." *Id.*

96. 859 F.2d at 932.

97. *Id.* at 936.

cognizance."[98] Although the appellate court dismissed the action, finding that the complaint failed to state a claim because it lacked an allegation that the United States itself participated in injuries to Americans in Nicaragua, it is relevant to the present discussion for its ruling that the political question doctrine does *not* bar personal and property rights just because the personal and property claims asserted involve foreign policy. The Court's reasoning is instructive:

> We believe the trial court's reliance on the political question doctrine was misplaced, particularly to the extent that appellants seek to vindicate personal rights rather than to conform America's foreign policy to international legal norms. Like the trial court, however, we find that the complaint warrants dismissal. Although we conclude that the complaint is justiciable, we believe that it fails to state a claim on which relief can be granted.[99]

While the Court made clear that claims brought for the sole purpose of "strengthen[ing] the United Nations" were excluded from judicial review,[100] the court distinguished bald policy claims from property claims that had foreign policy implications, finding the latter clearly justiciable.[101]

Holding the matter justiciable is materially different, of course, from determining that an act of Congress which abrogates an earlier treaty is actionable. Under the *Nicaragua* decision, a later act of Congress that is inconsistent with earlier treaty obligations simply "modifies or supersedes customary international law [or treaty provisions] to the extent of such inconsistency."[102] A breach of contract action independent of the constitutional challenge, then, would not seek to set aside congressional appropriations, and would not seek to enjoin the United States from further appropriations shortcomings. Rather, a breach of contract action would recognize the legitimacy of congressional mandates in violation of the U.N. Charter while seeking damages that logically flow from those mandates. Although this decision fell short of finding a right of damages resulting from congressional acts

---

98. *Id.* at 935 (citing Baker v. Carr, 369 U.S. 186 (1962)). *Contra* Perry v. United States, 294 U.S. 330 (1935).

99. 859 F.2d at 932 (emphasis added). Dismissal was based on plaintiff's failure to set forth a cognizable claim in part because there was no allegation that the United States itself was involved in the acts causing their alleged harm.

100. *Id.* at 934.

101. *Id.* at 935.

102. *Id.* at 938.

(or failure to act),[103] other cases have come closer to the mark, as discussed below.

B. Failure To Comply with Funding Provisions of Treaty

1. Congressional Action in Derogation of Earlier U.S. Agreement

Whether the United States can be held liable for monetary damages resulting from a congressional act in derogation of an earlier Government agreement was answered in the affirmative in *United States v. Winstar*.[104] In *Winstar*, in an effort to bail out a failing thrift industry and at the same time avoid insurance liability for impending failures, the Federal Home Loan Bank Board (Bank Board) encouraged "supervisory mergers" of unhealthy thrifts with healthy thrifts.[105] The Bank Board did this by sweetening the appeal of otherwise unhealthy thrifts by allowing the acquisitions to be subject to a different accounting treatment; specifically, allowing the acquiring institutions to meet their federally imposed reserve capital requirements by treating goodwill as an intangible asset with a tangible value.[106] The accounting treatment to be accorded supervisory goodwill and capital credits was found to be the subject of express arrangements between federal bank regulators and the acquiring institutions,[107] based on federally promulgated standards.[108]

Six years after the accounting standards were issued, they were deemed by Congress as not just ineffective, but arguably a "gimmick" that was itself partly to blame for the failing thrift industry.[109] Congress therefore enacted legislation in direct contravention of the earlier

---

103. Specifically, the Court stated:

> In short, do violations of international law have domestic legal consequences? The answer largely depends on what form the "violation" takes. Here, the alleged violation is the law that Congress enacted and that the President signed, appropriating funds for the Contras. When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law.

Id. at 935.

104. United States v. Winstar Corp., 518 U.S. 839 (1996).

105. *Id.* at 847.

106. *Id.* at 848-49.

107. *Id.* at 853.

108. Specifically, the Financial Accounting Standards Board in 1983 had promulgated Statement of Financial Accounting Standards No. 72, which applied specifically to the acquisition of a savings and loan association, providing that "[i]f, and to the extent that, the fair value of liabilities assumed exceeds the fair value of identifiable assets acquired in the acquisition of a banking or thrift institution, the unidentifiable intangible asset recognized generally shall be amortized to expense by the interest method." *Id.* at 855.

