2008

Monetizing Diaspora: Liquid Sovereigns, Fertile Workers, and the Interest-Convergence Around Remittance

Jose M. Gabilondo

College of Law, Florida International University, jose.gabilondo@fiu.edu

Follow this and additional works at: http://ecollections.law.fiu.edu/faculty_publications

Part of the Civil Rights and Discrimination Commons, Comparative and Foreign Law Commons, Immigration Law Commons, Labor and Employment Law Commons, and the Law and Society Commons

Recommended Citation
Available at: http://ecollections.law.fiu.edu/faculty_publications/86

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections @ FIU Law Library. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections @ FIU Law Library. For more information, please contact lisdavis@fiu.edu.
Monetizing Diaspora: Liquid Sovereigns and the Interest Convergence Around Worker Remittances

José Gabilondo*

I. Introduction

Larry Catá Backer raises two issues in his Article on law in a post-Soviet world on which I want to comment. First, Catá Backer considers the relationship between law and “ethnos,” which refers to the link between an aggregate of people and a country’s territory.¹ Law, he notes, can both strengthen and weaken a people’s tie to a country’s territory.² Second, he finds that the locus of public international law-making has shifted from traditional public law actors, like states and treaty-based organizations, to private law actors: trans-national corporations, the media, customers, nongovernmental organizations, and markets themselves.³ In the new world order, these private law actors, says Catá Backer, may have an “adverse interest dependency” resulting in ad hoc alignments between interest groups with otherwise adverse interests.⁴

This Article examines the relationship between law and ethnos and “interest dependency” in the context of cross-border flows of money and

---

* Associate Professor, Raphael Diaz-Balart Hall, College of Law, Florida International University, Miami, Florida, Jose.Gabilondo@fiu.edu. Harvard College, B.A. 1987, J.D. 1991 University of California, Berkeley. The arguments in this Article benefited from presentation and feedback at globalization panels at the 2005 Law and Society Conference and the 2007 American Society for International Law Conference. My grateful thanks go to Larry Catá Backer, Tim Canova, and Hannibal Travis for their comments on earlier drafts.

2. Id. at 522-23.
3. Id. at 546-48.
4. Id. at 548 (“These actors have interests, albeit fundamentally adverse interests, yet are dependent on each other. That adverse interest dependency is deepened in a system that increases the authority and legitimacy of each of the actors through their regularized interactions.”).
other resources sent by overseas workers to a home country, so-called "worker remittances." Worker remittances simultaneously strengthen and weaken the link between a people and a country's territory, enhancing the local prosperity of a home-country by splitting its citizens between physical residents and diaspora workers. An opportunity for some, rueful for others, emigrating to work is a fact of life for the diaspora workers who generate these remittances and manna to those who receive or traffic in them. Indeed, the liquidity which remittances provide to labor-exporting countries has aligned these countries with some labor-importing ones (where remittances are sourced) and with treaty-based organizations charged with development and global macroeconomic policy. It is a form of the interest dependency which Catá Backer identifies, albeit in the official sector.

The transaction costs of sending these remittances can be quite high and workers have an identical interest in paying less to send money home. Diaspora workers, though, have little recourse against these costs in either their distant home country or the country of employment. Their physical dispersion across labor-importing countries makes it difficult for them to advocate for this interest. Making matters worse, "undocumented" workers lack not only suffrage in the employment country but, importantly, the bargaining power in the open market brought by legal status. This collective interest will remain underserved by a public law system until it comes to terms with the reality of employment-based migration. Foreseeable or, for many, inevitable migration to escape economic hardship in the home country changes the implicit bargain between the home country and its citizens, a bargain which assumes a meaningful opportunity to reside in the country of one's citizenship. This power dynamic bears generally on the bonds betweens citizens and states, but this Article examines only the transaction costs of remittances and official efforts to reduce them.

Labor-exporting countries, labor-importing ones, and treaty-based organizations have recognized the need to lower transaction costs, but their resulting initiatives tend to reflect a shared interest-convergence that stops short of more basic improvements for these workers. Apart from the claims which public law actors make on the remittance waterfall, however, remittance liquidity is itself a new type of "private actor," which stands in for the collective interests (and efforts) of diaspora workers. Given the growing significance of remittance liquidity

---

5. Remittances are "[c]urrent transfers by migrants who are employed in new economies and considered residents there. (A migrant is considered a person who comes to an economy and stays, or is expected to stay, for a year or more). Workers remittances often involve related persons." INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS Manual ¶ 302 (3d ed. 1961).
to both overseas workers and the usual public law actors, a more radical approach is needed to reduce these transaction costs, one that tackles the collective action problem on behalf of these workers.

