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BOOK REVIEW

THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS, BY ABRAM CHAYES & ANTONIA H. CHAYES

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BOOK REVIEW

The New Sovereignty: Compliance with International Regulatory Agreements, by Abram Chayes and Antonia Handler Chayes. Cambridge: Harvard University Press, 1995. Pp. 285. $49.95 (hardcover).

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I. INTRODUCTION

Just after the end of the second World War, and at the dawn of the modern age of technological innovation, the future prime minister of the United Kingdom, Sir Anthony Eden, told the House of Commons that "[e]very succeeding scientific discovery makes greater nonsense of old-time conceptions of sovereignty."[1] Five decades later, despite the sustained assault mounted not only by science but by the dissolution, association, and recombination of what used to be thought of as indisputably sovereign states, and by the expanding importance of intergovernmental and nongovernmental organizations, international lawyers have been slow to discard those conceptions. Sovereignty is still seen as a defining criterion of international legal personality, rendering more difficult questions regarding the juridical status of such entities as the European Union, the former Yugoslav republic of Macedonia, the Commonwealth of Independent States, the Palestine Liberation Organization, and insurgent forces exercising government authority in such places as Liberia, Bosnia, Burma, and Sri Lanka.[2]

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1. *Text of the Speech by Attlee and Excerpts From That of Eden before the House of Commons*, N.Y. TIMES, Nov. 23, 1945, at 10.

2. At least two U.S. federal judges—Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit and Judge Peter K. Leisure of the U.S. District Court for the Southern District of New York—have opined that the lack of status as sovereign states exempted the Palestine Liberation Organization and the so-called Republic of Srpska, respectively, from the obligation to comply with international norms of human-rights protection. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); Doe v. Karadzic, 866 F. Supp. 734, 740-41 (S.D.N.Y. 1994), *rev'd*, 70 F.3d 232 (2d Cir. 1995).

Despite both its title and the need for a scholarly yet provocative book on the evolution of the concept of sovereignty at the end of the twentieth century, this is not the set of issues to which Abram and Antonia Chayes turn their attention in *The New Sovereignty: Compliance with International Regulatory Agreements*.[3] Rather than a theory of sovereignty, new or otherwise, they present a theory of international behavior modification. More accurately, it is a theory of getting states to do what they *should* do, either because they accepted obligations voluntarily, as in the case of treaties and other agreements, or because obligations were imposed on them by other international legal processes, such as the maturation of custom into binding law.

The book's principal thesis is that noncompliance with norms is usually the result, not of deliberate contumacy, but of a lack of capacity, sluggishness brought on by domestic political paralysis, or, occasionally, ambiguity in the rule itself.[4] Compliance, therefore, is most efficiently secured not by coercive measures, or even by threatened or actual withdrawal of membership rights in international organizations, but by interactive, cooperative efforts and transparency.[5] Such efforts result not only in improved behavior by recalcitrant states but in improvement of the international regimes themselves.

The most valuable and persuasive parts of the book are those in which the Chayeses draw upon their first-hand experience to discuss specific regulatory treaty regimes of which they have been participants or close students.[6] The least effective are those in which generalizations are hazarded with insufficient empirical support and theoretical underpinnings that are not developed with adequate rigor. The volume also suffers from inconsistent and even incorrect readings of U.S. law and policy (U.S. law is regularly deployed as illustrating key aspects of the authors' thesis), which undermine some of the credibility that the authors work so hard to earn elsewhere in the book. In particular, the critical argument that coercive sanctions do not work fails to take into account other objectives, beyond bringing about compliance with treaties, that

3. ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

4. *See id.* at 9-17.

5. *See id.* at 22-28.

6. Mr. Chayes was legal advisor to the Department of State in the Kennedy and Johnson Administrations. Ms. Chayes served as undersecretary of the Air Force under President Carter.

states have in view when they decide that other states' behavior is intolerable and requires a response.

II. The New Sovereignty

The agenda in *The New Sovereignty* is the development of a theory under which the international community can attain a level of compliance with what the authors call "international regulatory agreements" superior to that commonly observed.[7] To that end, they set out to prove, first, that sanctions—whether collective or unilateral, economic or military—do not work.[8] That is, coercion does not bring about the result desired: an improved pattern of compliance by states with their international legal obligations.[9]

The Chayeses find support for the first part of their thesis by canvassing collective military sanctions authorized by the United Nations in Korea[10] and Kuwait,[11] and by the Organization of American States in Cuba.[12] There is a brief discussion of multilateral economic sanctions but it passes quickly over or omits a number of the interesting cases, including the multinational economic boycott of South Africa[13] and the Arab League's boycott of Israel.[14] Obviously, numerous developments regarding the current international restrictions on Iraq occurred too late to be considered.[15] Regarding the unsuitability of unilateral measures, the authors present five provisions of U.S. law: (1) section 301 of the Trade Act of 1974,

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7. Chayes & Chayes, *supra* note 3, at 1-28.

8. *Id.* at 29 ("Preoccupation with sanctions as a method of treaty enforcement continues to be disproportionate to either the frequency of their use or their effectiveness when used.").

9. *Id.*

10. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., at 4, U.N. Doc. S/1501 (1950), *reprinted in* 2 United Nations Resolutions 84-85 (Dusan J. Djonovich ed., 1988).

11. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., at 27, U.N. Doc. S/Res/678 (1990), *reprinted in* 29 I.L.M. 1560, 1565 (1990).

12. Resolución Sobre la Adopcion de Medidas Necesarias para Impedir que Cuba Amenace la Paz y la Seguridad del Continente, OEA/Ser.G/II/C-a-463, at 31, 33 (1962) (original in Spanish).

13. *See generally* Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs and Apartheid*, 19 Fordham Int'l L.J. 1464 (1996) (describing the history of the international effort to end apartheid in South Africa).

14. *See generally* Edmund Blair, *The Resilience of the Arab Boycott*, MEED Middle East Business Weekly, Feb. 11, 1994, at 2, *available in* LEXIS, News Library, Mags File.