109. *Id.* at 857 (citing House Report).

accounting treatments allowed by the Bank Board through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[110] FIRREA was enacted with the express objects of "preventing the collapse of the industry, attacking the root causes of the crisis, and restoring public confidence."[111] In particular, the new statute required thrifts to "maintain core capital in an amount not less than 3 percent of the savings association's total assets," and defined "core capital" to *exclude* "unidentifiable intangible assets," such as goodwill.[112]

Despite the clear policy directive at the heart of FIRREA, the Supreme Court found contractual liability and damages arising from its enactment.[113] Finding that the government regulators had expressly promised that the supervisory goodwill and capital credits could be counted toward satisfaction of the regulatory capital requirements, the Court found liability for damages arising from enactment of the new law in contravention of those promises.[114] As to the threshold question of whether there was an implied contract between the Bank Board and plaintiffs, the United States contended that the earlier accounting principles were simply a reflection of the policy in effect at the time of the transactions, but (like treaties and other acts of Congress) that those principles were always subject to congressional modification.[115] The Supreme Court, however, agreeing with prior rulings by the lower courts which read the transactional documents as contractual commitments, not mere statements of policy,[116] held that the Government had a *contractual obligation* to permit plaintiffs to count the supervisory goodwill generated as a result of its merger.[117]

In *Winstar*, the United States asserted three defenses of relevance to a breach of contract claim for congressional abrogation of a promise to pay U.N. dues: (1) the canon of contract construction that surrenders sovereign authority must appear in unmistakable terms;[118] (2) the doctrine that a government may not contract to surrender certain reserved powers;[119] and (3) the principle that a government's sovereign acts do not

---

110. Pub. L. No. 101-73, 103 Stat. 183 (1989).

111. *Winstar*, 518 U.S. at 856.

112. Pub. L. No. 101-73, §§ 221, 301, 103 Stat. 183, 266, 277 (1989).

113. *Winstar*, 518 U.S. at 843.

114. The enactment of FIRREA caused many institutions to fall out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators. *Id.* at 858.

115. *Id.* at 909-10.

116. *Id.* at 863.

117. *Id.* at 864.

118. *Id.* at 860 (citing Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986)).

119. *Id.* (citing Stone v. Mississippi, 101 U.S. 814 (1880)).

give rise to a claim for breach of contract.[120] These defenses failed in pertinent part because the plaintiffs in *Winstar* did not seek to *prevent* or *nullify* the congressional action, but rather sought damages in result of the action:

> We read this promise as the law of contracts has always treated promises to provide something *beyond the promisor's absolute control*, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence .... "Such an agreement ... is usually interpreted as one to pay damages if performance is prevented rather than one to render a performance in violation of law." The thrifts do not claim that the Bank Board and FSLIC purported to bind Congress to ossify the law in conformity to the contracts ... they seek no injunction ... (but) simply claim that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury.[121]

So too is a treaty with annual funding provisions a commitment to pay, giving rise to damages—as distinguished from injunctive relief—if payment is prevented by subsequent congressional action. Rather than repudiate one congressional act in favor of another, the *Winstar* court simply assessed damages.[122] Just as financial regulations were held in the nature of a binding agreement, treaties are held in the nature of contracts, as discussed below. To find the U.N. Charter, an intergovernmental agreement, less binding than the agreements giving rise to damages in *Winstar* would be tantamount to holding that treaties have less binding force than federal regulations, which has never been done. Moreover, the clause in the *Winstar* transactions, which textually contemplated that future acts of Congress could abrogate the agreed upon accounting principles,[123] is not present in the U.N. Charter, in that similar language

---

120. *Id.* (citing Horowitz v. United States, 267 U.S. 458, 460 (1925)).

121. *Id.* at 868-71 (emphasis added) (internal quotation omitted).

122. "[T]here seems no reason of policy forbidding a contract to perform a certain act legal at the time of the contract if it remains legal at the time of performance, and if not legal, to indemnify the promisee for non-performance." *Id.* at 870 n.17 (citing 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1170, at 254 (1964) (noting that in some cases where subsequent legal change renders contract performance illegal, "damages are still available as a remedy . . . but specific performance will not be required")).

123. The merger assistance agreement between the Bank Board and the merging thrifts provided in part:

> For purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board ... respectively, or any successor organization to either.

does not appear in the Charter or in any subsequent reservation to the U.S. signature on the Charter.

