International Local Government Law

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CITIES ARE NOT FREE TO DO WHATEVER THEY PLEASE. They can exercise power only within the legal frameworks that others have created for them. These legal frameworks are called local government law. Traditionally, the content of local government law has been determined either by national governments directly (as in the United Kingdom and South Africa) or by subnational governments (such as the states in the United States). National or subnational governments decide whether city governments are elected or appointed. They dictate whether cities can act independently or only with express approval from a higher government. They specify which governmental services will be provided locally and which will be provided by others. They define cities' fiscal authority and their powers to regulate land use development within their boundaries. And they decide where those city boundaries are. Domestic politics and domestic legal rules, in short, largely determine the legal status of cities, and these rules have a major influence on both the experience of city life and the practice of local self-government.[1]

As this article explains, this traditional way of creating local government law is changing. Parties negotiating international trade agreements, international tribunals arbitrating commercial disputes,[2] United Nations' rapporteurs investigating compliance with human rights obligations,[3] and international financial institutions formulating development policy[4] have all begun to express interest in the legal relationship

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1. For an examination of these rules, see GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, LOCAL GOVERNMENT LAW (4th ed. 2006).
2. *See infra* Section II.C(2).
3. *See infra* Section II.B(2)(b).
4. *See infra* Section II.B(1)(a).

between cities and their national governments. Indeed, cities themselves are beginning to use international institutions to redefine the scope of their domestic legal powers. As a result, a set of international legal rules and regulations for cities is emerging that—in order to emphasize its novelty and comprehensiveness—we call international local government law. International local government law is likely to have profound effects on the legal status of the world's cities and, therefore, on the kind of cities the world will have. For that reason, its emergence raises fundamental questions about who should determine the legal framework within which cities operate and what that framework should be.

This article examines this new development. In doing so, we have three goals. First, we want to demonstrate that a focus on international local government law differs from other ways in which scholars have begun to think about cities and their place in the world. The study of international local government law lies at the intersection of two prominent bodies of current scholarship: the comparative study of urban governance[5] and the literature on what are commonly called "world cities."[6] As we shall explain, the study of international local government law, unlike each of these lines of research, emphasizes cities' roles as simultaneously subordinate domestic governments and independent international actors. To the extent that urban scholars and policymakers come to recognize cities as having these dual functions, we suggest, they will increasingly direct their attention to the important international rules and regulations concerning cities that now often escape their attention.

Second, we seek to introduce the topic of international local government law into the field of international law. International law has traditionally been a means of regulating relations between sovereign states. So-called internal affairs—such as the division of power within a state—have been understood to stand outside its scope. Although scholars of international law now recognize many exceptions to this classic conception of their field, they continue to overlook international law's impact on the world's cities. This scholarly stance can no longer be justified. Rules and regulations already in place—and those in the

5. *See generally* NEIL BRENNER, NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD (2004); CITY MATTERS: COMPETITIVENESS, COHESION AND URBAN GOVERNANCE (Martin Boddy & Michael Parkinson eds., 2004).

6. *See generally* SASKIA SASSEN, THE GLOBAL CITY (1999) [hereinafter THE GLOBAL CITY]; WORLD CITIES IN A WORLD SYSTEM (Paul Knox & Peter Taylor eds., 1995).

process of being formulated—reveal that international law is now making the domestic legal status of local governments an important object of concern. To be sure, there is no fully developed code of international local government law, and the kinds of international interventions affecting cities that are now in evidence vary considerably in their degree of legal formality. Nevertheless, international lawyers are increasingly becoming urban policymakers, and urbanists must become conversant with international law.

We pay special attention in this article to decisions by international arbitration tribunals regulating cities' ability to control land use development. We have chosen to focus on these decisions because they address an area—local land use policy—that is of intense interest to cities, city residents, and business interests of many kinds, above all to real estate developers. But we have chosen them as well because this kind of intervention involves a strong form of international legal regulation. The decisions arise from disputes over international trade agreements that authorize private parties to be paid damages in case of breach. The arbitration decisions deal with the scope of a city's domestic legal power and the nation's responsibility for defining it. The cases, therefore, help demonstrate that international law is beginning to concern itself deeply with the domestic legal status of cities.

Our final goal in this article is to offer an analytic framework for evaluating the content of international local government law at this initial stage of its development. In doing so, we situate the recent arbitration decisions concerning local land use authority within the context of the international community's broader conception of the city's legal status. Like domestic local government law, international local government law is responding both to the promise and to the peril of permitting cities to exercise power. It is not empowering or disempowering cities in any straightforward way. Indeed, we suggest, international local government law should not be evaluated in terms of whether the world is enhancing or limiting local power. The focus instead should be on the kinds of cities that international local government law is trying to create. Although the world's cities have divergent interests, a central project of international local government law currently seems to be a papering-over of these differences. Again and again, international institutions, including institutions that purport to represent cities themselves, present cities as uniformly striving for uncontroversial but important goals—often summed up in such phrases as "best prac-

7. The Best Practices & Locale Leadership Programme encourages sustainable local development. Best Practices & Locale Leadership Programme, http://www.blpnet.org (last visited Nov. 21, 2005) [hereinafter Best Practices].

tices,"[7] "local autonomy,"[8] "good urban governance,"[9] "local self-government,"[10] and "united cities."[11]

The history of domestic legal reform of city power suggests the need for skepticism about this appeal to neutrality. Cities might appear to be a unified group with a common interest in gaining power. But they are as likely to be competitors as allies. Reforms that benefit some can disadvantage others. Moreover, efforts to reform domestic local government law have frequently been products of controversial political ideologies and economic theories that are ascendant at the moment that the reform takes root. This dynamic seems to be at work in efforts to reform local government law worldwide as well. Notwithstanding the purportedly neutral statements about the importance of good governance and the value of local self-government, international local government law appears to us to be in the midst of promoting a particular, contestable conception of the city—a conception that we call the private city. A private city, as we shall define it, is one that envisions city power principally as a mechanism for promoting private economic development.

We offer this analysis tentatively, aware that it is too early to conclude definitively whether international local government law has an agenda—let alone a self-conscious agenda—for the world's cities. It may be that international local government law is better described as embracing a variety of contradictory (and inchoate) ideas regarding city life. It may even be that there are sufficient counter-examples to suggest that a different idea of the city—including an opposite one—animates international local government law. Whichever of these accounts turns out to be most accurate, they all share an important feature: they suggest that international local government law is implicated in many of the same debates about city life that have long dominated domestic debates over urban policy. If so, the current discourse of "united cities" threatens to obscure the significance of these debates and of the emerging

8. Constitution of the World Organization of United Cities and Local Governments, 1, http://www.cities-localgovernments.org/uclg/upload/template/templatedocs/Constitution.pdf (last visited Nov. 21, 2005) [hereafter UCLG Constitution].

9. *See* THE GLOBAL CAMPAIGN ON URBAN GOVERNANCE, CONCEPT PAPER (2d ed. 2002), http://www.unhabitat.org/campaigns/governance/campaign_overview.asp (last visited Nov. 21, 2005) [hereinafter CONCEPT PAPER].

10. UNITED CITIES AND LOCAL GOVERNMENT, FOUNDING CONGRESS FINAL DECLARATION § 11, http://www.dsf-fsn.org/en/documents/Declaration-UCLG-en.pdf)(last visited Nov. 21, 2005) [hereinafter UCLG FINAL DECLARATION].