15. *See* Bradley Graham, *U.S. Launches More Cruise Missiles Against Iraq*, Wash. Post, Sept. 4, 1996, at A1. Enforcement of an expanded "no-fly" zone over southern Iraq and heightened protection of ethnic Kurds in the city of Irbil and its surroundings were the stated, immediate U.S. goals and allied military sanctions as late as September 1996. *See Clinton: 'When You Abuse Your Own People . . . . You Must Pay a Price'*, Wash. Post, Sept. 4, 1996, at A21 (transcript of statement from President Clinton).

as amended;[16] (2) the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act;[17] (3) human-rights conditions in various foreign-aid legislation;[18] (4) the Nuclear Non-Proliferation Act of 1978;[19] and (5) the so-called Hickenlooper Amendment,[20] concerning expropriation of property belonging to U.S. citizens.[21] These measures, the authors conclude, have not produced the desired result: There has been no sustained routine of better behavior on the part of states whose actual or perceived failure to comply was the motivation for adopting them.[22]

Although they readily concede that there is far less empirical evidence available to support this contention, the Chayeses also assert that suspension or expulsion from international bodies fails to produce meaningful results.[23] Such action similarly does not lead to better conduct or more consistent, sustained respect for binding treaty norms.[24]

The underlying reason for the inadequacy, inefficiency, or impropriety of sanctions of any kind is that "[o]nly infrequently does a treaty violation fall into the category of a willful flouting of legal obligation."[25] Rather, noncompliance ordinarily stems from one or more of three causes: difficulties resident in the language of the treaty itself;[26] a party's inability to comply, either in full or in part, with the duties it has undertaken;[27] or what the authors call "the temporal dimension."[28] The authors argue that, since a state

16. 19 U.S.C. §§ 2411-2420 (1994).

17. 16 U.S.C. § 1821(e)(2) (1994) (describing actions available to the secretary of state against countries that violate international-fishing agreements).

18. For a survey of references to international human rights in U.S. law, see generally INTERNATIONAL HUMAN RIGHTS LAW GP., U.S. LEGISLATION RELATING HUMAN RIGHTS TO U.S. FOREIGN POLICY (4th ed. 1991). This volume lists dozens of general and country-specific legislative provisions under which either benefits are conditioned on a certain level of human-rights observance by the recipient nation, or sanctions are laid out for those deemed to have been lax.

19. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified as amended at 22 U.S.C. §§ 3201-3282, 42 U.S.C. §§ 2011-2160(a) (1994)).

20. Foreign Assistance Act of 1962, Pub. L. No. 87-565, § 301(d)(3), 76 Stat. 255, 260 (codified at 22 U.S.C. § 2370(e) (1994)).

21. CHAYES & CHAYES, *supra* note 3, at 90-91. The authors appear to contend that this list is exhaustive. *See id.* at 97.

22. *Id.* at 97-98.

23. *Id.* at 85-87.

24. *Id.* at 86-87.

25. *Id.* at 10.

26. *Id.*

27. *Id.* at 13.

28. *Id.* at 15. The authors refer to political obstacles to implementing the necessary policy and legislative changes required by international agreements. "Significant changes in social or economic systems mandated by regulatory treaties take time." *Id.*

that fails to comply with treaty norms is not akin to a delinquent in need of correction, there is no point in attempting to force it to do what it is incapable of doing or incapable of understanding.[29] "If we are correct that the principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly."[30]

The better solution, in the authors' view, is a cooperative, nonaccusatory, nonadversarial approach,[31] which is based on several principles. First, treaties that provide the greatest transparency and clarity of meaning have the fewest violators because of ambiguity. Second, treaties offering the greatest opportunities for participation by members of the regime in defining, monitoring, and enforcing normative content have the smallest number of signatories who feel alienated from the regime, resulting in a lack of enthusiasm for confronting domestic political obstacles to compliance. Third, treaties in which members work together to improve the technical capacity of all parties to bring their behavior into line are the ones that reduce the incidence of noncompliance based on lack of ability to act as required.

Such a conception of treaty norms and treaty regimes would also support what the Chayeses call "the new sovereignty." "Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity."[32] According to the authors, however, the very meaning of sovereignty has now shifted:

> Sovereignty, in the end is status—the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.[33]

States participate in international institutions, no longer out of convenience or self-interest, but by virtue of the inherent nature of modern statehood.[34] The state that is not a member of a major international treaty or other regulatory regime compromises its sovereignty.[35] Perhaps it does not go too far to say that such an

29. Under the Chayeses' approach, "[i]nstances of apparent noncompliance are treated as problems to be solved, rather as than [sic] wrongs to be punished." *Id.* at 109.

30. *Id.* at 22.

31. *Id.* at 3, 22-28 (describing the "management of compliance").

32. *Id.* at 26.

33. *Id.* at 27.

34. *See id.*

35. *Id.* at 28.

entity is not a sovereign state at all.[36] This is what the Chayeses appear to mean by "the new sovereignty."

A natural result of this reasoning is that the imposition of discipline on treaty regimes is not a luxury; it is a necessity. Participation in these regimes defines a state's sovereignty, but if such participation has no effect on the state's actual behavior, then there can be no "regulation" and "order" to give the new sovereignty content. It is vital, therefore, that in light of the inadequacy of sanctions-based compliance mechanisms, other mechanisms that work be found. But when states are involved in international structures, whether as broad as the United Nations or as specific as the Agreement on the Conservation of Polar Bears,[37] their adherence to the rules is subject to scrutiny by other participants, both public and private. As the demonstrators chanted at the Democratic National Convention in 1968, "the whole world is watching."[38] When that happens, the malefactors are supposed to behave.

The authors argue, on this basis, for an increase in the transparency of treaty norms generally;[39] improved methods of data collection, monitoring, reporting, and verification;[40] a continual process of self-criticism by international regimes themselves;[41] and the expanded role of nongovernmental organizations in assisting in all of these steps, as well as in ensuring that the process of treaty compliance remains on the active docket of the court of public opinion.[42] These mechanisms, they argue, will better serve the practical objective of improving compliance profiles, and will also more honestly reflect the emerging changes in the nature of treaty regimes and those entities that are bound by them.