Under a breach of contract analysis, in distinction from a constitutional challenge, the issue is not whether Congress has the right to abrogate by failing to meet the funding mandates of article 17, but whether the United States can be held liable for damages arising from the nonpayment, especially in light of its continued membership and attendant membership benefits. What is critically important to take from *Winstar*, for purposes of a U.N. damages claim, is the Court's reconciliation of the abrogating congressional act with the earlier governmental commitment to the contrary. Rather than review whether or not Congress was within its authority to modify or amend a prior government agreement, the Supreme Court, by holding that a subsequent amendment or modification gives rise to a private right of damages,[124] gave effect to *both*.

2. Treaty as Contract

Treaties have long been regarded as contracts between nations, and the U.S. performance or nonperformance under a treaty must be reviewed in light of the treaty language itself.[125] Relative to the agreements at issue in *Winstar*, the U.N. Charter should pose no difficulty of interpretation. Written in clear language, the Charter, when signed by the United States and ratified by the Senate, binds the United States to funding obligations in compliance with article 17, which provides in section 1 that the General Assembly sets the U.N. budget, and in section 2 that the expenses "shall be borne by the Members as apportioned by the General Assembly."[126] Whether denominated as treaty, agreement, or contract, the signatory parties undertook to fund the United Nations on a capacity-to-pay basis, in accordance with the funding decisions made by the General Assembly, not the United States Congress.

> The Government emphasized the last sentence of this clause, which provided that the relevant accounting principles may be "subsequently clarified . . . or amended," as barring any inference that the Government assumed the risk of regulatory change.

Id. at 865.

124. *Id.* at 843.

125. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259-60 (1984) ("In determining whether the Executive Branch's domestic implementation of the Convention is consistent with the Convention's terms, our task is to construe a "contract" among nations."); *see also* Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131 (2006).

126. U.N. Charter art. 17.

Whether fiscal or U.N. funding deference to an outside entity was improvident, or whether the costs to the United States exceed the benefits, is beyond the scope of judicial review. If the answer to either of those political questions is yes, then the United States must seek an amendment of article 17 through article 108 of the U.N. Charter,[127] or, barring satisfactory amendment, withdraw. Until such time, the treaty remains in force and the funding agreement remains binding. A court, when faced with interpreting the mandates of article 17, need only look to the clear language of that paragraph, as there is a strong presumption in favor of a literal reading, "especially as against a construction that is not interpretation but perversion."[128] Imposition of conditions on payment forty years after signature, conditions that do not appear in article 17 or anywhere else in the U.N. Charter, while purportedly maintaining U.N. membership, is a perversion of that document.

3. U.N. Charter as Implied Contract

If there is any question about the meaning of article 17 or the parties' intent that it be legally binding, consider also whether early intentions to pay, coupled with timely payment history from 1945 to 1970, evinces U.S. intent. In interpreting a treaty as a binding contract, the "conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored."[129] As discussed, the United States not only paid its dues on time for the first twenty years, but was a champion for the cause of the legally binding nature of article 17.[130] The United States made these legal arguments at a time when the U.S. percentage assessments greatly exceeded those of today.[131] Surely the U.N. Charter was not a binding contract from 1945 until 1970, then transmogrified into something less than thereafter; to the extent that congressional actions have so demoted the treaty, such demotion would

127. *See id.* art. 108.

128. The Five Per Cent Discount Cases, 243 U.S. 97, 106 (1917); *see also Franklin Mint*, 466 U.S. at 263 ("Constructions of treaties yielding parochial variations in their implementation are anathema to the raison d'etre of treaties, and hence to the rules of construction applicable to them."); Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.").

129. *Five Percent Discount Cases*, 243 U.S. at 106.

130. *See* Galey, *supra* note 28, at 548.

131. *See* G.A. Res. 69, at 131, U.N. Doc. A/RES/69 (Dec. 14, 1946).

itself lie at the heart of both the constitutional challenge as well as the breach of contract action.

While the extent to which the United States has been enriched—or not—from its membership is beyond the scope of this Article, and in fact would be beyond judicial review, under ordinary contract principles *any* consideration is sufficient to support an inference of intent. Indeed, consideration—as that concept is traditionally applied to contract analysis—is not even required for a treaty to be deemed a contract. Notwithstanding, the U.S. economic benefits from hosting the United Nations are quantifiable and easily posed as a continuing benefit. It is estimated that the United Nations contributes $3.2 billion each year to New York City, resulting in annual earnings to the city of $1.2 billion.[132] Given that these economic benefits dwarf assessed contributions of under $500 million, these figures may provide further consideration in creation of an implied contract.