11. United Cities and Local Governments is a group that advocates democratic local self-government. *See* United Cities and Local Governments, http://www.cities-local governments.org/uclg/index.asp (last visited Nov. 21, 2005).

body of rules and regulations we describe. Therefore, it does little to advance thinking about how the mechanisms of international law should be brought to bear on cities. The time to begin the debate over the agenda of international local government law, we argue, is now, at the outset, before the kind of reform it favors takes root, not after the legal status of the world's cities has been dramatically altered.

I. Alternative Ways to Link the City and the World

In recent years, there has been an explosion of scholarship that examines cities and their place in the world.[12] Before examining international local government law directly, we consider two ways of thinking about cities from an international vantage point: the comparative analysis of urban governments[13] and the literature on world cities.[14] These lines of research have achieved a secure foundation in contemporary urban scholarship, and they have generated important insights. But each offers only a partial conception of the role of cities in the world. The comparative analysis of urban governance focuses on the differences between the domestic legal rules governing cities in countries around the world, but it does not examine the internationalization of urban centers or the kinds of inter-city connections that globalization has brought about. The world cities literature does the reverse: it highlights the impact of international economic forces on urban development and the importance of city-to-city connections but is unconcerned with the rules that establish cities as governments. International local government law, in our view, fills in the omissions in these two bodies of work. These omissions explain why the emergence of international local government law—a critical influence on city life and the future of urbanism—has largely gone unnoticed.

A. *Comparative Analysis of Urban Governance*

Because local government law is a species of domestic law, cities throughout the world confront urban problems armed with different powers. Studies comparing the domestic legal frameworks within which the world's cities operate can therefore assist those who are working to address contemporary urban issues. These studies demonstrate that some countries have better legal rules for addressing urban problems than others. Sometimes, they even point the way to a model code of local government law.

12. *See supra* notes 5–6.
13. *See supra* note 5.
14. *See supra* note 6.

A good example of the connection between the comparative analysis of urban governance and the domestic reform of cities' legal powers comes from the United States. In the late nineteenth and early twentieth centuries, large cities in the United States, facing unprecedented urban growth, seemed to be in crisis. In response, progressive reformers looked abroad to learn how other countries organized their cities. A spate of reports compared the legal powers of American city governments with those of Europe.[15] American cities lacked many of the legal powers their foreign counterparts enjoyed, leading the American analysts to marvel at the "free" cities of Europe.[16] Building on these precedents from abroad, urban reformers in the United States pressed for legal changes at home.[17]

Between 1875 and 1920, many states passed constitutional amendments that imported key features of Europe's local government law. A new regime of "home rule" gradually replaced the old American legal framework, one that had required cities to obtain express state legislative authority to undertake even the most trivial of actions.[18] The European example also spurred efforts to promote city planning in the United States. Progressive urban reformers made frequent trans-Atlantic voyages to learn how foreign cities used their broad planning powers and sought to bring to the United States the powers that European cities exercised. Ultimately, American cities failed to win planning powers equivalent to those possessed by the great European cities. Instead, they obtained the local zoning power.[19]

Comparative studies of urban governance are still flourishing. Some, like the examples just given, seek to bring fresh ideas from Europe to the United States. James Kushner begins his recent reader, *Comparative Urban Planning Law*,[20] by asserting that comparative inquiry should induce "optimism" in an American audience that too often assumes little can be done to make urban spaces attractive and efficient. Euro-

15. *See, e.g.*, DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 112–59 (1998).

16. *See* Robert Brooks, *Metropolitan Free Cities*, 30 POL. SCI. Q. 222 (1915) (describing powers of European cities); FRANK GOODNOW, MUNICIPAL HOME RULE (1897) (discussing powers of European cities).

17. *See* RODGERS, *supra* note 15.

18. *See generally* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2277–2322 (2003) (examining the home rule movement) [hereinafter Barron, *Reclaiming Home Rule*].

19. *See* RODGERS, *supra* note 15, at 218–20; M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING (1983).

20. JAMES KUSHNER, COMPARATIVE URBAN PLANNING LAW: AN INTRODUCTION TO URBAN LAND DEVELOPMENT LAW IN THE UNITED STATES THROUGH THE LENS OF COMPARING THE EXPERIENCE OF OTHER NATIONS (2003).

pean land use laws, he suggests, provide promising models for the United States. Scholars interested in the developing world have also been drawn to the comparative analysis of urban governance. The National Research Council's recent study, *Cities Transformed*, exemplifies this kind of comparative work.[21] The report contends that the demographic shift to urban centers in the developing world is an international phenomenon of great consequence.[22] Urban governance, it argues, will significantly affect whether that process will be beneficial or destructive.[23] The report discerns a clear trend favoring the decentralization of power to cities and describes how various developing nations—from Mexico to Brazil to Côte d'Ivoire—have brought about this reform.[24] It concludes by considering whether there is a model for urban governance that could guide countries as they decentralize power.[25]

The comparative study of urban governance need not identify a model framework that would solve a particular urban problem. Instead, it can demonstrate that local factors are more important than universal ones. H.V. Savitch and Paul Kantor, for example, recently examined how cities respond to heightened international competition for economic development.[26] They did so in order to evaluate the claim that global market forces are determining urban fortunes. Their argument emphasizes instead the ways in which individual cities and their nations shape their development through their own domestic policies.[27] A similar theme underlies *Illegal Cities*, a recent comparative study of laws regulating the informal housing sector in the developing world.[28] The authors in this volume warn that an international approach to the problem of slum housing must take account of important differences in existing local legal frameworks.[29]

Whether or not the comparative study of urban governance stems from a universalizing impulse, it is based on a key premise: city government matters. Cities' government organization and the public policies they pursue, the literature suggests, are of significance both to the

21. CITIES TRANSFORMED: DEMOGRAPHIC CHANGE AND ITS IMPLICATIONS IN THE DEVELOPING WORLD (Panel on Urban Population Dynamics, M.R. Montgomery, R. Stren, B. Cohen & H.E. Reeds eds., 2003) [hereinafter CITIES TRANSFORMED].
22. *Id.* at 8, 11–12.
23. *Id.* at 7–8.
24. *Id.* at 25.
25. *Id.* at 401–06.
26. *See* H. V. SAVITCH & PAUL KANTOR, CITIES IN THE INTERNATIONAL MARKETPLACE (2004).
27. *Id.* at 43–46.
28. ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES (Edesio Fernandes & Ann Varley eds., 1998).
29. *Id.* at 3.

lives of urban dwellers and to the future of urbanism. At the same time, because the focus of this work is on comparing domestic legal systems, it tends to highlight the role of law in influencing the nature of city governments and the policy options available to them.

B. *Urbanization, Globalization, and World Cities*

For many sociologists and geographers, urban governance is not the most interesting way to study cities internationally. Over the last few decades, some of these scholars have explored instead what John Friedmann called, in his seminal article, "The World Cities Hypothesis."[30] The orientation of this enormously influential line of research differs markedly from the one that underlies the studies of comparative urban governance.

The world cities hypothesis responds to the widely held view that key features of the globalization of the world economy—the dramatically enhanced mobility of capital, a spatial division of labor on a world scale, sharp reductions in travel time, unprecedented advances in communications technology, and large-scale domestic and international migration—deprive urban centers of their historic economic advantage.[31] Proponents of the world cities hypothesis argue that, in fact, the opposite is more nearly the case. Although international travel and communications and the circulation of international capital may be much easier, "place" has not ceased to matter.[32] On the contrary, cities have become more important to the world economy because global companies need to centralize key functions, even as they disperse other aspects of their production processes.[33] They do so in order to ensure their proximity to other corporate headquarters and to a variety of specialized services (such as public relations firms, legal offices, and financial institutions) necessary to effective participation in the global market. Immigrants—domestic and international, rich and poor—move to the same global cities to provide the support services that the ever-more-concentrated business sector needs. The growth of multinational companies thus results in a worldwide demand for specific locations—arranging the world's cities into a hierarchy of command centers for the global economy.[34]

30. John Friedmann, *The World Cities Hypothesis, in* WORLD CITIES IN A WORLD SYSTEM, *supra* note 6, at 317.
31. *Id.* at 317–318.
32. *Id.* at 319–22.
33. *Id.* at 322–23.
34. *See id.; see also* THE GLOBAL CITY, *supra* note 6 (exploring how spatial dispersal and global integration has created a new role for the global city).