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36. Puzzlingly, the Chayeses allow that there are "a few self-isolated nations" that are presumably still sovereign, and yet that have opted out of international organizations. *Id.* at 28. If such a nation does indeed retain the indicia of sovereignty, however, then it is hard to see how the word can be defined in terms of membership. Furthermore, the authors elsewhere confusingly speak of a state that is not part of a regulatory regime as "free to act without legal constraint in that field, to the detriment of other parties." *Id.* at 74. Given their definition of "sovereignty," it would sound as if the outlaw state has a better, not a weaker, claim to be "sovereign."

37. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918 (1976), 13 I.L.M. 13 (1974).

38. *See* Jonathan Alter, *Karl Marx, Meet Marshall McLuhan*, NEWSWEEK, May 29, 1989, at 28.

39. *Id.* at 135-53.

40. *Id.* at 154-73.

41. *Id.* at 174-93.

42. *Id.* at 250-85.

III. Analysis

It is generally inadvisable for writers to announce, as they set out to articulate a lengthy and intricate logical structure, that "[l]anguage is unable to capture meaning with precision."[43] Apparently the authors attempted, through the use of this unfortunate sentence, to defend the notion that treaties, like other contracts, despite the best intentions of the drafters, are sometimes ambiguous as to what constitutes proper compliance.[44] Unfortunately, the message is suggested that the authors have despaired of achieving the goal of linguistic precision in their own work.

There are critical terms throughout the book whose use seems not entirely rigorous, either because such terms are not defined, or because efforts to define them raise more questions than answers. The key term "treaty," for example, is used to mean any binding international agreement between states,[45] as well as "the supreme law of the land," as that term is used in Article VI of the U.S. Constitution. But the two are not the same. The General Agreement on Tariffs and Trade (GATT), one of the regimes that the Chayeses use most frequently to illustrate various points, is a treaty in the former sense but not in the latter.[46] The key term "sanctions" is defined to include virtually any measure aimed at changing a state's behavior,[47] such as those occasionally invoked by the United States under the authority of section 301 of the Trade Act of 1974, even though some of those measures have been efforts to embarrass and persuade rather than to coerce. Finally, the key term "norms" is defined in terms of *obligations*,[48] yet the authors go on to define what they call "the legitimacy of norms" in terms of *enforce-*

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43. Chayes & Chayes, *supra* note 3, at 10.

44. *Id.*

45. *Id.* at 115 (citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), S. Exec. Doc. L, 92d Cong., 1st Sess. 11 (1971), 1155 U.N.T.S. 331, 333 (1980)).

46. The GATT is an executive agreement, and is thus not "the supreme law of the land" under Article VI. *See* John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 U. Mich. L. Rev. 253-54, 265 (1967). That is why each amendment to the GATT, including the set of revisions agreed to in the Uruguay Round, is subject to legislative implementation, not ratification after advice and consent of the Senate. *See, e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-965, 108 Stat. 4809 (1994). Therefore, it is incorrect to say that an amendment to the GATT/WTO "must be ratified in accordance with . . . the political pitfalls of submission to the Senate." Chayes & Chayes, *supra* note 3, at 225.

47. *See* Chayes & Chayes, *supra* note 3, at 30.

48. "The norms established by treaties are *legal* norms, at least in that they embody rules acknowledged in principle to be legally binding on states that ratify them." Chayes & Chayes, *supra* note 3, at 116 (emphasis in original).

ment.[49] Surely, rules possess a normative effect irrespective of the consistency of their application. A believer in the God of the Old Testament, for example, probably does not find the legitimacy of the rule "[h]onour thy father and thy mother"[50] to be undermined by the fact that many people ignore it without apparent penalty.

A. *The Efficacy of Sanctions*

Much of the Chayeses' core argument requires them to defend the proposition that sanctions as a means of enforcing treaty compliance do not work. If that premise fails, the contention that something else must be sought is substantially weakened. The authors thus explore the failings and weaknesses of five U.S. laws that they claim specifically mandate sanctions for treaty violations.

Four of the five examples, however, are inapposite, either because they do not require that *treaty-violative* conduct be sanctioned, or because the behavior they seek to punish does not come within an international treaty regime at all. Surely one can argue that U.S. claims of the right to punish other states for conduct not prohibited under international law are excessive, arrogant, or, to use the Chayes's term, "illegitimate." But if one has no empirical evidence to show that sanctions are ineffective, and no jurisprudential argument that they are illegal, then one is left simply defending the proposition that they are unwise. This is a slender reed on which to rest the weight of the entire argument of the book.

Yes, as the Chayeses write, "unilateral and even concerted sanctions are essentially a monopoly of the great powers."[51] It cannot be otherwise if they are to be effective. That is, it would make no sense for the Andean Pact nations[52] to impose an economic embargo on Burma in order to bring about a change in that country's government, or even to coerce Burma's compliance with international human-rights treaties. A similar resolution by the Alliance of Southeast Asian Nations (ASEAN)[53] countries, with far greater

49. *See id.* at 127-34. "Legitimacy, then, depends on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum substantive standards of fairness and equity." *Id.* at 127.

50. *Exodus* 20:12 (King James).

51. CHAYES & CHAYES, *supra* note 3, at 107.

52. The Andean Pact consists of Bolivia, Colombia, Ecuador, Peru, and Venezuela. Cartagena Agreement, May 26, 1969, 28 I.L.M. 1165 (1969).

53. The Association of Southeast Asian Nations (ASEAN) consists of Brunei, the Phillipines, Singapore, Thailand, Indonesia, Vietnam, and Malaysia. Bangkok Declaration of August 8, 1967, 6 I.L.M. 1233 (1967).

economic might, could rationally be selected as a viable way of encouraging, threatening, or punishing Burma for its behavior.