Consider also whether an implied agreement of liability may separately arise from the United States' continued U.N. membership,[133] through which the United States routinely invokes U.N. authority, and cites U.N. complicity in foreign affairs when to do so is of strategic benefit to the United States.[134] The U.N. agreement provides for payment by all "members,"—implying current membership—and establishes membership as consideration for the binding promise to pay, which the members of the United Nations have not varied.[135] Thus, by retaining membership in and by calling on the United Nations to perform

---

132. *See* Global Policy Forum, *supra* note 41 ("The UN, its agencies and the diplomatic and consular corps contribute $3.2 billion a year to the economy of the New York City area alone, according to mayor Rudolph Giuliani. This has generated 30,600 jobs, yielding $1.2 billion in annual earnings.").

133. See *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967), for a discussion of implied agreement to pay damages.

134. A recent State of the Union Address by President Bush referred to the United Nations as part of a "quartet" of international players acting in concert with the United States, and the President repeatedly referred to multinational forces operating under a mandate from the United Nations. The President's speech went so far as to endorse the United Nations as a voice of the world, stating, "The United Nations has imposed sanctions on Iran, and made it clear that the world will not allow the regime in Tehran to acquire nuclear weapons." *See* George W. Bush, State of the Union Address (Jan. 23, 2007).

135. *See* RESTATEMENT (SECOND) OF CONTRACTS § 346 cmt. a (1981) ("Every breach of contract gives the injured party a right to damages against the party in breach" unless "[t]he parties . . . by agreement vary the rules."); 3 E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 189 (2004) ("The award of damages is the common form of relief for breach of contract. Virtually any breach gives the injured party a claim for damages.").

extensive and expensive operations ranging from peacekeeping[136] to studies on climate change,[137] the United States has retained benefit of the bargain, regardless of how one "values" the economic benefit.

An assessment of damages under the U.N. Charter would not bind the United States Government's exercise of authority to modify participation in the United Nations, or of any other sovereign power, because Congress retains the right to withdraw from the Charter, to adopt a funding reservation under the Charter, or to mandate that the United States move to amend article 17 of the U.N. Charter through appropriate amendment proceedings. As in *Winstar* (where the thrift bailout damages were in excess of $140 billion, as compared to current U.S.-U.N. dues of under $500 million),[138] a simple award of damages for breach would not be "tantamount to any such limitation"[139] on congressional action.

Having established that acts of Congress are justiciable, and further that congressional acts may give rise to damages when those acts contradict earlier government agreements, we turn now to the specific question of whether congressional failure to appropriate funds—in derogation of an earlier government agreement to do so—is actionable.

C. Failure To Appropriate Funds Held Actionable

1. A Conflict Between Two Congressional Acts

The Supreme Court has had occasion to examine the interplay between a congressional promise to pay, followed by a subsequent failure

---

136. *See* Edith M. Lederer, *Sudan Leader Frustrates Security Council*, WASH. POST, Feb. 7, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/07/AR2007020700112.html.

137. *See* Juliet Eilperin, *Science: Global Climate Report*, WASH. POST, Feb. 5, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/discussion/2007/02/02/DI2007020200882.html.

138. The relative smallness of the U.N. sums at issue, indeed of the U.N. financial struggles as a whole, has been called an "absurdity":

> [T]he charge flung about the Northern world [is] that the UN System's budgets are huge, extravagant drains on our countries' treasuries. The impact of this propaganda can be illustrated through a true anecdote. When the eminent international financiers convened by the Secretary-General to review UN financing problems first met in late 1992 . . . , they expressed bewilderment about the data prepared for them on UN budgets. Were there not misprints in the tables? When they were assured that the figures were accurate they expressed astonishment: had they really been asked to look at the problems of mobilising such very small annual sums?

Erskine Childers, Financing the United Nations, Presentation at the Tinbergen Institute, Rotterdam (Sept. 29, 1995), *available at* http://www.globalpolicy.org/reform/topics/general/1995/0929childers.htm.