By definition, the "world city" status does not apply to every city in the world. Indeed, a major topic in the world cities literature concerns which cities qualify as world cities and which do not.[35] At any given time, only a small number of major cities—above all, London, New York and Tokyo—perform the role described above.[36] These cites are best conceived of as "world cities" because they function as international economic actors on a global scale rather than on a more secondary regional, or domestic, one. In Saskia Sassen's formulation, they "function in four new ways: first, as concentrated command points in the organization of the world economy; second, as key locations for finance and specialized service firms, which have replaced manufacturing as the leading economic sectors; third, as sites of production, including the production of innovations in these leading industries; and fourth, as markets for the products and innovations produced."[37]

Although the number of world cities is small, the implications of the world cities hypothesis are very broad. World city scholars do more than simply describe how certain privileged cities have achieved their status. They seek to explain how urbanism is foundational to globalization, and, in turn, how globalization affects urbanism. The current leading world cities, they say, stand on top of a worldwide system of cities.[38] They "constitute the key nodes or command points that exercise power over other cities in a system of cities, and thus, the world economy."[39] World cities pursue economic development strategies that have earned them their place in the world cities hierarchy. And they influence the politics of other cities as they themselves strive to rise up the list of cities with regional and global reach. This hierarchical image has led to criticism of the world cities literature on the grounds that it concentrates on a small set of wealthy urban centers, rather than on the cities that have been hurt by global economic integration or on those

35. *See, e.g.*, Arthus S. Alderson & Jason Beckfield, *Power and Position in the World City System*, 109 AM. J. SOC. 811 (Jan. 2004) (classifying cities position in the world city system); J.V Beaverstock, R.G. Smith & P.J. Taylor, *A Roster of World Cities*, 16 CITIES 445 (1999) (analyzing the functional tradition, which treats cities as a part of a larger system, as an approach to the study of cities as an integral part to contemporary globalization process); *see also* Jennifer Robinson, *Johannesburg's Futures: Beyond Developmentalism and Global Success, in* EMERGING JOHANNESBURG, PERSPECTIVES ON THE POSTAPARTHEID CITY 260, 268 (Richard Tomlinson et al. eds.,2003) (critiquing world cities literature for its preoccupation with classification).

36. *See* THE GLOBAL CITY, *supra* note 6; *see also* Aldreson & Beckfield, *supra* note 35, at 846 (concluding New York, London, and Tokyo to be the most powerful cities).

37. *See* THE GLOBAL CITY, *supra* note 6, at 3–4 (2001).

38. *See* Alderson & Beckfield, *supra* note 35, at 814–19 (describing this aspect of the world cities hypothesis).

39. *See id.* at 812.

that are located in countries on the periphery of this transformative process.[40]

From the perspective of the world cities literature, it is obsolete to emphasize the importance of the city-nation relationship. Under conditions of globalization, cities have begun to loosen the bonds of national control. According to one proponent, globalization enables "wealthier 'world cities' . . . [to] operate like city-states in a networked global economy, increasingly independent of regional and national mediation. . . ."[41] Another argues that "cities have become increasingly decoupled from local (i.e. regional or national) political geography as the salience of their position in international networks of investment and trade has grown."[42]

To be sure, these scholars do not claim that world cities—let alone the cities on the margins—have separated from their host nations altogether. But they do claim that national influence over cities is waning. Cities have entered into a new phase in history. Their orientation has become external rather than internal. Their associations have become global rather than domestic. And, insofar as they are world cities, they are becoming so important that they may be able to reverse the direction in which power flows: some cities may begin to dictate how nations behave rather than the other way around.

C. *The Place of International Local Government Law*

The literature on world cities suggests that the comparative study of urban governance anachronistically reinforces the traditional view that cities are creatures of the nations in which they are located, thus, wrongly overlooking the new ways that urban centers are being internationalized. Those engaged in comparative work on urban governance might respond that the world cities literature's focus on the economic activities of global private business is insufficiently concerned with the role of city governments. In fact, the world cities literature's references to London, New York, and Tokyo are generally not to the cities themselves. They refer to a physical territory, one that is not coterminous with the boundaries of any local government. In John Friedmann's

40. *See, e.g.*, Robinson, *supra* note 35, at 268; *see also* John Flowerdew, *The Discursive Construction of a World-Class City*, 15 DISCOURSE & SOC'Y 579 (2004) (exploring how the Hong Kong government promoted itself as a world city).

41. Arjun Apadurai, *Deep Democracy: Urban Governmentality and the Horizon of Politics*, 14 PUB. CULTURE 21, 24 (2002).

42. *See* Saskia Sassen, *Introduction* to GLOBAL NETWORKS: LINKED CITIES (Saskia Sassen ed., 2002) [hereinafter GLOBAL NETWORKS].

definition, the word "city" has "an economic definition. A city in these terms is a spatially integrated economic and social system at a given location or metropolitan region. For administrative or political purposes the region may be divided into small units which underlie . . . the economic space of the region."[43] Because of its reliance on this definition, the world cities literature does little to explicate the role of city governments under conditions of globalization. On the contrary, its continued use of city names to refer to a territory larger than the city obscures the distinction between an economically defined region and the cities themselves.

It is the analytical space between these competing images of the city—one emphasizing that cities are subordinate domestic governments and the other that they are independent international economic actors—that is of primary interest to us. This space is now being filled up by a third conception of the city that is increasingly attracting the attention of international institutions and those who seek to influence them. This conception recognizes that cities are both subordinate domestic governments *and* independent international actors. It is for this reason that international institutions and international legal agreements are increasingly attentive to the domestic legal relationship between cities and their central governments.[44] This focus reflects a growing awareness that cities exercise governmental power and, in doing so, that they have an international impact. But it also reflects an awareness that national governments exercise important authority over cities, and thus that the content of domestic local government law is likely to shape their behavior. That is why domestic local government law becomes a subject of international concern.

Some scholars of comparative governance and of world cities are aware that cities are being thought about in this new way. Comparative scholars have considered efforts by international organizations like the United Nations and the World Bank to promote new forms of urban governance.[45] And world city scholars have recognized that international trade and investment agreements are a critical part of the institutional architecture that enables world cities to become powerful.[46] Neither literature, however, adequately explores the ways in which international institutions and agreements are bringing the governments of

43. Friedmann, *supra* note 30, at 318.
44. *See infra* Section II.B(2).
45. *See* CITIES TRANSFORMED, *supra* note 21.
46. *See, e.g.*, GLOBAL NETWORKS, *supra* note 42; *see also* SAVITCH & KANTOR, *supra* note 26, at 357.

the world's cities within their regulatory reach. To the extent that urban scholars do make this phenomenon the focus of analysis, they examine only a limited number of international rules. They do not relate these rules to the more general body of law for the world's cities that is now coming into being—a comprehensive legal framework that we call international local government law.