Part II explains that, as remittance flows have increased, awareness has grown that their transaction costs are onerous, adding to what are already the substantial hardships of leaving a home country to work abroad. Part III shows how three distinct sets of interests have come to frame the debate on transaction costs. Some labor-exporting countries have come to rely on the hard-currency foreign exchange made possible by remittance liquidity, which may exceed the foreign exchange received from borrowing, aid, or foreign investment. In these countries, remittance liquidity has produced face-saving prosperity for treaty-based organizations charged with development, in particular the World Bank, the International Monetary Fund, and regional development banks. On the sending end of the remittance equation, counterterrorism programs in labor-importing countries have targeted remittance transfers on the theory that outbound remittances can help finance terrorism. These three interests—the foreign financing needs of labor-exporting countries, the reputational strategies of treaty-based organizations, and the security programs of labor-importing countries—have converged to form a particular policy approach to remittance policy, including the problem of transaction costs. Moving from the conceptual to the practical, Part IV concludes by recommending that the International Monetary Fund establish a free or low-cost facility to transfer worker remittances. The large-scale migrations which produce remittance flows are likely to continue, as is the official interest-convergence about remittances. More intervention by a treaty-based organization like the International Monetary Fund could eliminate or reduce the additional transaction cost burden to overseas workers consistent with the terms of the current official interest-convergence.

II. Transactions Costs

As employment-based migration has increased, so too have remittance flows, bringing public attention to their transaction costs. Remittances tripled in dollar volume between 1990 and 2005. The actual figure may be higher because some remitters use informal mechanisms, which do not report transaction volume.


7. During this period, remittance flows jumped from 68 billion to 232 billion. Id. at 88. Many remittances are sent along informal methods which escape reporting. Id. at 86.

8. Caroline Freund and Nikola Spatafora, Remittances: Transaction Costs,
countries, remittances are the largest source of foreign exchange flows, exceeding the sum of foreign investment and official aid. Many remittances flow along major “corridors” between a labor-exporting country and a labor-importing country. The largest corridors run to labor-exporting countries such as China, India, Mexico, and the Philippines. Some labor-exporting countries harvest remittances by requiring repatriation from offshore workers.

And with the growth of employment-based migration, worker demand for sending remittances has produced a variety of transfer mechanisms. Remitters send money home through postal services and automated teller services offered by depository institutions. Remitters may also use a wide variety of informal transfer mechanisms, such as in-kind payments, bearer-mechanisms like couriers, barter arrangements, and so called “ethnic stores,” which send money to home countries as part of their specialized goods and services for diaspora communities. These informal systems may cost less than banks and other official


9. See GLOBAL ECONOMIC PROSPECTS, supra note 6, at 88.


11. GLOBAL ECONOMIC PROSPECTS, supra note 6, at 89.


13. Commercial banks are offering dual ATM cards upon opening an account permitting the remitter to keep one at the host country and sending the other to the beneficiary at the home country to easily access the funds for a nominal network fee. Id.

mechanisms. They may also allow remitters to remain anonymous and to avoid legal requirements like taxes and currency reporting controls.

For both senders and transfer agents, transaction costs are at the heart of the remittance business. The transaction costs of these transfer services include fees, exchange rate commissions, and the opportunity cost to the recipient of the "float" captured by the transfer agent by delaying access to the remitted funds. Of course, transaction costs reduce the net amount received in the home country. The World Bank has found that:

remittance fee pricing is complex, and rarely are senders informed about the full and precise price of a remittance transaction. Fees may be as high as 20 percent of the principal, depending on the remittance amount, channel, corridor, and transaction type. The average price is reported to have been around 12 percent of the principal in 2004... Prices are believed to have declined but are still very high in low-volume corridors.

And it is these "golden crumbs"—the transaction costs—that attract firms to the transfer business, which enjoy economies of scale and repetition. For example, the World Bank estimates that the total cost to a transfer agent—including staff time—of the first remittance transaction for a particular client is $5.50, with costs dropping to $3.60 for subsequent transfers and to $3.00 if electronic processing is used for the transaction. So, even a "cheap" transfer cost of 5% on a $300 remittance, i.e., $15, leaves the transfer agent with a large profit margin, especially if the remitter becomes a regular customer.

Aware that globalized workers may lack both market and legal

18. GLOBAL ECONOMIC PROSPECTS, supra note 6, at 137. See also Multilateral Investment Fund, Inter-American Development Bank, Sending Money Home Remittances as a Development Tool in Latin America and the Caribbean (Jan. 24-25, 2005) (estimating that in 2003 there were 150 million transfers with an average value of $300) [hereinafter Multilateral Investment Fund].
19. GLOBAL ECONOMIC PROSPECTS, supra note 6, at 140. For 2004, major money transfer operators reported net operating profits of between 18 percent to 32 percent of gross revenues. Id.
20. Id. at 140-44. The World Bank's methodology may not consider the cost-savings from low-cost wire transfer services like the México-Direct program mentioned. See text, infra note 25.
power in their home and employment countries, many recognize the need for affirmative consumer protections, including lower transaction costs.\textsuperscript{21} That is the approach taken in the Universal Declaration of the Rights of Financial and Banking Services Users, promoted by a non-governmental organization which advocates on behalf of retail consumers with cross-border financial needs.\textsuperscript{22} Related bills to increase the transparency of costs for remittance senders have also been introduced in the United States Congress.\textsuperscript{23} Labor-exporting countries and treaty-based organizations agree in general terms on what should be done to reduce these costs: compel the transfer agent to disclose the overall cost of the transaction and foster competition between different transfer agents.\textsuperscript{24} For example, the Federal Reserve has established a low-cost wire transfer service for transfers in outbound remittance transfers from the United States to Mexico.\textsuperscript{25}

The costs should come down, of course, but my point is that the transaction cost problem is part of a more basic dynamic of globalization policies which encourage the circulation of capital, be it in the form of people, cash, goods, or services. Freeing capital creates random efficiencies and, with them, prosperity bubbles; but, for public policy makers at least, fixating on these efficiencies and bubbles outside of their


\textit{R}emittances are an important source of capital in many countries of the Hemisphere. We commit to take concrete actions to . . . reduce[e] by at least half the regional average cost of these transfers no later than 2008 . . . promot[e] competition between the providers of these services, [and] eliminat[e] regulatory obstacles and other restrictive measures that affect the cost of these transfers . . . .