139. United States v. Winstar Corp., 518 U.S. 839, 881 (1996).

to appropriate funds in accordance with that promise. In *Cherokee Nation v. Leavitt*,[140] the Indian Self-Determination and Education Assistance Act, authorizing the United States to enter into agreements to pay Indian tribes for the provision of health services, was followed by a subsequent Congressional Appropriations Act that failed to appropriate enough money to pay funds due under the Self-Determination Act.[141] Following the insufficient congressional appropriations, the tribes brought suit under the original Act for the difference between what was promised and what was appropriated.[142]

In response to the tribes' claim, the sole U.S. defense was that it was bound by prior agreements if, and only if, Congress appropriated enough funds to comply with them, and that, in this instance, Congress had not.[143] The defense pointed out that the Indian Self-Determination Act textually mandated, "*Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is . . . subject to the availability of appropriation* . . . ."[144] The United States argued that this language amounted to "an affirmative *grant* of authority to the Secretary [of the Interior] to adjust funding levels based on appropriations."[145]

The Court rejected this argument based largely on a lump sum appropriation in excess of the funds at issue,[146] which as will be seen, also exists with respect to U.N. funding. The Court noted that "the Government in effect claims . . . to have the legal right to disregard its contractual promises if, for example, it reasonably finds other, more important uses for an otherwise adequate lump-sum appropriation."[147] In defense, the Government asserted the later-enacted statute, namely, section 314 of the 1999 Appropriations Act, which provided, "Notwithstanding any other provision of law [the] amounts appropriated to or earmarked in committee reports for the . . . Indian Health Service . . . for payments to tribes . . . for contract support costs . . . *are the total amounts available* for fiscal years 1994 through 1998 for such purposes."[148] Rejecting the "total amounts" argument as well, the Court noted that the Government's interpretation would "undo a binding

140. Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).
141. *Id.* at 635.
142. *Id.*
143. *Id.* at 636.
144. *Id.* at 640.
145. *Id.* at 643-44.
146. *Id.* at 643.
147. *Id.* at 644.
148. *Id.* at 645 (citing Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-88 (1998) (emphasis added)).

governmental contractual promise" and that "[a] statute that retroactively repudiates the Government's contractual obligation may violate the Constitution."[149]

A U.N. claim, sounding in contract, based on the conflict between a prior treaty and subsequent congressional act, would be theoretically identical to the *Cherokee Nation* claim. Similar to article 17 of the U.N. agreement, the Indian Self-Determination and Education Assistance Act provided for an annual funding agreement.[150] Like the U.N. agreement, the Indian Self-Determination and Education Assistance Act exchanged an agreement to provide annual payments in exchange for services which would otherwise have been provided by the United States.[151] Finally, Congress later appropriated less than the amount required for the annual funding agreement.[152] To illustrate, replace "the tribes" and corresponding language with "the United Nations" in the following language:

> The Indian Self-Determination and Education Assistance Act . . . , authorizes the Government and *Indian tribes* to enter into contracts in which *the tribes* promise to supply federally funded services, for example tribal health services, that a Government agency would otherwise provide. . . . The Act specifies that the government must pay *a tribe's* costs, including administrative expenses.[153]

Supply of services that would otherwise be supplied by the United States—in furtherance of its own interests—including world health and inoculations, peacekeeping missions, and international commercial regulation, to list a few, is at the core of the agreement by the United States to pay its share of U.N. contributions.[154] Whether one agrees with the utility or efficacy of delivery or not, these "services" are the

---

149. *Id.* at 646 (citing United States v. Winstar Corp., 518 U.S. 839, 875-76 (1996)); *see supra* notes 160-177 and accompanying text.

150. 543 U.S. at 635.

151. *Id.* at 634.

152. *Id.* at 635.

153. *Id.* at 634.

154. The United Nations, according to its Charter, was formed:

> to maintain international peace and security . . . ; to develop friendly relations among nations, based on the principle of equal rights and self-determination of peoples . . . ; to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character . . . ; and be a centre for harmonizing the actions of nations in the attainment of these common ends.

U.N. Charter art. 1. Nowhere, in any scholarship or political debate of record, has it been claimed that the United States joined the United Nations in a complete act of altruism; it is beyond debate that at the organization's inception, following on the heels of the horrors of World War II, the United States joined the United Nations believing it to be in the United States' best interest.

performance and U.S. dues the "consideration" to which the parties agreed in 1945, in a pact from which the United States has never withdrawn. To crystallize the comparison, replace the "Indian Act" with the "U.N. Charter" and replace "tribes" with "the United Nations," for a re-reading of the Cherokee Nation claim:

> The U.N. Charter, authorizes the Government and *the U.N.* to enter into contracts in which *the U.N.* promises to supply federally funded services, for example *U.N.* health services, that a Government agency would otherwise provide. The Charter specifies that the Government(s) must pay *the U.N.'s* costs, including administrative expenses.