II. What Is International Local Government Law?

By calling attention to international local government law, we differ not only from the way other urban scholars think about cities in the world, but also from the way scholars of international law have traditionally conceived of cities. To understand the nature of that difference, it is important to describe the traditional conception of international law that our account challenges. With that background in place, we can then better explain the new manner in which the international legal order is approaching the legal status of cities.

A. *The Traditional Conception of Cities in International Law*

International law has long had an indirect impact on cities. For example, agreements and rules regarding war and peace have shaped cities and their development because cities often bear the brunt of fighting when nations go to war. At the same time, city actions have inevitably influenced international relations. In the nineteenth century, the failure of the City of New Orleans to prevent the lynching of several Italian citizens led to a major diplomatic impasse between the United States and Italy.[47] President Theodore Roosevelt remarked that local policies concerning the anti-Japanese actions of California were one of his chief foreign policy headaches.[48]

Until recently, however, the fact that the global and the local were plainly entwined did not make the legal status of cities a distinct subject of international law. The relationship between a sovereign state and its cities has traditionally been considered an internal domestic matter—the type of issue that is outside the orbit of international law. International law was concerned with sovereign nation-states, not the sub-state organs subordinate to them. References to cities are few and far be-

47. *See* Mob Violence, 6 MOORE DIGEST § 1026, at 837–49 ("Lynching of Italians at New Orleans and Elsewhere"); *see also id.* § 998–9 (describing international negotiations in response to the lynching).

48. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1655 (1997).

tween in the classic texts of international law. Indeed, the field's casebooks, restatements, treatises, and scholarly articles generally ignore cities altogether.[49]

Still, since nation states, with rare exceptions, are comprised of cities, international law has had no choice but to grapple with their legal status on some occasions. Alongside the predominant focus on states, one finds two basic approaches to the city within international law. The first treats cities as being largely independent from any sovereign state and thus under the direct jurisdiction of the international community. The second treats cities as if they were indistinguishable components of their host countries, and thus without any meaningfully separate legal status. The former approach arose in the wake of World War I and applies to a small number of specific cities.[50] The latter applies to cities generally and is foundational to the international legal system. Each approach to the city's legal status, in its own way, denies the third view that is now emerging: that the domestic legal relationship between cities and their states is itself a proper subject of international legal regulation. Instead, each approach renders the nation-city relationship invisible—

49. Much the same can be said about the domestic law of foreign relations in the United States. This field establishes rules regarding the power of cities and other sub-national entities to engage in international affairs. The U.S. Constitution makes it clear, for example, that the individual states may not enter into treaties without congressional approval. And the Supreme Court has relied on the federal constitutional structure to hold that states and cities are impliedly preempted from engaging in a range of practices that might bear on the nation's foreign policy. *See generally* Goldsmith, *supra* note 48. In recent years, scholars of foreign affairs law in the United States have devoted renewed attention to the international role that states and cities should be permitted to play. They have even begun to suggest that, in light of globalization, some long-standing legal doctrines that limit their role should be re-thought. *See id.; see also* Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649 (2002) (discussing how foreign relations law doctrines that are based on history of international relations may need to be reexamined as elements of globalization reduce risk of disastrous interstate conflict). But these scholars have devoted no attention to international law's regulation of city powers. Their focus is entirely domestic and primarily constitutional. Moreover, like scholars of foreign affairs law generally, they are typically not interested in cities as such. They focus on the role of sub-national entities generally, and thus are as likely to discuss the legal rights of American states as cities. *See* Goldsmith, *supra* note 48. The same point can be made about the scholarship concerning the growing body of law known as international economic law. Its focus tends to be on this body of law's impact on the nation state or, in some cases, on the next level of government down in federal systems. To the extent that cities are mentioned, it is generally only in the course of an analysis of international law's role in limiting sub-national governments generally. That international economic law also might be regulating the kinds of powers that nations (or sub-national governments in many federal systems) grant or deny to cities as distinct governmental institutions has essentially escaped scholarly consideration. *See infra* II.C.

50. *See generally* Nathaniel Berman, "*But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993) (discussing the "theoretical displacement of traditional problems of international law [and] particular responses to the Nationalist challenge." *Id.* at 1799).

the first because it separates the city from the nation and the second because it merges the two together.

1. A FOCUS ON STATES, NOT CITIES

The invisibility of cities within international law stems in large part from the fact that international law came into being in response to—and coterminous with—the rise of the independent nation-state.[51] The nation-state thus became the object of legal concern as the law of nations developed. Classic international law texts repeatedly emphasized that sovereign nation-states alone possessed legal personality—that they alone were the subjects of international law. States and only states, they say, can make international law, and states and only states are bound by it.[52]

As is to be expected, there are exceptions to this rule. The Vatican is not a typical sovereign state, yet it is a recognized legal subject in international law.[53] The same is true of the United Nations, which is not a state, but which no one doubts is a legal person for purposes of international law.[54] The legal status of political movements that might rival the state for control—one might think of the Islamic Revolution in Iran or Al Qaeda—is also a subject of controversy.[55] Exempting such nonstates from international legal duties can raise serious concerns, but so can giving them international legal rights. Treatise writers also acknowledge that so-called dependent states—including the component parts of a federation—may sometimes enter into binding international legal agreements even though they are not themselves sovereign in a formal sense.[56]

Nevertheless, the core actor in international law is the sovereign state. "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community

51. As a leading casebook on international law explains, "[t]he structure of the modern law of nations is intimately connected with the era of sovereign national states dealing with each other as independent units. In a strict sense, therefore, the history of the modern law of nations begins with the emergence of independent nation-states from the ruins of the medieval Holy Roman Empire. . . ." *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 9 (3d ed. 1993) [hereinafter HENKIN].

52. *See, e.g.*, J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (5th ed. 1955) ("The Law of Nations, or international law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another." *Id.* at 1.).

53. *See* Guido Acquaviva, *Subjects of International Law: A Power-based Analysis*, 38 VAND. J. TRANS. L. 345, 353–57 (2005).

54. *See* HENKIN, *supra* note 51.

55. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990) (discussing Iran); Acquaviva, *supra* note 53, at 394 (discussing Al Qaeda).

56. *See* BROWNLIE, *supra* note 55, at 60–61, 74–76.

consisting primarily of states having a uniform legal personality."[57] Consistent with this state-centered orientation, the Vienna Convention on the Law of Treaties applies only to an "international agreement concluded between States"[58] and the United Nations admits only states as members.[59]

Even the way that black-letter definitions of the term "state" are written reflects the fact that no consideration was given to the possibility that cities might be independent subjects of international law. The *Restatement (Third) of Foreign Relations* is exemplary in this regard. It provides that "[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other countries."[60] Cities are themselves located within defined territory, and, although their populations are not permanent, neither are the populations of nation-states. The requirement that an entity must be under the control of "its own government" plainly presumes the absence of a superior domestic government, but the locution is telling. After all, the home rule movement in the United States sought to ensure that cities would control their own governments even though it would not make them entirely independent. Yet no one thinks cities with home rule qualify as states under the classic international law definition. Finally, the last requirement excludes cities only because nations typically have forbidden sub-state entities from engaging in formal relations with other nations. In other words, it does not explain *why* cities should be precluded from operating as independent actors in the international legal system. Nor does it acknowledge that the international legal system might have an interest in reforming the legal status of cities within their national legal systems. It just restates the premise of the classic international law position—states and states alone are legally significant.