But a national decision to impose sanctions may not always be driven by the realistic expectation of behavior modification. Likewise, it may not always be dependent upon the existence of clear and binding treaty norms. Efficacy, as well as the requirements of international law, are only some of the considerations that policy makers take into account in deciding on national responses to the conduct of other states.[54]

The Chayeses' project would have been a greater success had the authors restricted the claims for their theory to treaties that do not involve or address areas perceived to be politically sensitive. They might have been able to show with greater plausibility that, when applied to those specific treaty regimes, better information exchange and member participation encourage consistent compliance with treaty obligations. But they argue a generalization across all treaties, even ones of which experience has suggested the contrary. Moreover, despite their frequent insistence that it is only treaty norms to which their theory is pertinent, the authors frequently draw from contexts in which there is no governing treaty, suggesting an even more ambitious polemic against the use of international sanctions generally. The argument that international economic sanctions, for example, are never effective or legitimate requires far more empirical support than the Chayeses bring to their book.

Most of those who disagree with the authors about the efficacy of economic sanctions would point to the recent history of South Africa for support. Although such pressures as expulsion from various international bodies had been brought to bear on South Africa for years with little success, U.S. adoption of international economic sanctions, over President Ronald Reagan's veto in 1986,[55] was followed after only five years by the dismantling of the legal structure of apartheid.[56] Three years later, Nelson Mandela was elected president of that country.[57] The Chayeses concede that actions attributable to the United States and its citizens, "fanned by

54. *Id.* at 1234.

55. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986); *see also* Steven V. Roberts, *Senate, 78 to 21, Overrides Reagan's Veto and Imposes Sanctions on South Africa*, N.Y. TIMES, Oct. 3, 1986, at A1.

56. *See* Christopher S. Wren, *For South Africa, a Watershed Vote*, N.Y. TIMES, Mar. 16, 1992, at A1.

57. Bill Keller, *The South African Vote: The Overview; Mandela Proclaims Victory: South Africa Is 'Free at Last!'*, N.Y. TIMES, May 3, 1994, at A1.

repeated General Assembly condemnations, are to be credited with a negative impact on South African economy and morale."[58] But while chronology does not prove causation ("*post hoc ergo propter hoc*"), the claim that economic sanctions do not work must address the case of South Africa in more detail. Otherwise, the Chayeses' book will fail to achieve one of its apparent principal purposes: making the case against economic sanctions, whether multilateral or unilateral, that might be levied upon the next generation of international miscreants.[59]

B. *Examining U.S. Laws*

The general case by the Chayeses against using sanctions to coerce treaty compliance is not solidly grounded. The authors cite five examples from U.S. law in which "Congress seeks to use unilateral economic sanctions systematically to enforce treaty or regime obligations"[60] binding upon foreign nations.[61] But of the five examples selected, three are not primarily concerned with conforming conduct to treaties, and one of the others would seem to be a better illustration of exactly the opposite contention.

1. Section 301 of the Trade Act of 1974

The first example cited, section 301 of the Trade Act of 1974 as amended,[62] is said to be a U.S. device to coerce compliance with the GATT. The Chayeses begin their analysis as follows:

> Section 301 of the Trade Agreement Act of 1974 [*sic*], requir[es] the president to retaliate against countries that violate their GATT obligations to the United States and giv[es] the affected private party the right to initiate proceedings before the

58. CHAYES & CHAYES, *supra* note 3, at 107.

59. The United States is a regular user of unilateral economic coercion for a wide variety of reasons. The United States currently has general commerce or investment restrictions in place, such as the Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1994), and the International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706. These legislative provisions are not discussed. Congress has had before it bills to impose trade sanctions for various reasons from cited trade offenses to alleged abuse of human rights. *See, e.g.*, H.R. 2892, 104th Cong., 2d Sess. (1996) (proposing trade sanctions against Burma; bill was not enacted during the 104th Congress).

60. CHAYES & CHAYES, *supra* note 3, at 90.

61. *Id.* at 88-103.

62. 19 U.S.C. §§ 2411-2420 (1994). For a good, albeit somewhat dated, summary of section 301 practice, see generally Bart S. Fisher & Ralph G. Steinhardt III, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y IN INT'L BUS. 569 (1982). For a discussion of the post-1989 amendments to section 301, see generally Julia Christine Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 LAW & POL'Y INT'L BUS. 501 (1989).

> U.S. International Trade Commission (ITC) to challenge a trade practice of a foreign country. "Super-301," enacted in 1988, required the U.S. trade representative (USTR) to publish a target list of egregious offenders as priority countries for corrective action under section 301. The USTR must seek to eliminate such barriers by negotiation, but if no progress is made after twelve months, the section mandates retaliatory action.[63]

There are two serious problems with this paragraph, calling into question the inferences that the authors invite readers to draw from it.[64]

To begin, it is stretching the rules of language and statutory interpretation to describe section 301 as "requiring" retaliatory action. The 1994 post-Uruguay-Round amendments provide for numerous exceptions, waivers, derogations, and other ways in which retaliation against even a convicted violator of the GATT can be avoided.[65] Thus, the U.S. Trade Representative (USTR), for example, need not take action even when U.S. rights under a trade agreement have been found to have been denied. This is possible whenever (1) the president in his apparently unreviewable discretion[66] directs otherwise; (2) the Dispute Settlement Body of the World Trade Organization (WTO) finds that rights of the United States are not being violated;[67] (3) the USTR finds that the foreign country either "is taking satisfactory measures" to grant the rights to which the United States is entitled, has agreed to end the offending practice, or has agreed to mitigate the injury;[68] or (4) the USTR finds that retaliating would have an adverse and disproportionate impact on the U.S. economy or would seriously harm U.S. national security.[69] Moreover, the USTR is granted a very wide

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63. CHAYES & CHAYES, *supra* note 3, at 90 (emphasis omitted) (footnotes omitted).

64. There are two less serious errors in this single passage; errors that should have been caught by the editors. First, the International Trade Commission has nothing to do with section 301. Petitions are filed with the United States Trade Representative (USTR), who conducts determinations and investigations. 19 U.S.C. § 2411(a) (1994). Second, "Super 301," codified at 19 U.S.C. § 2420, does not "mandate[ ] retaliatory action" against a foreign country with whom no agreement is reached within a year.