Just as repudiation of the annual funding provisions of the Indian Self-Determination Act was held actionable,[155] repudiation of the annual funding provisions of article 17 is actionable. Surely tribe health services are no more, nor less, important than world health services, inoculations and peacekeeping missions that benefit the United States, albeit on a global scale. Further, the policy implications of the Indian Self-Determination Act are no more, nor less, compelling than the policy implications of membership in a multilateral organization, and U.S. relations with sovereign Indian tribes are no less "political questions" than matters involving the U.S. contractual undertaking of the U.N. Charter.

Notwithstanding the theoretical similarities between *Cherokee Nation* and a putative U.N. claim, some material facts present in *Cherokee Nation* would not exist in the latter; for example, the Court noted that the Indian Self-Determination Act referred to the word "contract" 426 times.[156] However, the defense in *Cherokee Nation* had a statutory ally that would be wholly lacking in a U.N. claim: namely, explicit language in the Indian Self-Determination Act expressly linking the provision of funds to the "availability of appropriations."[157] Nowhere in the U.N. Charter, or in the U.S. ratification, is participation or payment of assessed contributions made expressly contingent on availability of appropriations. This, of course, is the historical rub with U.N. contributions: numerous administrations promise to pay arrearages,[158] but Congress fails to make the requisite appropriations. Despite some factual dissimilarities, the U.N. Charter provides a multiparty undertaking, under which the United Nations carries out its mission

---

155. 543 U.S. at 634.

156. *Id.* at 639.

157. *Id.* at 640.

158. *See generally* Alison Bond, *U.S. Funding of the United Nations: Arrears Payments as an Indicator of Multilateralism*, 21 BERK. J. INT'L L. 703 (2003).

within the parameters of the Charter, and the United States has not sought to modify the contract by withdrawal or amendatory article 17 language. In short, the contract remains in force. Under the same breach of contract analysis employed in *Cherokee Nation*, the United Nations, no less than sovereign tribes supplying services of benefit to the United States, is entitled to damages for nonpayment.

2. Divergence Between Lump Sum Appropriation and Amounts Paid

One of the determining factors of the *Cherokee Nations* decision was the fact that the Appropriations Acts for the years at issue authorized unrestricted lump sums for the Indian Health Service to carry out, among other things, the Indian Self-Determination Act.[159] Because these lump sum appropriations exceeded the amount in controversy with the tribes, which was between $1.277 billion and $1.419 billion, the tribes argued that there was no clear basis for imposing the funding restrictions.[160]

The Court agreed, and reiterated that it was "a fundamental principle of appropriations law . . . that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions."[161] Further, "indicia in committee reports and *other legislative history as to how the funds should or are expected to be spent* do not establish any legal requirements on the agency."[162]

Compare this, then, with the statutory schemes under which U.N. appropriations are made. In 1986, Congress appropriated $255 million for U.S. assessments to international organizations, but in November of that year the State Department allocated only $100 million to the United Nations, which was $110 million short of the U.S.-assessed contribution amount.[163] Similarly, in 1987, the Appropriations Committees approved $480 million in appropriations for international organizations, while from that lump sum appropriation the Department of State paid the United Nations only $100 million.[164] While this discrepancy and resultant shortage in funding was roundly criticized by other Member

159. 543 U.S. at 636-37.

160. *Id.* at 637 (citing 107 Stat. 1408 (1993); 108 Stat. 2527-2528 (1994); 110 Stat. 1321-189 (1996)).

161. *Id.* (citing Lincoln v. Vigil, 508 U.S. 182, 192 (1993)).

162. *Id.* (emphasis added).

163. *See* Galey, *supra* note 28, at 563.

164. Act of Dec. 22, 1987, Pub. L. No. 100-202, tit. III, 101 Stat. 1329, 1329-30.

States,[165] no steps were taken to examine whether the shortages were legally actionable within the United States.