That prominent legal definitions of the term "state" make no effort to explain why cities are excluded demonstrates how little international law pays attention to them. It is just too obvious that cities have a dependent domestic legal status. Even though independence is not an express requirement of statehood under prominent international law definitions, commentators suggest that it is an all but necessary condition.[61] Cities stand at the bottom of the domestic governmental hi-

57. *See id.* at 287.
58. Vienna Convention, art. 2, May 23, 1969.
59. U.N. CHARTER art. 3.
60. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987); *see also* Montevideo Convention, art. 1, Dec. 26, 1933, 3 Bevans 145.
61. BROWNLIE, *supra* note 55, at 71–72; *see also* Acquaviva, *supra* note 53.

erarchy. To recognize them as separate legal entities would challenge the notion of the state as a unified sovereign—"the sole executive and legislative authority"[62]—for purposes of relating to other states. Such a recognition would transform international law from a means of regulating relations between states into a means of regulating the internal affairs of states.

The same objection, of course, could be raised against the use of international law to regulate how sovereign states treat their own residents. Yet international human rights law has rejected the notion that the relationship between individuals and their states is not a proper subject of international legal concern. The international legal recognition of cities, however, might be seen as posing an even greater threat to the classic view of the proper bounds of international law than the recognition of human rights. Recognizing the rights of cities would suggest that there is no such thing as a single "state" that relates to the world. Instead, there is a composite of distinct governments, each with its own rights and duties. This would imply that the international community has the right to intrude deeply into the internal governmental structure of a sovereign state by according a subordinate governmental entity an individualized legal status. The dangers of this prospect have led traditional international law to exclude the city as a legal concept in a way that it excludes few others.

2. TREATING CITIES AS INDEPENDENT OF STATES

Given international law's essential focus on states, the principal way cities have become visible, not surprisingly, is by being treated as separate from a superior state. Cities that are no longer controlled by a superior state are states in their own right. Singapore is the classic example. It is widely considered a city-state, but, for purposes of international law, it is just a state.[63] Singapore is bound by international legal duties and entitled to international legal rights. Assimilating a city-state to the legal category "state" does no violence to the traditional understanding of international law. A city-state is no different from any other small state, such as Iceland.[64] Each receives international legal recognition precisely because it has no government above it.

On occasion, international law has recognized cities as legal persons without also recognizing them as states. These cases pose a greater

62. BROWNLIE, *supra* note 55, at 74.

63. Singapore is one of eight "cities" discussed in GLOBALIZING CITIES: A NEW SPATIAL ORDER? (Peter Marcuse & Ronald van Kempen eds., 2000).

64. BROWNLIE, *supra* note 55, at 85–86 (discussing micro-states).

challenge to the classic conception of international law as a means simply of regulating sovereign states. They threaten to assert international legal authority over cities that are not city-states. The most famous examples are the International City of Tangiers and the Free City of Danzig.[65] Each was put under direct international control for a period of time following World War I, but neither was conceived of as a newly independent sovereign state. The international agreements that created them provided for their governing institutions. The International City of Tangiers was subjected to the control of a multi-member body comprised of officials from other countries.[66] The Free City of Danzig was placed under the direct protection of the League of Nations.[67] But the International Court of Justice ruled that the Free City of Danzig was sufficiently subordinate that (unlike a state) it was not entitled to membership in the International Labor Organization.[68]

International law did not treat these cities as full-fledged states. However, they were not conceived as subordinate domestic governments within sovereign states either. The purpose of calling Tangiers an "international" city and of designating Danzig a "free" city was to highlight their independence from Morocco and Poland, respectively. They were not governed by a state in the way that cities usually are. The international community itself assumed that supervisory function. By recognizing these cities as legal entities, therefore, international law was not claiming jurisdiction over the domestic legal relationship between states and their cities. Instead, it was attempting to resolve territorial disputes between states by designating certain territory to be under the trusteeship of the international community.[69]

For that reason, these international cities paradoxically reinforced the invisibility of the city in international law. The city became visible so that it could be excised from its state. In the case of the Free City of Danzig, it was because the city was associated with some larger national identity—namely, that of the German people—that it became an object of interest to international law.[70] By internationalizing a largely German territory, the Polish state could be created. The city as

65. *See id.; see* Berman, *supra* note 50, (discussing Danzig); *see* Wikipedia, City-State, http://en.wikipedia.org/wiki/City-state (last visited Nov. 21, 2005) [hereinafter City-State].

66. City-State, *supra* note 65.

67. Berman, *supra* note 50, at 1886–93.

68. Advisory Opinion, *Free City of Danzig and International Labor Organization*, 1930 P.C.I.J. (ser.B) No. 18 (August 26).

69. *See* Berman, *supra* note 50.

70. *See id.*

a separate yet subordinate entity within a state remained unrecognized as a proper subject of international law.

3. TREATING CITIES AS DEPENDENT ON THEIR STATES

Unless a city establishes its independence in the manner just described, international law has traditionally accorded it no legal status at all. With the exception of the aberrant case of the "dependent state" in some federations,[71] subnational governments—and thus cities—are legally non-existent. This is the result of specific legal doctrines.

Under the traditional view, state organs—such as cities—are not directly obligated to comply with international legal requirements. The state is bound, but subunits of the state are not.[72] Indeed, the international legal duty runs against the state even when it was the city that engaged in the problematic behavior. Of course, a state may seek to change a city's behavior in order to ensure that the state itself lives up to its international legal obligations. But, as a formal matter, international law does not bind cities. To the extent that local action is the problem, state action is the solution. Cities are not unique in this regard; the same rule applies generally to all sub-national governments. They, like domestic governmental institutions other than the state itself, are formally insignificant.

A related doctrine of international law seeks to diminish the threat to the international legal system presented by the notion that cities are not bound by international law. Many nations—including the United States—place limits on national governmental authority over local matters.[73] Under international law, however, this does not mean that these federal systems can evade an international legal commitment by appealing to the commands of domestic law. International law provides that "[a] state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law."[74] Thus, if a nation-state wishes to protect itself from liability arising from lower-level governmental conduct that it cannot control, it must include reservations to that effect in its international agreements. Its legal inability to regulate local behavior affords it no excuse.

Of course, a state only needs to protect itself through reservations if international law makes it responsible for the conduct of sub-national

71. HENKIN, *supra* note 51.
72. *Id.*
73. BROWNLIE, *supra* note 55, at 34.
74. *Id.* at 35.

governments. There is nothing natural in the idea that a higher level of domestic government should be liable for the conduct of lower ones. In the United States, California is not liable when one of its cities violates a federal statute. And in a recent set of cases concerning Congress's power to remedy federal constitutional violations, the Supreme Court has split on the question whether American states are responsible for the actions of their cities. Some Justices have argued that evidence of past city violations supplies a basis for Congress to subject states to suits for similar conduct in the future.[75] But other Justices have contended that, in general, a state bears no responsibility for the wrongs committed by its cities.[76] Evidence of their cities' past wrongful conduct would thus provide no basis for congressional legislation that would subject American states to liability.[77]

International law, however, does provide that a state is responsible for the actions of "its officials or its organs."[78] There is an exception when a component of the state commits an *ultra vires* act undertaken without even apparent authority.[79] Otherwise the liability is vicarious. This broad rule regarding "state responsibility" is not designed solely with sub-state governments in mind. The doctrine is in many ways an analogue of the federal constitutional doctrine of state action in the United States. It provides the framework for determining the legal line between governmental action, which may trigger international legal liability, and private action occurring within a government's territory, which often does not.[80] But unlike the constitutional doctrine of state action, the international rules concerning state responsibility also determine which *governmental* actions within a state are those of the "sovereign state" itself. These rules establish that, under international law, virtually all the actions of cities will be treated as if they are the actions of the state.[81]

One can see why a rule that makes states responsible for the conduct of their cities might be thought to follow from the long-standing conception of international law as a means of regulating relations between states. Because a state is sovereign over its territory, action by any