\textit{Id.} The Summit of the Americas is a multilateral legal and policy forum organized in large part by the Organization of American States. \textit{See also Universal Declaration of the Rights of Financial and Banking Services Users, available at http://www.ausbancinternacional.org/jornadas/AusbancInternacionalV/DeclaracionUniversald/declaracion_eng.pdf} (last visited on Jan. 3, 200) (-sponsored by a non-governmental organization which advocates for consumers with financial needs that span several jurisdiction) [hereinafter \textit{Universal Declaration}].

22. \textit{See Universal Declaration, supra note 21.}


24. \textit{See Multilateral Investment Fund, supra note 18. See also Monetary and Financial Systems Department, Regulatory Frameworks for Hawala and Other Remittance Systems} (Fund 2005); Mohammed El Qorchi et al., Informal Funds Transfer Systems: An Analysis of the Informal Hawala System (Fund 2003); Samuel Munzele Maimbo et al., Migrant Labor Remittances in South Asia (Bank 2005).

25. \textit{See Directo a México to Visit 12 Cities, Demonstrate Innovative New Tool} (May 6, 2006), \textit{http://www.frbservices.org/Retail/pdf/DirectoMexico_Release050206.pdf} (last visited Jan. 3, 2008) (stressing the cost advantages of the service). The implication of this scale economy for the transaction costs faced by individuals who remit along less-traveled remittance paths is that cost savings may be less likely.
larger context is opportunistic. Commenting on the neo-liberal “euphoria” which follows capital flows into the developing world, one World Bank economist hinted at the larger context for remittances and the ensuing prosperity which many have touted:

As with the euphoria surrounding private capital flows in the mid-1990s, the attractiveness of remittances is in part a reaction to failures of earlier development mantras.... Remittances strike the right cognitive chords. They fit in with a communitarian “third way” and exemplify the principle of self-help. People from poor countries can just migrate and send back money that not only helps their families, but the host and recipient countries as well.... What could be better? Are these hopes valid?²⁶

He makes an important point about why the remittance model for the developing world is seductive: propelled by the self-combustion of work, thrift, and personal sacrifice, it works without much government intervention or coordination. And, like water after a long thirst, remittances promise quick relief to many, so long as one overlooks the hardship to workers and their families of abandoning home to work in a foreign country. Remittance “euphoria,” then, rests on a political philosophy that seems somewhat hostile to active government intervention and willing to assume away some of the suffering of the underlying workers whose surplus value makes the model possible. The next Part examines how this point of view reflects the shared interests of labor-exporting countries, labor-importing ones, and treaty-based organizations—the traditional public law actors.

III. The Interest Copula Around Remittances

In his Article, Catá Backer explains law in terms of the “force relations” which Foucault suggested drive action.²⁷ This involves seeing “through” visible forms of law to see how force plays on and through individuals and institutions.²⁸ In the traditional public international law landscape, one had to “pierce” formal institutions to see the de facto force relations identified by Foucault. In Catá Backer’s model, though, norm production disperses away from traditional actors to private law actors, making it easier to map the structure of de facto force relations because the force relations have been “positivized” through the agency of these private law actors. In this revised landscape, Catá Backer observes

²⁷. Catá Backer, supra note 1, at 551.
²⁸. Id.
an "adverse interest dependency" between these private law actors.  

To explain how the current policy approach to the transaction cost problem with remittances has emerged, I use a related concept introduced by Derrick Bell: interest-convergence. Bell explained the marginal legal gains which African-Americans received in Brown v. Board of Education in terms of an ad hoc alignment between the otherwise adverse interests of blacks and whites in formal racial equality: "[T]his principle of 'interest-convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." An early example of critical law and economics, Bell's argument has been widely used in critical race theory.

An interest-convergence argument reveals a previously hidden effect of power by finding an implicit bargain between the interests of a subordinated constituency and those of a dominant constituency—a bargain which benefits the subordinated constituency. In this case, the dominant interests are labor-exporting countries, labor-importing ones, and treaty-based organizations; the subordinated party is the overseas worker; and the "benefit" is the campaign to reduce transaction costs for remitters. The following discussion lays out the three dominant interests: the foreign financing interests of labor-exporting countries, the security interests of labor-importing ones, and the reputational interests of treaty-based organizations. Each is an example of the "self-interest leverage" which Bell explains lies behind an ad hoc interest-convergence. The official campaign to reduce transaction costs may marginally benefit some overseas workers but it does so only insofar as it also benefits each of the dominant interests. Moreover, these approaches to reducing transaction costs reaffirm the basic terms of the current institutional arrangement, rather than asking—as is justified—whether new patterns of work-based migration call for a more radical approach to protect growing numbers of diaspora workers.