65. *See infra* notes 66-70 and accompanying text.

66. Although the president's authority to designate both beneficiary developing countries and articles covered under the Generalized System of Preferences, 19 U.S.C. §§ 2461-2466 (1994), is subject to legislated criteria, it has been held essentially unreviewable. *See* Florsheim Shoe Co. v. United States, 744 F.2d 787, 796 (Fed. Cir. 1984) (noting that presidential action is a "multifaceted judgmental decision").

67. 19 U.S.C. § 2411(a)(2)(A) (1994).

68. *Id.* § 2411(a)(2)(B)(i)-(iii).

69. *Id.* § 2411(a)(2)(B)(iv)-(v).

range of potential "remedial" measures,[70] some of which can hardly be described as coercive.[71]

Nor are the investigative or remedial powers of the USTR limited to cases of proven GATT violations. The United States reserves the right under law to impose sanctions unilaterally, even when there has been no GATT/WTO complaint, and therefore no favorable panel decision vindicating its position; in short, where there has been nothing more than a decision by the USTR that, for example, a foreign trade practice "denies fair and equitable . . . opportunities for the establishment of an enterprise," or constitutes a denial to workers of their "right of association."[72]

Thus, section 301 does far more, and far less, than the Chayeses acknowledge. It does much more, in that it permits the United States to retaliate without use of the WTO dispute-settlement mechanism.[73] It achieves much less, in that it does not make reprisal mandatory, even in cases of unarguably clear GATT violations.[74] These are not mere quibbles. To the extent that section 301 provides authority for U.S. sanctions in cases other than ones in which a trading partner has violated its treaty obligations, or does not trigger coercive measures when a violation has been demonstrated, it is not an illustration of the authors' point regarding treaty compliance.

2. Human Rights

What the Chayeses refer to as "human rights provisions in foreign assistance legislation"[75] fail even more dramatically to provide support, by way of evidence or illustration, for the argument the authors seek to make. U.S. law bars the grant of international development assistance funds to

> the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction or clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such

70. *Id.* § 2411(b).

71. Such actions can include negotiating with offending parties to phase out offending conduct over time.

72. *See* 19 U.S.C. § 2411(d)(2)(B) (1994).

73. Measures may be taken under section 301 even if the dispute-settlement body resolves the claim *against* the United States. *See id.* § 2411(a)(2)(B).

74. *See id.*

75. CHAYES & CHAYES, *supra* note 3, at 91, 96-97.

> assistance will directly benefit the needy people in such country.[76]

But, even assuming that one considers the suspension of development aid—which is essentially a gift, not an entitlement—to be a sanction, it is surely not a sanction imposed for the purpose of coercing compliance with treaty norms. There is no treaty at issue, and no treaty referenced in the statutory language.[77] The same is true for U.S. law that prohibits security assistance to governments consistently violating human rights.[78] These two legislative enactments simply reflect the strong view of the United States that it does not wish to support governments that trample basic human rights. Undoubtedly the authors of these statutes—and indeed most Americans—firmly hope that the threat of denial of U.S. aid will bring about improved respect for those rights. But in no sense can it be argued that these provisions seek to enforce the normative content of any treaty regime.

Again, one can make a sensible argument that restrictions on the availability of U.S. aid have produced results that have brought about improved respect for human rights among beneficiary countries. Alternatively, one can argue that these are mere "feel-good" provisions that allow the American public to vent its high moral dudgeon, and their government to claim that it has nothing to do with outrages perpetrated by nations to whom other kinds of perhaps more covert support are regularly given. Both of those arguments, however, are empirical ones. Both require at least an overview of the instances in which aid cutoffs have been imposed or threatened. They require an assessment of how many recalcitrant governments have been weakened to the breaking point by the prospect that U.S. development or security assistance might be denied. Such analysis is absent from the Chayeses' book.

3. Treaty on the Non-Proliferation of Nuclear Weapons

In discussing the case of nuclear arms, the authors at least have the benefit of a binding treaty that has inspired U.S. enforcement efforts: the Treaty on the Non-Proliferation of Nuclear Weapons.[79] The goal of the relevant U.S. legislation, however, is to encourage nations that are not part of the treaty regime to join it, not to pun-

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76. 22 U.S.C. § 2151n(a) (1994).
77. *See id.*
78. *See* 22 U.S.C. § 2304 (1994).
79. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature*, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, (entered into force Mar. 5, 1970).

ish those who are already parties for a failure to abide by its terms.[80] It seems odd to cite a statute that seeks to sign up new members for an international regime, rather than to sanction exisiting ones, as an illustration of a coercive enforcement method.

Surely there are legislative initiatives that have been used to punish those alleged to have cheated. The so-called Pressler Amendment to the Foreign Assistance Act of 1961,[81] for example, directs the president to withhold all "assistance," as well as "military equipment or technology" otherwise to be sold or transferred to Pakistan, if he cannot certify to the Congress in each fiscal year that "Pakistan does not possess a nuclear explosive device and that the proposed United States assistance program will reduce significantly the risk that Pakistan will possess a nuclear explosive device."[82]

The Pressler Amendment became law as of August 8, 1985.[83] President Reagan made the appropriate certification for Fiscal Year (FY) 1986 on November 25, 1985;[84] for FY 1987 on October 27, 1986;[85] for FY 1988 on December 17, 1987;[86] and for FY 1989 on November 18, 1988.[87] On October 5, 1989, President George Bush issued the certification for FY 1990, again making the required affirmation.[88]

Through September 30, 1990, therefore, there was no ban under the Pressler Amendment against the sale or transfer of military equipment or technology to Pakistan. On October 1, 1990, such sale or transfer became illegal pending a certification by the president for the new fiscal year. President Bush declined to certify that Pakistan did not possess a nuclear explosive device in FY 1991,[89] nor did he or his successor do so in later years.[90] Beginning with FY 1991, therefore, the Pressler Amendment has had the effect of prohibiting sales or transfers of "military equipment or technology" to Pakistan.