75. *See* Tennessee v. Lane, 541 U.S. 509, n.16 (2004); *see* Bd. of Trs. of Univ. of Al. v. Garrett, 531 U.S. 356, 378–79 (2001) (Breyer J., dissenting).
76. *See Bd. of Trs. of Univ. of Al.*, 531 U.S. at 368–69.
77. *Id.*
78. RESTATEMENT (THIRD) FOREIGN RELATIONS § 207(c); BROWNLIE, *supra* note 55, at 451.
79. BROWNLIE, *supra* note 55, at 447; RESTATEMENT (THIRD) FOREIGN RELATIONS § 207(c).
80. HENKIN, *supra* note 51.
81. BROWNLIE, *supra* note 55, at 446–55.

component of the state is action by the state. Such a conclusion seems to make practical sense. A legal agreement between states could be easily evaded if a sub-national governmental entity were not treated as if it were the state. Through delegations of power downward, states could easily accomplish the very thing that an international agreement sought to preclude. In addition, the tight connection between states and their subsidiary governments limits a foreign state's obligation to deal with constituent part of other states.[82]

Whatever the functional basis for the rule, clearly, the doctrine of state responsibility merging cities into their states influences the domestic legal relationship between central and local governments. By making states responsible for their cities' actions, international law encourages central governments to cut back on the domestic legal protections that sub-national governments are granted. Otherwise, states may expose themselves to liability for conduct that, as a matter of domestic law, they cannot regulate. But this doctrine of state responsibility does not reflect an international position on the legal status of cities as distinct governmental institutions. Nor does it reflect the world community's view as to what kind of governments cities should have or what powers they should be permitted to exercise. In fact, the doctrine of state responsibility applies to all subnational government bodies. Even the sub-national "states" within nation-states that are responsible for determining the legal powers of cities as a matter of domestic law are subject to the doctrine of state responsibility. Thus, while this classic doctrine of international law has had a centralizing bias, by promoting the idea that the nation-state is (and should be) in control, it has done so less out of a desire to suppress city power than to ensure appropriate international relations between states. Questions of the proper extent of city power are still intended to be for states to decide. That international law might influence the domestic resolution of debates over the proper extent of decentralization is simply an incidental

82. Peter Spiro nicely summarizes the functional benefits in this regard:

> In the old world, this doctrine both reflected and reinforced a reality of central government control and centralized relations among states in the international arena. Against the backdrop of thin communication networks and diverse systems of government, it would have been highly inefficient to require states to interact with component units of other states. It would also have been difficult for states to enforce obligations against those component units, for their leverage would, in most cases, have been minimal; greater international conflict would have been the result. Better to require that central governments police their own domains, the interposition of domestic constitutional arrangements notwithstanding, insofar as central governments were best positioned to discipline potentially disruptive actors.

Spiro, *supra* note 49, at 668.

consequence of its efforts to promote the rule of law between sovereign states.

B. *Regulating the Legal Relations Between Cities and Their States*

The invisibility of cities in international law that we have just described is both self-conscious and remarkably complete. Cities are either ignored or seized upon in ways that deny what is unique about them. This is true not only of the classic doctrines of international law but also of the relevant legal scholarship in fields that break with the classic conception. It is no secret that the emerging rules and regulations that comprise international economic law, for example, are often aimed at influencing subnational governmental action. Scholars analyzing these new international legal interventions, however, rarely make special reference to their impact on cities. The very fact that cities stand at the bottom of the domestic governmental hierarchy appears to lead scholars to merge them with higher level subnational governments. They thus are as likely to be referring to the State of California as the City of Los Angeles when they address the increasing international legal regulation of "local" governments.[83]

As we explain in this section, however, the era of cities' invisibility within international law is coming to an end. International law is increasingly penetrating the nation-state in order to regulate directly the actions of subnational governments. In doing so, it is also attempting to redefine the legal position of cities *vis à vis* both higher-level subnational governments and the nation-state itself. In other words, international law is beginning to treat the city as a distinct level of government that may be separately targeted for legal transformation. In part, this change stems from broad jurisprudential shifts away from the classic conception of international law,[84] an increased international attention to supra-national and sub-national entities rather than simply nation-

83. *See, e.g.*, Edward T. Hayes, *Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within Their Territories*, 25 NW. J. INT'L L. & BUS. 1 (2004); Hal S. Shapiro, *Is There a Role for Sub-Federal Governments in International Trade Policy Formation?*, 9 IUS GENTIUM 73 (2003); Peter L. Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 CORNELL INT'L L.J. 1 (2001); Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491 (2001).

84. Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 4, 841 (2003).

states,[85] and the acceleration of global interdependence.[86] But the change is also the product of cities' own efforts, the actions of human rights organizations and international financial institutions, and the phrasing of recent international agreements.[87]

We examine below three examples of cities' own attempts to intervene in world affairs: the creation of inter-city networks, the formulation of municipal foreign policies, and the proposal for a World Charter of Local Self-Government. We then turn to ways in which international efforts to promote good governance and human rights are affecting local government organization, policies, and powers. The discussion concludes with an analysis, in the next subsection, of cases that examine the legality of city actions under international agreements.

Our decision to organize our exposition of international local government law in this order is, in part, designed to highlight the complexities of the meaning of the word "law" within the phrase "international local government law." These complexities are not news to international lawyers: they have long struggled to define the ways in which international law is really law. We do not intend to revisit those struggles here. It seems clear to us that when we reach the end of our account—our discussion of cases decided by international arbitration tribunals—we are dealing with law in the most traditional definition of the term. As we move backwards toward the beginning of our discussion, the meaning of the word "law" undoubtedly changes. But international lawyers themselves study the promotion of good governance[88] and human rights[89] as part of the international legal order. And Anne-Marie Slaughter has written a recent book designed to bring networks, like the inter-city networks which we describe immediately below, into the purview of international lawyers.[90] This article is working within this capacious tradition, taking as its subject the kinds of activities international lawyers take as their subject with one difference: our focus is on international law's role in defining the relationship between cities and the nation-states in which they are located.

85. *See* Mildred Warner & Jennifer Gerbasi, *Rescaling and Reforming the State Under NAFTA: Implications for Subnational Authority*, 28 INT'L J. OF URB. & REG. RES. 4, 858 (2004).

86. *See id.*

87. *See id.* at 868–69.

88. *See, e.g.*, Kerry Rittich, The Future of Law and Development: Second Generation Reforms (2004) (unpublished manuscript, on file with author).

89. HENRY J. STEINER & PHILIP ALSTON, HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2d ed. 2000).

90. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

1. CITIES' INTERNATIONAL ACTIVITIES

When cities enter the international sphere on their own, they do so recognizing the extent of the power that national and sub-national governments exercise over them. Cities' international activities are designed, in part, to change these existing central-local relationships by expanding the scope of cities' authority. This objective is most obvious, and most explicit, in the proposed World Charter of Local Self-Government.[91] But it is also an aspect of the efforts to form inter-city networks and to establish municipal positions on foreign policy issues.

a. International City Networks

Anne-Marie Slaughter's *A New World Order*[92] is devoted to a discussion of the emergence of sub-state networks as an important part of the international legal order. Her book describes what she calls "the disaggregated state" and makes a normative argument for its virtues.[93] International law, she suggests, should not be concerned simply with international organizations and the relationships among unitary states.[94] Instead, it should take into account the existing new world order being built by a wide variety of inter-connections formed by subcomponents of nation-states. These inter-connections, she argues, provide a new, more promising basis for solving world problems by increasing the scope and quality of international cooperation.[95] And, if properly organized, they can do so in a way that reflects "values of equality, tolerance, autonomy, interdependence, liberty, and self-government."[96]

Slaughter's analysis of the disaggregated state is a helpful way to understand the current expansion of inter-city networks around the world. At the same time, it is a testament to the invisibility of cities to international lawyers. Slaughter describes a wide variety of sub-state networks—judicial, legislative, regulatory—as well as the activities of nongovernmental entities in her canvassing of the disaggregated state. But the word "city" does not appear in her index; she does not discuss inter-city networks at all. Although she makes a very brief reference to "subsidiarity,"[97] her vision of an international world order based on

91. *See infra* notes 133–35 and accompanying text.
92. SLAUGHTER, *supra* note 90.
93. *Id.* at 12.
94. *Id.* at 13.
95. *Id.* at 213–15.
96. *Id.* at 31.
97. SLAUGHTER, *supra* note 90, at 255–57 (discussing subsidiarity; the word "local" appears only in the definition of subsidiarity: "the location of government power at the lowest level practicable among local, regional, national, and supranational authorities." *Id.* at 259.).

disaggregated states does not seem to envision international activities by cities.