Which is not to suggest that these interests are perfectly aligned. States and treaty-based countries may disagree, as the Asian

29. Id. at 548.
Development Bank and the government of the Philippines recently did over what the government planned to do with the proceeds of some remittances securitization. Nor is it to suggest that the countries and treaty-based organizations act only on the basis of opportunistic self-interest, a point made by Bell when he noted the moral commitments of abolitionists and white advocates of formal racial equality. Conceding that these institutional actors have mixed motives, the point is that major programmatic changes—like the kind involved in reducing these transaction costs—occur only when a critical mass of interests forms strong enough to overcome institutional inertia. Interest-convergence analysis reveals the patterns of interest alliance which pre-exist and, most likely, will survive any particular reform. For that reason, taking life as it is, I build on the current interest-convergence when recommending in Part IV that the International Monetary Fund establish a free or low-cost remittance transfer facility.

A. The Foreign Financing Interest of Labor-Exporting Countries

Because of some unique characteristics as a source of hard-currency foreign exchange, remittances have become central to how some labor-exporting countries manage their financing of foreign transactions. Remittances give recipients hard currency (or its local currency value) with which they can pay for consumption in the home country. As reserves of this hard-currency build up, the home country can service foreign currency-denominated public debt, pay for imports, and,

32. In this case, the Asian Development Bank did not want the government to absorb the remittances into its general budget: “We don’t want the money to flow to the government,” Belton [an ADA official] said. “We think it’s much more efficient to get the money into the private sector and have rational market economics dictate it rather than simply make it another form of government borrowing.” Doris Dumlao, Bonds Backed by OFW Pushed, PHIL. DAILY INQUIRE 13 (Nov. 14, 2005), available at 2005 WLNR 18399408.

33. As Bell points out, moral interests played a role in judicial cases which tried to dismantle segregation but it was only when these interests were added to the aggregate of self-interests that institutions went into action to formally repudiate race-based desegregation. “Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.” See Bell, supra note 30, at 525.

34. In this sense, the liquidity windfall to a home government from remittances mirrors the way in which liquidity in a private firm increases managers’ freedom to switch between alternative investments, including those that would lead to the most perquisite consumption. Cf. George Triantis, Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises, 117 HARV. L. REV. 1102 (2004) (modeling a firm as an internal capital pool in which legal restrictions on liquidity restrict managerial discretion, including the freedom to consume perquisites).
generally, improve its balance of payments position vis-à-vis other countries. Labor-exporting home countries, then, are one leg of the interest-convergence stool. These countries can also get hard currency inflows by borrowing, through inbound foreign investment, and in the form of foreign aid, but these are quid pro quo transactions which obligate the country in some way, typically with an offsetting financial claim. What makes remittances attractive to countries is that these flows are “unrequited transfers,” which come with no strings attached. And remittance flows are less prone to the external economic shocks that make quid pro quo foreign financing volatile as fickle investors react to market changes. Conditions in the country of employment—for example, an immigration reform—can, however, make remittance liquidity volatile to a home country.

For some labor-exporting countries, the foreign financing advantages of remittances have amended the basic terms of the bond between citizen and state. If a citizen produces more foreign exchange as a migrant worker than as a home country resident, a country has a plausible interest in encouraging its nationals to work abroad, perhaps indefinitely. Doing so may bring in more hard currency foreign exchange into the local economy although, as has been noted, it can also discourage the home country government from trying to foster local employment. As Anupam Chander has noted, some labor-exporting

35. In other words, in exchange for a resident of Country A issuing an outflow of value to a resident of Country B, the Country A resident acquires a claim on a Country B resident. In contrast, unrequited transfers involve a one-way transfer of value—with no offsetting consideration—from a resident of one country to a resident of another. See generally Chantal Thomas, Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order, 15 AM. U. INT’L L. REV. 1249 (2000) (analyzing balance-of-payments crises in the developing world and illustrating how a country’s current and capital accounts balance may interact negatively).

36. This counter-cyclicality of remittances has been noted: “Remittance flows are much more stable than private capital flows, which exhibit strong herd like behavior, amplifying the boom-bust cycles in many emerging markets.” See Kapur, supra note 26, at 338.

37. Anupam Chander, Homeward Bound, 81 N.Y.U. L. Rev. 60, 67-68 (2006). Today, national policies train people to be emigrants. The Philippines requires exit lessons of its emigrants, even supplying a handbook, now in its sixth edition. People now rank among many nations’ most important exports. A public policy towards emigrants is even more important for countries such as the Philippines; one out of every eleven Filipinos lives abroad.” (internal citation omitted).

38. Indeed, this has been identified as a key issue in managing remittance flows: “Remittances inflow might have negative effects as well. If the recipient country remains dependent on money transfers, it will encourage further migration of labor by reducing the effectiveness of investments of domestic and foreign investors because of the unstable workforce.” Ardian Fulani, Governor of the Bank of Albania, Key Policy Issues for
countries use "bonding mechanisms" to foster cultural and economic ties with their expatriates. The bonding mechanisms described by Chander help to conserve the value of what may be for some countries their most important income-producing assets—mobile citizens.