In addition to the two-year snapshot provided above for 1986-87, present funding language may also prove actionable. Under 22 U.S.C.S. § 262a, "financial contributions by the United States to international organizations in which the United States participates as a member shall be made by or with the consent of the Department of State *regardless of the appropriation* from which any such contribution is made."[166] Consistent with *Cherokee Nation*, this language may support an argument that the Secretary of State is afforded latitude to fund the United Nations, subject only to the overall financial limitation of the amount appropriated. This argument becomes clearer when examined in the context of the relevant 2006 Appropriations Act, which appropriated $1.166 billion to be expended by the Secretary of State for "expenses, not otherwise provided for, necessary to meet annual obligations of membership in international multilateral organizations, pursuant to treaties ratified pursuant to the advice and consent of the Senate"[167] which includes the regular budget of the United Nations.[168]

---

165. *See* Galey, *supra* note 28, at 569:

> Many UN members have expressed anger at the United States for ostensibly flouting principles and norms, for instance, that the expenses of the Organization are to be shared by Members and assessments are to be paid promptly and in full. The European communities criticized the US in 1986 for failing to make its full contribution. In 1987, continuing US failure to meet its international legal obligation led the African states to withdraw support for the budget ceiling in the General Assembly. [T]he Soviets . . . announced that they would repay their arrearages, thus endorsing the principle of collective responsibility for the expenses of the Organization. . . .

166. 22 U.S.C.A. § 262(a) (2002) (emphasis added). Although the historical notes provide that the international organizations referred to in text are the Inter-American Children's Institute, the International Labor Organization, the U.N. Food and Agriculture Organization, and the World Health Organization, limitations excluding the regular U.N.-assessed contributions are not clear.

167. Act of Nov. 22, 2005, Pub. L. No. 109-108, tit. IV, 119 Stat. 2290, 2322. The full 2006 text provides:

> International Organizations: For expenses, not otherwise provided for, necessary to meet annual obligations of membership in international multilateral organizations, pursuant to treaties ratified pursuant to the advice and consent of the Senate, conventions or specific Acts of Congress, $1,166,212,000: *Provided*, That the Secretary of State shall, at the time of the submission of the President's budget to Congress under section 1105(a) of title 31, United States Code, transmit to the Committees on Appropriations the most recent biennial budget prepared by the United Nations for the operations of the United Nations: *Provided further*, That the Secretary of State shall notify the Committees on Appropriations at least 15 days in advance . . . of any United Nations action to increase funding for any United Nations program without identifying an offsetting decrease elsewhere in the United Nations budget and cause the United Nations budget for the biennium 2006-2007 to exceed the revised United Nations budget level for the biennium 2004-2005 of $3,695,480,000: *Provided further*, That any payment of arrearages under this title shall be directed toward special

As of October 31, 2006, the United States owed $526 million in arrearages to the United Nations.[169] Applying the "lump sum" analysis of *Cherokee Nation*, in light of the blanket appropriation of $1.166 billion for international organizations for that same year, the United States would be liable for the difference between what it paid to the United Nations for arrearages, and what was owed, because the overall appropriations amount far exceeded the amount at issue. This would be true of all other years, going back to when the United States began accruing arrearages, and could also provide a good faith basis for a claim of interest on the unpaid amounts. The "lump sum" analysis would apply notwithstanding a separate act that limits U.N. funding to 22% of the overall budget,[170] because that limitation applies only to the ongoing, regular budget of the United Nations, and nothing in that limitation applies to arrearages. Minimally, since the 22% cap was enacted in 2002,[171] the same analysis would support damages in the amount of the difference between what was assessed, and what was paid to the United Nations for the twenty years *before* 2002.

VI. REMAINING PLEADING REQUIREMENTS

Assuming that this Article successfully presents bases for a constitutional claim, and alternatively a breach of contract claim for conditioned and nonpayment of article 17 regular assessed contributions, two other pleading requirements deserve mention: jurisdiction and standing.

With respect to jurisdiction, it has been argued[172] that under the U.N. Headquarters Agreement, the United States and the United Nations agreed to submit questions arising between them to arbitration.[173]

---

activities that are mutually agreed upon by the United States and the respective international organization: *Provided further*, That none of the funds appropriated in this paragraph shall be available for a United States contribution to an international organization for the United States share of interest costs made known to the United States Government by such organization for loans incurred on or after October 1, 1984, through external borrowings.

168. *Id.*

169. *See* Global Policy Forum, *supra* note 33.

170. 22 U.S.C.A. § 287e-3 (2004) ("None of the funds available to the Department of State shall be used to pay the United States share of assessed contributions for the regular budget of the United Nations in an amount greater than 22 percent of the total of all assessed contributions for that budget.").

171. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, div. A, tit. IV, § 403, 116 Stat. 1350, 1389 (2002).

172. *See* United States v. Palestinian Liberation Org., 695 F. Supp. 1456, 1461 (1988).