Yet cities are involved in the very kinds of networks that Slaughter describes. Indeed, as the Constitution of United Cities and Local Governments states, "representatives of local governments the world over, serving the populations of rural and urban communities; small, medium and large towns; metropolises and regions; gathered in Paris, France on 5 May 2004 to create a new unified world organisation of local governments."[98] Among the objectives of the newly created United Cities and Local Governments are promoting "democratic local self-government throughout the world," political representation of local governments" in the work of international organizations, the development of principles of good urban governance, and the "strengthening of free and autonomous local governments through learning, exchange, and capacity-building.[99] To accomplish these objectives, the organization intends to engage in lobbying in the international arena, information sharing, the establishment of extensive inter-city networks, and the formulation of common policy positions.[100] By design, if it is successful, this kind of activity would strengthen city power. In fact, as an earlier joint statement makes explicit, the cities are seeking the support of nation-states as they try to increase their domestic responsibility and their role in international institutions.[101]

United Cities and Local Governments is the culmination of a history of efforts to create a world-wide inter-city organization.[102] But there are many other kinds of inter-city activities and connections as well, including Sister Cities International (linking 2,500 cities in 125 countries),[103] the International City/County Management Association (providing technical and management assistance to its 8,000 members),[104]

98. UCLG Constitution, *supra* note 8, preamble.
99. *Id.* art. 3.
100. *Id.* art. 4.
101. II World Assembly of Cities and Local Authorities, Rio de Janeiro, 6 May 2001, http://www.iula-int.org/iula/upload/template/templatedocs/wac/aciifina/declaration.htm (last visited Nov. 21, 2005).
102. The UCLG Constitution refers to, among other predecessors, the activities since 1913 of the International Union of Local Authorities, the adoption in 1957 of the United Towns Charter, and the 1996 Final Declaration of the World Assembly of Cities and Local Authorities adopted in Istanbul in 1996. *Id.*
103. City Mayor's Organisation, *Communities in some 125 countries work for peace through Sister Cities*, http://citymayors.com/orgs/sister_cities.html (last visited Nov. 21, 2005).
104. International City/County Management Association, Association Overview, http://www.icma.org/main/bc.asp?bcid=60&hsid=1&ssid1=17&ssid2=22&ssid3=259 (last visited Nov. 21, 2005).

and a variety of regional inter-city networks that cross national boundaries.[105] One particularly noteworthy organization is Cities Alliance, launched in 1999 by the World Bank and the United Nations Human Settlements Programme (UN-Habitat). Cities Alliance is designed to foster new ways to develop better slum-upgrading programs for the urban poor and to build a consensus for development strategies and investment.[106]

As we shall discuss in our final section, both Cities Alliance and United Cities and Local Governments illustrate the complexities of finding the proper vehicle for representing the views of the world's cities. The Board of Directors of Cities Alliance, called the Consultative Group, is co-chaired by officials of the World Bank and UN-Habitat, and has members from financial organizations, international organizations of cities (including United Cities and Local Governments), and national governments. But it includes no representatives from individual cities.[107] The United Cities and Local Governments leadership, by contrast, is made up of city officials. But its top officers include not only the mayors of Paris and Istanbul but also of South Bay, Florida (population: 3,859).[108] (United Cities and Local Governments does have a metropolitan section, called Metropolis, which is the world organization of major metropolises. But its representativeness is itself open to question: at the moment, for example, its membership does not include any cities in the United States.[109])

United Cities and Local Governments is in the process of becoming the voice of the world's cities in the international arena. In 2003, the Secretary General of the United Nations established a Panel of Eminent Persons, chaired by Fernando Enrique Cardoso, the former President of Brazil, to review the relationship between the United Nations and civil society. The Cardoso report recommended that the United Nations "regard United Cities and Local Governments as an advisory body on

105. *See, e.g.*, FLACMA, http://www.flacma.org (Latin America) (last visited Nov. 21, 2005); Council of European Municipalities and Regions, http://www.ccre.org (Europe) (last visited Nov. 21, 2005).

106. The Cities Alliance, http://www.citiesalliance.org/index.html (last visited Nov. 21, 2005).

107. The Cities Alliance, City Alliance Members, http://www.citiesalliance.org/members/members.html (last visited Nov. 21, 2005).

108. United Cities and Local Governments, Presidency, Treasurer and Vice-Presidents, http://www.cities-localgovernments.org/uclg/index.asp (follow "About Us" hyperlink; then "Presidency" hyperlink) (last visited Nov. 21, 2005); Wikipedia, South Bay, Florida, http://en.wikipedia.org/wiki/South_Bay,_Florida (last visited Nov. 21, 2005).

109. Metropolis, About Metropolis, http://www.metropolis.org/index.asp?docId=40&MenuID=40&seccio=2 (last visited Nov. 21, 2005).

governance matters."[110] It also recommended that that UN agencies work closely with local authorities and that the General Assembly debate a resolution "affirming and respecting local autonomy as a universal principle."[111] In 2004, United Cities and Local Governments entered into an Agreement of Cooperation with UN-Habitat to work together on a global campaign on urban governance, a global observatory that will monitor progress on the strengthening of local authorities, the promotion of an international dialogue on the decentralization of power, and similar objectives.[112] In 2005, United Cities and Local Governments called upon national governments at their Millennium + 5 Summit in September, 2005, to "formally recognize the role of local government as an essential and unique partner in implementing the United Nation's Millennium Goals." The United Cities and Local Governments website helpfully provided a draft letter, to be signed by individual mayors, which concluded with this sentence: "The role of local governments will become all the more effective if it is recognised at the world level and if UN advisory body status is granted to our organisation United Cities and Local Governments."[113]

Local Agenda 21 is another illustration how local governments have begun to integrate themselves into international decision making. Agenda 21 is a global environmental and development program adopted by the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992.[114] It establishes a "global partnership" to work together on policies ranging from combating poverty to the protection of the atmosphere. This partnership includes not

110. Proposal 18, Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations, Transmittal letter dated 7 June 2004 from the Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations addressed to the Secretary-General,U.N. Doc. A/58/817, 20 (June 11, 2004), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N04/376/41/PDF/N0437641.pdf?OpenElement (last visited Nov. 21, 2005).

111. *Id.* at 20 (Proposal 17, 18).