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80. 22 U.S.C. § 3201(c) (1994).

81. *Id.* § 2375(e).

82. *Id.*

83. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 902, 99 Stat. 190, 267-68.

84. Determination No. 86-03, 50 Fed. Reg. 50,273 (1985).

85. Determination No. 87-3, 51 Fed. Reg. 40,301 (1986).

86. Determination No. 88-4, 53 Fed. Reg. 773 (1987).

87. Determination No. 89-7, 53 Fed. Reg. 49,111 (1988).

88. Determination No. 90-1, 54 Fed. Reg. 43,797 (1989).

89. *See* Ben Barber, *Ex-Premier Declares Pakistan Has A-bomb*, WASH. TIMES, Aug. 24, 1994, at A1, A18.

90. *See* Thomas W. Lippman, *U.S. Effort to Curb Nuclear Weapons in Peril as India Insists on Limits for China*, WASH. POST, July 7, 1994, at A11.

The United States has interpreted the law to forbid the delivery of defense supplies already contracted and paid for by Pakistan.[91] In particular, as part of a program called "Peace Gate IV," as of October 1, 1990, the United States had received from Pakistan approximately $658 million for the purchase of several fighter aircraft.[92] No planes had yet been physically transferred to Pakistan, nor, under the terms of the purchase contract, had title passed.[93] Yet the United States has argued that it is required by the Pressler Amendment to decline to deliver the goods purchased and to retain the purchase price.[94]

Even the invocation of the Pressler Amendment, however, punishes Pakistan for failing to live up to a standard of conduct set unilaterally by the United States, not for an alleged violation of the Treaty on the Non-Proliferation of Nuclear Weapons per se. Whether it has worked in achieving the objective of deterring Pakistan from joining the nuclear "club" has not yet been definitively determined, at least insofar as information is available to the general public. But regardless of whether the singling out of Pakistan for such treatment is politically justified, regardless of whether it is consistent with U.S. legislation or arms-control policies regarding other nations, and regardless of whether it serves the long-term interests of the United States in South Asia or in the world generally, the Pressler Amendment is not an illustration of the failure or inefficacy of unilateral enforcement of treaty norms.

4. The Hickenlooper Amendment: Expropriation

And so three of the five cases that the Chayeses cite as examples of U.S. unilateral sanctions are, on closer analysis, not cases of treaty enforcement at all. The last cited exemplar, the Hickenlooper Amendment,[95] is actually an illustration of something

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91. *See* Barbara Starr, *USA Puts Proliferation Price on F-16 Delivery*, Jane's Defense Weekly, Mar. 26, 1994, *available in* LEXIS, News Library, Mags File.

92. *See id.*; *India and Pakistan: More Weapons, Please*, ECONOMIST, Dec. 16, 1995, at 34.

93. Title was to pass, pursuant to the contract, when the United States gave formal notice that the planes were ready for delivery. *See USA Tries Again to Close F-16 Indonesian Sale*, Flight International, May 1, 1996, *available in* LEXIS, News Library, Mags File.

94. *See* Harbir K. Mannshaiya, *Distrust Grows in South Asia; US Arms Deal Complicates Indo-Pakistani Conflict*, International Defense Review, Apr. 1, 1996, *available in* LEXIS, News Library, Mags File (reporting one-time exception to the Pressler Amendment passed by the U.S. Senate).

95. 22 U.S.C. § 2370(e) (1994). For a comprehensive discussion of uses of the Hickenlooper Amendment to encourage foreign compliance with U.S. objectives without formal denial of aid, see generally Matthew H. Adler, *Congressional Involvement in Expropriation Cases: A Case Study of the "Factfinding" Process*, 21 LAW & POL'Y INT'L BUS. 211 (1989).

else entirely. It represents, not unilateral enforcement of the rules of an international regime, but rather the arrogation of a right by the world's only superpower to coerce compliance with a legal principle that the rest of the world has rejected,[96] and which is not, therefore, international law in any recognizable sense.

The principle behind the Hickenlooper Amendment is not objectionable or even controversial. The principle is that the United States may deny aid to any foreign state whose government has, *inter alia*, "nationalized or expropriated or seized ownership of control of property owned by any United States citizen or any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens."[97] The terms "nationalization" and "expropriation" were originally not defined.[98] In its most recent version, however, as part of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995,[99] the statute suggests a way in which these terms should be understood. It provides that suspension of aid is not required when the offending nation has, within set time limits, either returned the property, agreed to binding arbitration, "provided *adequate and effective* compensation for such property in convertible foreign exchange or other mutually acceptable compensation equivalent to the full value thereof, as required by international law," or "offered a domestic procedure providing *prompt, adequate and effective* compensation in accordance with international law."[100]

Surely there is no general treaty obligation for states, nationalizing property within their territories, to provide "prompt, adequate, and effective compensation" to those persons claiming rights of ownership.[101] Indeed, it is far from obvious that there is such an

96. *See, e.g.*, G.A. Res. 1803, U.N. GAOR, 17th Sess., 1194th mtg., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962), *reprinted in* 9 UNITED NATIONS RESOLUTIONS 107-08 (Dusan J. Djonovich ed., 1974) (stating only that "appropriate" compensation need be paid to the foreign investor).

97. 22 U.S.C. § 2370(e)(1)(A) (1994).

98. *See* Foreign Assistance Act of 1962, Pub. L. No. 87-565, § 301(d)(3), 76 Stat. 255, 260 (1962) (codified at 22 U.S.C. § 2370(e) (1994)).

99. Pub. L. No. 103-236, § 527, 108 Stat. 460, 475-77 (1994) (codified at 22 U.S.C. § 2370a (1994)).

100. 22 U.S.C. § 2370a(a)(2)(B), (C) (1994) (emphasis added).