173. Act of Aug. 4, 1947, ch. 482, § 21, 61 Stat. 756, provides:

However, a close reading of the Headquarters Agreement makes clear that the parties agreed only to arbitrate matters arising in that agreement; namely, in the Headquarters Agreement itself.[174] Because the obligation to pay regular U.N. assessed contributions arises from article 17 of the U.N. Charter, while the Headquarters Agreement is silent on the matter, the arbitration clause of the Headquarters Agreement would not apply.

It may also be assumed that the ICJ, as the judicial arm of the United Nations, would have jurisdiction in an assessment dispute. However, because the ICJ has limited jurisdiction to cases arising between nations,[175] and the United Nations is not a nation, jurisdiction must be found in an alternative forum, most notably the U.S. domestic courts.

One option affording jurisdiction to the federal judiciary would be the Administrative Procedure Act (APA), which assures judicial review, unless otherwise precluded by law, for persons suffering legal wrong because of agency action.[176] Under this provision, the United Nations could challenge funding in breach of the Charter as an agency action under the Secretary of State. An alternative basis for jurisdiction arises from the Tucker Act,[177] which permits awards of damages and other relief against the United States for "any claim . . . founded . . . upon any express or implied contract."[178] Because the claim arises from breach of the U.N. Charter, the Tucker Act grants jurisdiction whether the Charter is deemed an express or implied contract.[179]

(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed on both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.

174. *Id.*
175. U.N. Charter art. 94, ¶ 2.
176. 5 U.S.C.A. § 702 (1989).
177. 28 U.S.C. 1491(a)(1) (2000).
178. *Id.*
179. *Id.*

The last detail, standing, is easily met. To meet the standing requirements of Article III, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[180] The economic injury, namely insufficient operating funds and the difference between the U.S.-assessed amount and the U.S.-paid amount, is not only "fairly" traceable but is directly traceable, and redress would be in the form of damages of the unpaid amounts, whether including or excluding interest.

VII. CONCLUSION

This Article has discussed the legality of U.S. nonpayment and conditioned payments of regular assessed contributions under the U.N. Charter. Article 17 funding formulations show that the United States actually pays less than other Member States on a Gross National Income capacity-to-pay basis. The internal U.S. funding mechanisms were then reviewed, including a brief history during which the United States at first championed—and then abandoned—the legally binding nature of U.N. funding commitments. A sample of congressional acts conditioning payments on widely diverse policy considerations was then presented.

Post-ratification conditions on funding, it was argued, exceed congressional authority contained in Article I of the Constitution, and usurp executive treaty making authority set out in Article II. Alternatively, failure to fund in abrogation of U.N. treaty mandates was presented under a breach of contract analysis in light of factually disparate but theoretically similar precedent, concluding that funding shortages constitute breach of contract giving rise to a U.N. claim for damages. Had the United States opted out of the United Nations, by clear withdrawal, the outcome would be different, save for arrearages acquired prior to withdrawal. Absent a clear intent to withdraw from U.N. Charter obligations, the United States remains accountable for its contractual undertaking to pay assessments when due. To hold otherwise would be to force a loan on all other Member States which do pay their U.N. dues on time—those that loan money to the United Nations to fund activities pursued at the direction of (but without the funding from) the United States.

Following the horrors of World War II, the U.N. Charter was based on a critical assumption: that signatory states respect the rule of law as

180. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

the only shield against mutual destruction.[181] No organization can stand for universal law if its funding is the ongoing subject of political power-brokering. The U.N. funding problem is more fundamental than financial; the intra-organizational strain of having dictates imposed by its largest Member may prove fatal. Whether the United Nations is to survive at all depends in large measure on whether it has the will—and the stamina—to stand up for its premises and to impose its funding mandates as intended among all Member States. Even if the legal challenge fails, the attempt would lend the United Nations more political credence than continued concessions to its largest contributor, since the nature of unilateral demands is that once granted, more follow.

Perhaps some would argue that the U.S. nonpayment and conditioned payment of its U.N. dues is proof that global rule of law is not possible, given the disproportionate power of the United States to determine the law. If that is true, perhaps after the next world war the United Nations will disband and reconvene in another shape, under another name, with different funding formulae. If so, the same problems will eventually present themselves, if reconfigured. It is hoped that the next global entity, whatever it is called, learns from the first U.N. experience that disproportionate power problems can only be diffused through early and consistent application of the same rules—including funding rules—to every member.

181. *See* Franck, *supra* note 5. Post-Iraq, it may well be that the United States paying its apportioned U.N. dues is like putting a bandage on a broken leg, too little and too late.