Countries that systematically export part of their citizenry suggest a commodity theory of citizenship in which the home country uses foreign labor markets to better capture the surplus value of citizens. It is a form of citizen "arbitrage," hence the Article's title of "monetizing diaspora." Doing so lets these countries better serve their local citizens, but the practice disrupts the understanding that citizenship involves meaningful access to physical residence on a country's soil. Any perspective that frames remittances primarily in the context of the interests of countries, then, may overlook fundamental questions about how remittances change the bargain between the citizen and the country. When such a perspective is endorsed by treaty-based organizations—as the next section shows—debates about the terms of the bargain recede further into the background.

B. The Institutional Interests of International Organizations

The second leg of the interest-convergence stool around remittance prosperity is made up of the World Bank ("Bank"), the International Monetary Fund ("Fund"), and other treaty-based international financial institutions like regional development banks (collectively, "IFIs"). The IFIs have jumped on the remittance bandwagon, as suggested by the high volume of policy and programs devoted to this subject. Obviously, institutions whose mandate is to promote development would welcome the developing country prosperity made possible by remittances. This prosperity might suggest that the IFIs had succeeded in meeting their development mandate. The irony is that the prosperity reflects massive displacements of workers from developing countries where IFI policies

39. Chander, supra note 37 (summarizing and assessing the lawfulness under U.S. law of political and economic bonding mechanisms used by labor-exporting countries).

As economic and trade liberalization brought increased prosperity to the world in the 1990s, developing countries saw their diasporas as a key to opening their economies to international trade and investment. But they also came to recognize that the diaspora did not automatically maintain relationships with its homeland and that such relationships required cultivation. Rather than seek to adopt coercive measures such as taxing the diaspora [as suggested by Jagdish Bhagwati], states sought to nurture connections to the diaspora through other means. I will call these "bonding" mechanisms.

Id. at 67.

40. See, e.g., GLOBAL ECONOMIC PROSPECTS, supra note 6; Freund and Spatafora, supra note 8; Kapur, supra note 26; and Hernandez-Coss, supra note 10.
have had little seeming effect.\textsuperscript{41} Granted, the Bank has quietly noted that immigration and remittances do not cure chronic underdevelopment and inequality;\textsuperscript{42} but this is only a minor chord in the policy positions of the IFIs.

The Fund merits special attention because remittances figure directly into the Fund’s evolving role in monitoring the balance-of-payments between countries. The Fund has lost core functions as private markets have made more borrowing available to the Fund’s country members.\textsuperscript{43} The Fund has responded by offering more services to its constituencies, i.e., the least-developed countries who may not access the Euro-market.\textsuperscript{44} When it was established, the Fund concentrated on helping members manage short-term balance of payments but its role has shifted to longer-term financing of countries, in effect, lengthening the term of the Fund’s involvements with member countries.\textsuperscript{45} Also, when established, the Fund monitored the exchange rate parity system which members maintained for their currencies, but countries no longer follow that system, leading the Fund to expand its surveillance of members’ cross-border transactions.\textsuperscript{46}

\begin{itemize}
\item[41.] Kapur, supra note 26, at 339.
\item[42.] Coming in a single sentence out of a volume on remittances, this is only a mild admonition:
\begin{quote}
The money that migrants send home—remittances—is an important source of extra income for migrants’ families and for developing countries: in aggregate, remittances are more than twice as [sic] the size of international aid flows. However, migration should not be viewed as a substitute for economic development in the origin country—development ultimately depends on sound domestic economic policies.
\end{quote}
See Global Economic Prospects, supra note 6, at xi.
\item[43.] Dominique Carreau, Why Not Merge the International Monetary Fund (IMF) With The International Bank for Reconstruction and Development (World Bank)?, 62 Fordham L. Rev. 1989, 1997-98 (1994) (arguing that the Fund and the Bank’s functions have converged such that formal merger is called for). For example, during the Fund’s first twenty years, more than half of its resources were dedicated to helping industrialized countries—including the United States and Great Britain—with their balance of payments problems. Balakrishnan Rajagopal, From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions, 41 Harv. Int’l L.J. 529, 569-70 (2000) (urging that the Fund take into account more non-economic concerns as part of its expanded activities in the Third World).
\item[44.] Id. at 1998 (noting the Fund’s establishment of special financing mechanisms for least developed countries). For a description of some of these lending facilities, see John W. Head, Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund, 52 Kan. L. Rev. 521 (2004) [hereinafter Seven Deal Sins].
\item[45.] See Carreau, supra note 43, at 1993-98.
\item[46.] This argument by a Fund employee explains the increased emphasis on surveillance as a mere expansion of a long-standing function:
\begin{quote}
[I]t should be noted that although surveillance was always at the core of the IMF’s activities, the term, as such, did not appear in the international economic vocabulary until after the abandonment of the par value system. . . . Since then, however, the rules and parameters of international behavior have become less
\end{quote}
\end{itemize}
These changes to the Fund’s mandate have been reflected in formal amendments to the Fund’s organic law. Since its establishment at the Bretton Woods Conference of 1944, the Fund’s Articles of Agreements has been amended three times: first in 1969 to introduce the Fund’s unit of account (the Special Drawing Right); again in 1978 to reflect the abandonment of the gold standard and fixed exchange rates by member countries; and, most recently, in 1992 to permit the Fund to impose special sanctions on members with substantial arrears in loan payments.