101. There are, of course, bilateral treaties in which the United States and other countries have agreed to certain standards of treatment of investments. *See generally* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990) (discussing the development of bilateral treaties and their effects on foreign investment transactions). But the Hickenlooper Amendment, at least in its initial formulation, far antedated this development, and neither it nor the 1995 rewrite makes any reference to breaches of bilateral agree-

international obligation deriving from any provenance. What the United States seeks to achieve with the Hickenlooper Amendment and its progeny is not compliance with the minimum standards of any "international regulatory agreement," but rather acceptance by importers of foreign capital of rights for investors that are *greater* than those recognized by the international system.

The long-standing struggle to define the balance between the rights of states to nationalize property and the rights of foreign investors to compensation is too well-known to recount here.[102] The "Western" formulation of the entitlement to compensation—that it be "fair, effective and prompt"—appears to have been used first in a note from U.S. Secretary of State Cordell Hull in 1938[103] and is consistent with case law of the Permanent Court of International Justice.[104] On the other hand, as long ago as 1962, the General Assembly Resolution on Permanent Sovereignty over Natural Resources recognized the right of states to nationalize property as an attribute of sovereignty.[105] The resolution provided only that compensation must be "appropriate," with any disputes over it to be resolved by domestic law.[106]

Unless granted by bilateral or regional treaties, therefore, the right of a foreign investor whose property has been expropriated to "fair, effective and prompt" compensation cannot be considered an established tenet of the international legal order. It is, of course, lawful for any state to cut off aid to a recipient that nationalizes investments without payment of whatever amount the donor nation wishes to demand. But it cannot be said that the resolve to do so derives from international law, or that an attempt to coerce compliance with requirements unilaterally set is a measure to enforce an international legal regime.

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ments as either necessary or sufficient to sustain a charge of "actionable" expropriation. *See* 22 U.S.C. §§ 2370, 2370a (1994).

102. For a more detailed discussion of expropriation law, see Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, AM. J. INT'L L. 474 (1991)

103. *See* Letter from Cordell Hull, U.S. Secretary of State, to Dr. Don Francisco Castillo Nájera, Mexican Ambassador to the United States (Aug. 22, 1938), *reprinted in part in* HERBERT W. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 559, 560 (2d ed. 1952).

104. *See* Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, at 46-47 (Sept. 13, 1928).

105. G.A. Res. 1803, *supra* note 96. The resolution was adopted on December 14, 1962, by a vote of 87 to 2, with 12 abstentions. 9 UNITED NATIONS RESOLUTIONS 46 (Dusan J. Djonovich ed., 1974).

106. G.A. Res. 1803, *supra* note 96, at 107.

C. *The Legitimacy of the Use of Sanctions*

The Chayeses are surely correct in their intensive and detailed analysis of a large number of regulatory treaty regimes, aimed at showing that transparency, the sharing of resources to monitor and to test compliance, interaction in defining the desired conduct, and agreed systems of verification and reporting—all accomplished in large measure through the active participation of nongovernmental organizations—have been vital in the maintenance of international order. But there is a qualitative difference between those examples in which the Chayeses' theory works and those in which it does not. The critical distinction is this: Cooperative and technocratic management of a treaty regime will be allowed to preempt the field only when there is no domestic interest that insists on greater involvement via the political process.

In other words, when participation in a treaty regime has serious political consequences within a member state, which sees its national security, vital interests, or moral fiber as affected, it will generally not defer to a cooperative regime in which political control must be given up to international institutions. To do so would be—or would be perceived to be—a compromise of state sovereignty. But when an international regime must work smoothly if it is to work at all, and no state considers that it has anything important to lose through cooperation, then the kind of open, participatory, nonconfrontational system foreseen by the Chayeses is far more likely to prevail.

There is no inconsistency here. Although regulatory treaty regimes may work best in an atmosphere unclouded by the threat or use of coercive measures, there is no logical reason why the same must be true for regimes concerning such vital or sensitive matters as nuclear-weapons proliferation, expropriation, and human rights. Nor does this position imply anything anachronistic, irregular, or unrealistic about the nature of sovereignty itself.

If the view expressed here is correct, then, there is nothing presumptively illegitimate about the use of sanctions, although there may well be something illegal, ineffective, or even stupid about it in any given case. Even under the Chayeses' definition of legitimacy—requiring that "like cases should be treated alike, that the crucial determinations should be made by basically fair procedures, and that all actors should be equal before the system"[107]—unilateral

107. *Id.* at 106, 127. The source of these "fundamental standards" for testing the legitimacy of "law enforcement" is, unfortunately, not provided by the authors. Nor is it

sanctions will pass muster so long as they are applied in a reasoned and nondiscriminatory way. Protests against the threatened or actual use of section 301 generally do not focus on the claim that the procedures are unfair or that the targets are victims of discrimination. Instead, section 301 is challenged as a violation of the spirit of the GATT (and now the WTO), which is dependent on neutral international adjudication of treaty compliance.[108] The United States, by insisting upon section 301, arguably demands the right to repudiate its international obligations when it sees fit to do so. Other GATT signatories may even express irritation at what they see as the arrogance of the world's largest economic actor attempting to keep one foot in and the other out of the regime that would subordinate the field of international commerce to a system of multinationally created rules.

If section 301 is not illegitimate in the sense in which the Chayeses use the term—although it may itself be a violation of the very treaty it pretends to defend—then the economic, political, or even military coercion of states that systematically violate human rights is an even clearer example of proper use of sovereign authority. In announcing the latest round of punishment for outrages by President Saddam Hussein of Iraq, President Bill Clinton of the United States told the American people: "Our missiles sent the following message to Saddam Hussein: When you abuse your own people or threaten your neighbors you must pay a price."[109] States that care enough to insist upon observance of internationally protected human rights and that have the power—whether military, economic, or even moral—to force others to take notice of their views, can and do take measures, including unilateral measures, to coerce compliance from those who may be unwilling.

One can argue that to impose sanctions, as the United States has done in Iraq, is unwise, disproportionate, bad policy, and even unethical. Most importantly, one can argue that it is illegal. But this can only mean that a neutral adjudicator, such as the International Court of Justice (ICJ), properly seized of the dispute, would resolve

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explained how the legitimacy of a *norm* can depend upon the method for its *enforcement.* But even if one were to accept that these are the proper means for evaluating measures to enforce the law, it would not follow that they are relevant to international coercive actions, such as economic or even military sanctions, that might be designed for another purpose entirely, such as defense of the national security or of the national soul.

108. *See* Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order,* 65 N.Y.U. L. REV. 79, 107-08 (1990).

109. *Clinton: 'When You Abuse Your Own People . . . You Must Pay a Price', supra* note 15, at A21.

it against the actor. The ICJ, whose role the Chayeses disparage,[110] interprets the international legal system, not just treaties, and even absent a police force to carry out its mandate, it speaks loudly in world affairs.[111]

But it makes no sense to argue, without ample empirical evidence in support, that such sanctions do not work. It is not helpful to condemn them as "illegitimate," as if they were in some way a violation of natural justice. And it is surely just wrong to contend that, as time goes by, such measures are invoked less often than they were before.

D. *More Than Management*

"[C]apacity building, [nonadversarial] dispute settlement, and the adaptation and modification of treaty norms" may be, as the Chayeses argue,[112] the instruments of active management of treaty and other international normative regimes. But not all normative systems are susceptible to management. Some are simply too important for their parties to stipulate in advance to nonadversarial procedures applicable in the event of noncompliance. It is not enough, in such cases, to "assist[ ] and organiz[e] the efforts of willing, or at least nonrecalcitrant, parties to move toward increasingly complete fulfillment of their obligations."[113] Sometimes it is necessary to demonstrate disapproval or insistence that the law be obeyed through sterner means, whether or not they are efficacious in bringing about a change in behavior.

Sometimes it is necessary for nations to take a position of principle in defending the international legal order, just as sometimes it may be necessary for individuals to violate domestic law in matters of conscience. In failing to acknowledge this tremendously significant aspect of the problem of noncompliance with legal obliga-

110. *See* CHAYES & CHAYES, *supra* note 3, at 202-07. The Chayeses' gratuitous remarks about the court's sparse docket seem incongruous and unsupported.

111. Mr. Chayes surely knows this better than almost anyone; he advocated successfully for Nicaragua before the International Court of Justice. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27). That case demonstrates, *inter alia*, that the vindication that comes from a courtroom victory is of enormous value in influencing international policy, as well as public opinion.

112. CHAYES & CHAYES, *supra* note 3, at 197.

113. *Id.* at 227. Here, as elsewhere, the Chayeses hint that the rule might be different in those deviant cases of "recalcitrant" or "miscreant" noncompliance. But if an exception in such cases would permit unilateral or multilateral sanctions, expulsion from international bodies, and other forms of coercion, then the exception will swallow the rule. Those are the cases in which sanctions are applied, and the argument of the authors would thus not precisely address the situations for which it has been crafted.

tions, the Chayeses attempt to force the entire spectrum of international affairs into the narrow band of "regulatory regimes" to be "managed."[114]

IV. Conclusion

The sections of *The New Sovereignty* that set as their task the demonstration of how such regulatory regimes work, and how they should work, are persuasive. But the authors' quest for broader reach undoes the force and focus of their argument. Their thesis is not compelling as proof that either coercive treaty-enforcement measures (much less nontreaty legal regimes) do not work, or that according to some objective standard such measures should not be undertaken.

The Chayeses' theory of compliance, when limited to its proper subject matter of international regulatory agreements, does not either propose or presuppose a "new" concept of sovereignty. There never was a day in which sovereignty meant "the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity."[115] If the concept of sovereignty is under assault in the closing days of our century, and if science and history have by now conspired to its undoing, then salvation surely cannot be had by trying to reduce international personality to "the state's existence as a member of [an] international system."[116] Membership in the United Nations is still limited to "states."[117] Statehood is a prerequisite to participation, not a consequence of it.

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114. Indeed, an important role of international organizations is to sometimes establish a procedure for determining when sanctions are to be applied and under what rules. *See, e.g.*, Laurie Rosensweig, *United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law*, 48 Aus. J. Int'l L. 161, 182-83 (1995) (proposing a scheme using the United Nations as a focal point for setting sanction implementation procedure).

115. Chayes & Chayes, *supra* note 3, at 26. This statement surely is inaccurate as history, and it is highly suspect as philosophy as well. A state that enters into an alliance, like a person who enters into a contract, agrees to limit its actions in accordance with the terms of the joint exercise. By the same token, the very act of entering into the alliance demonstrates independence; the state could have chosen not to do so. Undergraduates traditionally debate whether a person who chooses to be bound is thereby more free than one who, to preserve his "freedom," scrupulously avoids commitment. But notwithstanding this level of discourse, what sense does it make to argue that, in the world of 1848, 1945, or 1975, every "sovereign" state had the complete legal autonomy to act as it chose? It is surely impossible, in any event, to suggest that such a notion, if it ever prevailed, survived such developments as the Statute of the League of Nations, the U.N. Charter, or the Treaty of Rome.

116. *Id.* at 27.

117. U.N. Charter art. 4, para. 1. The U.N. Charter limits membership to "peace-loving states which accept the obligations contained" therein. *Id.*

"[A] dispute between nations turns out in the end to be about the exercise of sovereign power, always a delicate matter and hard to resolve within the winner-take-all framework of adjudication."[118] But that is just the point: Every international dispute is ultimately about sovereignty, and every state has the right to determine for itself where it will draw the lines that define that sovereignty. If the state is legally wrong, international judges in the short run, and international legal observers and scholars in the longer run, must be trusted to say so; there is no other alternative.

The quest for a theory defining the truly new concept of sovereignty—recognizing the emergence and powers of the European Union and the disappearance of the Soviet Union, placing within the system the nongovernmental organizations that have had such an important role in developing modern international law, and relating treaty regimes to the vital interests of the individual states which they comprise—continues.

118. CHAYES & CHAYES, *supra* note 3, at 205.