Not surprisingly, critics have accused the Fund of mission creep. The Fund has admitted as much, as suggested by comments by its Managing Director about how globalization has changed the Fund’s mission:

“twenty-first century globalization... has altered the context of the Fund’s mission... and exposed gaps in the day-to-day work of the Fund...”

Moreover, among the IFIs, the Fund’s governance structure lends itself to convergence with member states. The Fund’s primary reliance on internal executive organs for dispute settlement intensifies the Fund’s close link with its country members. As the Fund’s most noted legal

---


53. The Fund is one of only a handful of international organizations which internalize dispute resolution this way. JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 441-46 (Oxford 2005). The Fund prefers to characterize this process as “interpretation” rather than dispute settlement. *Id.* at 442.
observer (and an insider as Fund general counsel) has noted, much of the Fund’s current regulation involves so called “soft” law, which is deliberately vague and relies on ongoing good faith compliance by members with the intent of Fund policies. This mix of private settlement of disputes between the Fund and its members and vague legal expectations of members make the Fund especially prone to alignment with member countries, particularly its representatives from home country banking and finance sectors.

C. Remittance Discourses as Counterterrorism

The final leg of the interest-convergence around remittances is the counterterrorism campaign of labor-importing countries, in particular the United States. Since the World Trade Center bombings in 2001, the U.S. government has launched a multi-pronged attack on terrorism, including its financing. To reach the sources of terrorist financing, Congress amended the Bank Secrecy Act of 1970 and the Money Laundering Control Act of 1986 and enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“Patriot Act”). In the counterterrorism paradigm, remittances can be used to finance terrorism, especially when sent along informal transfer networks. For example, the U.S. Department of Treasury has asserted that “direct links” exist between informal value transfer mechanisms and terrorist financing.

However, the profile of suspicious transactions identified by the Treasury in its counterterrorism campaign bears little resemblance to the recurring small-dollar transfers which make up the bulk of the remittance market. The Treasury’s initial policy analysis of informal transfer

---

54. See Joseph Gold, Strengthening the Soft International Law of Exchange Arrangements, 77 AM. J. INT’L L. 443, 457 (1983) (tracing the increase in the number of supermajority voting requirements—which increase the power of the United States and other major shareholders—and the supermajority threshold up to 85 percent for decisions about exchange arrangements since the establishment of the Fund).

55. Perkel, supra note 15, at 185-86 (arguing that the current penal regime against IVTS will not work and advocating an incentive-based scheme to formalize the informal sector).

56. Treasury Report, supra note 14, at 6 (“While it appears that the majority of IVTS activity is legitimate in purpose, these systems have been used to facilitate the financing of terrorism and in furtherance of criminal activities.”) (citation omitted). FinCen suggests that IVTS are used “frequently” for terrorist financing: “Recent law enforcement investigations have shown direct links between criminal elements and the use of IVTS mechanisms for the purpose of moving and laundering illicit proceeds. In addition, law enforcement officials in India and other countries have identified terrorist organizations that frequently utilize IVTS to move terrorist funds.” FinCen, supra note 16, at 3.

57. FinCen’s guidelines, which financial institutions are expected to use to monitor suspicious transactions, apply primarily to “wholesale” transactions made up of carefully structured large dollar value transfers by institutions or groups. For example, the
mechanisms was based on the hawala network, an informal funds transfer system used in the Arab and Islamic worlds.\textsuperscript{\textasciitilde58} The original nexus between remittances and terrorist financing was never very strong, resting on a handful of incidents since 1991.\textsuperscript{\textasciitilde59} A global study of the use of informal transfer networks mentions without substantiating one possible incident involving the use of these networks for terrorism.\textsuperscript{\textasciitilde60} The link between hawala networks and terrorism was weak to begin with and it becomes weaker still when universalized as a general approach to terrorist financing.\textsuperscript{\textasciitilde61} Moreover, terrorists may use formal transfer mechanisms too, as suggested by some Western Union receipts found in a "bomb factory" discovered in Great Britain as part of a conspiracy to commit air terrorism.\textsuperscript{\textasciitilde62}

Nevertheless, the counterterrorist approach to remittances has been a key part of the U.S. government’s international criminal enforcement programs and its domestic banking supervision programs. The U.S. Treasury’s Financial Action Task Force on Money Laundering ("FATF"), in particular, provides guidance on "best practices" in remittance transfers.\textsuperscript{\textasciitilde63} FATF encourages countries to discourage

---

\textsuperscript{\textasciitilde58} Treasury Report, supra note 14, at 5-6.
\textsuperscript{\textasciitilde59} Perkel, supra note 15, at 183.
\textsuperscript{\textasciitilde60} Funded by the Dutch Ministry of Justice, the report involved archival research and interviews law enforcement agents and academics from the U.S., Canada, Great Britain, France, Australia, Hong Kong, Germany, South Africa, India, and Russia. Although the report notes other illegal uses of these transfer networks, the only incident of alleged terrorism culled from this research does seem flimsy:

It has also been alleged that an Indian named Amir Bhai, who illegally ran his currency exchange business from Dubai, London and Hong Kong, and was not very discriminate about his customers used to accept money for Indian politicians and bureaucrats. He is said to have served Kashmiri activists and those who had planted bombs in Bombay in 1991.

\textsc{Nikos Passas, Informal Value Transfer Systems and Criminal Organizations: A Study Into So-Called Underground Banking Networks} 42 (1999).

\textsuperscript{\textasciitilde61} This statement is subject to only some exceptions. The terrorist financing involved in the Iran-Contra controversy did involve informal value transfer systems.

\textsuperscript{\textasciitilde62} Formal value transfer systems can also help fund terrorism, perhaps more reliably. See Don Van Natto, Jr. et al., \textit{In Tapes, Receipts and a Diary, Details of the British Terror Case}, N.Y. TIMES, Aug. 28, 2006, at A1 (mentioning the Western Union receipts found in a "bomb factory" in Great Britain).

\textsuperscript{\textasciitilde63} The counter-terrorism campaign of the United States asserts that informal value transfer mechanisms for remittances may support terrorist financing. Therefore, the U.S. Treasury’s Financial Action Task Force on Money Laundering ("FATF") strongly encourages countries to discourage informal funds transfer systems and to impose registration and oversight requirements on money transfer services. FATF,
informal funds transfer systems and to impose registration and oversight requirements on money transfer services.\textsuperscript{64} The goal is to keep remitters from using informal transfer mechanisms, like ethnic stores, and to direct workers to use regulated financial intermediaries from whom government agencies can more easily gather surveillance data. As a part of anti-money laundering compliance, banking regulators have advised their regulated depository institutions against maintaining correspondent accounts for money transfer businesses.\textsuperscript{65} In particular, the operations of foreign money transfer agencies have come under increased scrutiny by

\textit{Recommendation VI, 9 Special Recommendations on Terrorist Financing} (amended in Oct. 2004). The remedy urged by the U.S. security establishment—operating through the IFIs—is to encourage remitters to use formal mechanisms rather than informal ones. So, for example, banking regulators have advised their regulated depository institutions against maintaining correspondent accounts for certain money transfer businesses. See, \textit{e.g.}, Comptroller of the Currency, \textit{Bank Secrecy Act/Anti-Money Laundering: Guidance on Money Services Business Customers}, Advisory Letter 2004-07 (June 4, 2004).

Even the World Bank, though, has criticized the closing of these correspondent bank accounts. \textit{See GLOBAL PROSPECTS, supra} note 6, at 147. ("Clear guidance on how to assess risks and spot suspicious activity is lacking.") (internal citation omitted). For a more general discussion about how post-911 regulatory requirements may involve overreaction and may require a more nuanced look at the actual relationship between modes of money transfer and terrorist activity, \textit{see id}. at 146-47.

64. FATF strongly recommends that countries impose registration requirements on money transfer providers and that they adopt FATF’s recommendations generally:

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

FATF, \textit{supra} note 63, at 2.

Many of the Patriot Act provisions on the financial system are simply the reception into domestic banking law of FATF’s Forty Recommendations, a comprehensive approach to generating policy and institutions designed to combat money laundering. \textit{See FATF, Forty Recommendations} (2003).

65. \textit{See, e.g.}, Comptroller of the Currency, \textit{supra} note 63. The Letter tells national banks that they can rely as a measure of compliance on a letter which money service businesses receive when they register with the U.S. Treasury’s Financial Crimes Enforcement Network ("FINCEN"). \textit{Id}. One problem with the Letter is that it provides a minimum amount of supervisory guidance for banks interested in complying with the due diligence requirements in \textsection 302 of the Patriot Act. The Letter describes what compliance would look like on a number of complex fronts without identifying the standard of supervisory review which national banks must meet in order to satisfy their banking supervisor:

A reasonable due diligence program under this section is one that comports with industry best practices and should include, in addition to the items listed above, consideration of foreign licensing requirements and restrictions, the condition of regulation and supervision in the customer’s country, and money laundering risks associated with that country.

\textit{Id}. 
virtue of the Patriot Act. As a result, these depository institutions have closed many correspondent accounts, causing remitters to look elsewhere for transfer services.

The counterterrorist approach to remittances also involves social engineering away from an economy based on trust to one based on formal exchange between anonymous counterparties. To some extent, it is cultural bonds between users and providers of informal networks which provide the legal certainty for the transaction; so a transfer may leave no record. Granted, forcing consumers to shift from an informal transfer mechanism based on trust to a formal one may increase her financial literacy, but such “benevolent” intentions may thwart a consumer’s preference to deal with her own kind.

66. See registration requirements of §312, Patriot Act, 31 U.S.C. § 5318(i). See also Perkel, supra note 15 (assuming that informal value transfer systems materially contribute to money laundering and arguing for incentives to encourage registration of money transfer businesses).

67. The World Bank report on remittances notes how the regulatory reaction in the U.S. has made possible the first step in disintermediation from informal to more formal mechanisms for money transfer:

Since early 2005, correspondent bank accounts of hundreds of money service businesses in the United States have been closed by banks for fear that they may be targeted by [bank regulatory] authorities for servicing customers regarded as “high risk.” . . . Clear guidance on how to assess risks and spot suspicious activity is lacking.

68. Rachana Pathak, Note, The Obstacles to Regulating the Hawala: A Cultural Norm or a Terrorist Hotbed, 27 FORDHAM INT’L L.J. 2007, 2009 (2004) (“By offering tangible alternatives to convince people to switch to institutionalized banking, the United States would be taking a more international, culturally and economically sensitive approach.”).

69. Referring to an example involving the transfer through an informal transfer mechanism by a Pakistani immigrant in the U.S. to a relative in India, one advocate of the U.S. policies against informal transfer systems notes the alarming implications of shared cultural assumptions between the customer and the service provider:

Most transactions do not involve the physical or electronic transfer of money but merely an exchange of debts. Second, the IVTS is based on trust. In the example above, the customer in the U.S. received no official receipt for his deposit, and the dealer in Pakistan knew that the U.S. dealer would repay the debt. Finally, transactions as simple as this involve very limited paperwork. In this example, no receipts were generated and no names were recorded. These three characteristics make the IVTS system a desirable way to transfer funds for illicit purposes.

Perkel, supra note 15, at 190.

70. In this sense, the preference to use an informal transfer mechanism may be an example of the type of positive discrimination in favor of one’s own, which diaspora theory urges domestic authorities to recognize as a valid legal expectation.

The diaspora model would review discrimination in favor of other diaspora members [for example, by waiving the demand for a receipt to prove a financial
IV. A Multilateral Remittance Transfer Facility

Legal reform (or at least preparatory reflection) is needed to make law more responsive to the social reality that many workers may now spend the bulk of their productive life in self-imposed diaspora, between a home country and an employment country. In the conclusion to his Article, Catá Backer suggests that the new international legal order actually reflects the traditional influence of custom and practice in public international law:

[T]he law/power relationship being constructed outside of the formal structures of traditional public law shares a certain similarity to law in its pre-Enlightenment forms. . . . The new law/power matrix is custom and practice backed by social and economic power.\(^{71}\)

The same is true about the law of remittances. No major statutory or treaty-based efforts have been proposed to coordinate the reduction globally of remittance transaction costs. Instead, the problem has been left to the voluntary practices of transfer agents, coaxed along by alliances between countries and the IFIs.

The scope and complexity of remittance liquidity, though, call for more multilateral coordination and, although it has become a four letter word in the neo-liberal register, intervention. Foreign workers have a shared interest in a less expensive way to send money home but, dispersed across labor-importing countries, they cannot meaningfully advance this interest through advocacy or suffrage in either their home or employment countries. Bilateral reforms, like the Federal Reserve transfer facility between the United States and Mexico, have reduced transaction costs in the most highly-trafficked remittance corridors, but encouraging competition and cost transparency are unlikely to work for foreign workers not in a major corridor. A cross-border collective action problem like this is best addressed through some official multilateral remedy.

Given the Fund’s mandate over international payments, it is a natural vehicle for any serious reform to reduce the transaction costs of worker remittances. Remittances figure in both the Fund’s responsibilities for global financial surveillance and its role in the “establishment of a multilateral system of payments in respect of current transactions,” criteria from the Fund’s organic law.\(^ {72}\) Specifically, the

---

\(^{71}\) Catá Backer, supra note 1, at 551.

\(^{72}\) Art. I(iv), Articles of Agreement of the International Monetary Fund, supra note 34.
Fund could facilitate remittance transfers through a free or low-cost transfer facility implemented through its member countries’ banking systems, a project which the Fund is in a unique position to coordinate. Granted, an intervention like this might offend some radical notions about economic liberty to the extent that foreign workers would receive a banking service not available to domestic workers. But these notions rest on an implicit bargain between citizens and states, which does not apply to citizens who have entered a condition of partial statelessness in order to work. If the bargain has changed, then the whole paradigm needs rethinking. Apart from ideological objections, a free or subsidized facility would have some important losers too, mainly the private transfer agents who would see their remittance transfer business move to Fund-sponsored facilities.

Such a facility would be consistent with the Fund’s recent policies of providing more financial services to developing countries and of nodding to external stakeholders who may have little other formal redress against the Fund. Operating such a facility might have been ultra vires when the Fund was established to serve discrete functions in the balance of payments, but it gets harder to make that argument as the Fund continually reinvents itself to remain relevant in globalized trading market. Overseeing remittance transfers would also make the Fund more effective at conducting counterterrorist surveillance, discussed above as another major factor in how the debate on remittances is framed. Getting the Fund to implement a remittance facility would itself require a major interest-convergence and a consultative process to develop the proposal. In this Article, I only wanted to use Professor Catá Backer’s gracious invitation to join this Symposium as a way to introduce the idea.

47. In addition to these explicit authorities, public international law also recognizes that international organizations have implied powers necessary for their functions and not inconsistent with their express authorities. See John W. Head, Suspension of Debtor, supra note 50.

73. A recent self-study by the Fund noted its incipient openness to increased transparency:

Until the late 1980s, institutional transparency was not high on the agenda of the IMF. . . . The IMF saw itself as a technical institution, accountable to its member governments and with little need to explain itself to the wider public. . . . Since then, remarkable progress has been made in a short period of time. . . . The [external] institutional discourse has been broadened. . . . While the public record appears impressive, further improvements are possible. See LEO VAN HOUTVEN, GOVERNANCE OF THE IMF: DECISION MAKING, INSTITUTIONAL OVERSIGHT, TRANSPARENCY, AND ACCOUNTABILITY 58-60 (Fund 2002).