112. Press Release, United Cities and Local Government, United Cities and Local Governments and UN-HABITAT embark on partnership following landmark Agreement signed at World Urban Forum (Sept. 17, 2004), http://hq.unhabitat.org/cdrom/wuf/documents/Special%20events/MoU/Agreement%20UN-HABITAT%20and%20UCLG/Press%20releases/PRESS2.pdf (last visited Nov. 21, 2005); Agreement of Cooperation Between the United Nations Human Settlements Programme and United Cities and Local Government, http://www.unhabitat.org/unacla/documents/uclg_cooperation.pdf (last visited Nov. 21, 2005).

113. United Cities and Local Government, Letter in support of the Millennium Development Goals, http://www.cities-localgovernments.org/uclg/upload/news/newsdocs/Letter_for_Government.doc (last visited Nov. 21, 2005).

114. United Nations Division on Sustainable Development, Agenda 21, http://www.sidsnet.org/docshare/other/Agenda21_UNCED.pdf (last visited Nov. 21, 2005) [hereinafter Agenda 21].

only a Commission on Sustainable Development, made up of nation-states, but also the participation of what are called "major groups."[115] The somewhat-Borgesian[116] list of these major groups includes women, indigenous groups, nongovernmental organizations, business and industry—and local governments.[117] For cities, this recognition of a role in international decision making—a role independent of their nation states—is significant. Chapter 28 of Agenda 21 notes:

> Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilizing and responding to the public to promote sustainable development.[118]

Agenda 21 called upon local governments to come up with their own "Local Agenda 21" programs.[119] According to a survey published by the Commission on Sustainable Development, more than 6,000 local governments in 113 countries were participating in Local Agenda 21 initiatives by 2001.[120] Local governments' major complaint about their participation, according to the survey, was their lack of adequate authority under domestic law to implement environmental policy.[121] In its conclusion, the survey recommended that national policies affecting local power—in particular, taxation policy and funding mechanisms—be re-evaluated.[122]

b. Municipal Foreign Policy

Local Agenda 21 engages local governments on international issues through the auspices of international organizations. But local governments are also engaging these issues on their own, an effort that is collectively called "the municipal foreign policy movement."[123] In the

115. *Id.* at Section III.

116. *See* Jorge Luis Borges, *The Analytical Language of John Wilkins, in* JORGE LUIS BORGES, OTHER INQUISITIONS 101 (Ruth L.C. Sims trans., Univ. Tex. Press 1964).

117. Agenda 21, *supra* note 114, chs. 24, 26, 27, 28, 30.

118. *Id.* ch. 23.

119. *Id.* at 28, 3.

120. COMMISSION ON SUSTAINABLE DEVELOPMENT, SECOND LOCAL AGENDA SURVEY (2002), http://www.iclei.org/documents/Global/final_document.pdf [hereinafter LOCAL AGENDA SURVEY].

121. *Id.* at 21.

122. *Id.* at 27.

123. EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998); Andrew Kirby & Sallie Marston, *World Cities and Global Communities: The Municipal Foreign Policy Movement and New Roles for Cities, in* WORLD CITIES IN A WORLD SYSTEM, *supra* note 6, at 232; HEIDI HOBBS, CITY HALL GOES ABROAD (1994).

movement's early years, local city councils in the United States passed resolutions supporting a nuclear freeze, urging divestment from firms doing business in South Africa, and demanding cuts in the Pentagon's budget.[124] More recently, more than 165 cities have passed resolutions opposing the Iraq War,[125] and more than 180—including New York City—have passed resolutions opposing the Patriot Act.[126]

But the municipal foreign policy movement is not limited to local efforts to take positions with respect to the foreign policies of their host nations. In its contemporary variant, it also involves the local effort to internalize aspects of international law itself. San Francisco and Los Angeles, for example, have adopted the United Nations Convention on the Elimination of all Forms of Discrimination Against Women—a convention that has not been adopted by the United States.[127] Salt Lake City and Seattle have pledged to follow the Kyoto Protocol dealing with global warning, despite the lack of federal support for the Protocol.[128]

The Supreme Court's decision in *Crosby v. National Foreign Trade*,[129] holding that Massachusetts's effort to bar state entities from buying goods from Burma was preempted by a federal statute, is likely to limit these kinds of initiatives.[130] And it may have foreshadowed the future when it cited the interests of an international legal institution—the World Trade Organization—in determining the proper scope of the domestic legal powers of cities. But the fact that the *Crosby* decision was based on statutory interpretation rather than on making the federal government the exclusive foreign policy voice as a constitutional matter means that it is not likely to end the local incorporation of international law.[131] Moreover, *Crosby* does not affect many of the kinds of initiatives cities are undertaking. Cities, like states, have many interests abroad, ranging from trade to tourism, and their active pursuit of these interests is not likely to diminish. Seattle, for example, has a regional public/private partnership that seeks to link city officials and business orga-

124. HOBBS, *supra* note 123; Kirby & Marston, *supra* note 123, at 275.
125. Cities for Peace, http://www.ips-dc.org/citiesforpeace/ (last visited Nov. 11. 2005).
126. Evelyn Nieves, *Local Officials Rise Up to Defy the Patriot Act*, WASH. POST, Apr. 21, 2003, at A01.
127. Shanna Singh, Note, *Brandeis's Happy Incidents Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 546 (2005); Los Angeles City Resolution in Support of CEDAW, http://www.lacity.org/csw/html/cswpgE3d.htm (last visited Nov. 21, 2005).
128. Singh, *supra* note 127, at 547–48.
129. 530 U.S. 363 (2000).
130. *Id.* at 388.
131. Goldsmith, *supra* note 48, at 1641.

nizations in an effort to promote domestic and international trade.[132] And the City of Seattle itself, like Atlanta, Göteburg (Sweden), Kyoto (Japan), and other cities, has an office of international relations.[133] The more cities assert themselves internationally in this way, the more likely it is that they will enmesh themselves in international city networks of the kind described above.

c. The World Charter of Local Self-Government

We are still at the beginning of these kinds of city efforts to empower themselves domestically by intervening in the international arena. The culmination of these efforts could well be something like The World Charter of Local Self-Government.[134] At the moment, the World Charter is just an idea—a discussion draft that might ultimately be presented to the United Nations General Assembly. But the draft is an important indicator of the current state of thinking about international local government law because it contains language that would revise local government law around the world.

A few excerpts suggest the scope of its ambitions:

> Article 2. The principle of local self-government shall be recognized in national legislation, and where practicable guaranteed in the constitution.
>
> Article 3. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.
>
> Article 9(1). Local authorities shall be entitled to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.[135]

Like many of the other initiatives described above, the World Charter is a product of efforts by UN-Habitat and international organizations of city governments. But these organizations did not invent the provisions just quoted. They—and other aspects of the World Charter—derive from an already existing international agreement: the European Charter of Local Self-Government, which was proposed by the Council of Europe in 1985 and came into force in 1993.[136]

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132. Trade Development Alliance, http://www.seattle.gov/tda/about/mission.htm (last visited Nov. 21, 2005); *see* FRY, *supra* 123, at 66–105.

133. Seattle Office of Intergovernmental Relations, http://www.cityofseattle.net/oir/ (last visited Nov. 21, 2005); Atlanta Office of International Relations, http://www.atlantaga.gov/mayor/off_exteraffair.aspx (last visited Nov. 21, 2005); City of Gotenborg, International Activities, http://www10.goteborg.se/internationellt/en/ (last visited Nov. 21, 2005); International Relations Office of Kyoto City, http://www.city.kyoto.jp/somu/kokusai/index_e.html (last visited Nov. 21, 2005).

134. *See* United Nations Centre for Human Settlements (Habitat) World Associations of Cities and Local Authorities Coordination, Towards a World Charter of Local Self Government, http://www.gdrc.org/u-gov/charter.html (last visited Nov. 21, 2005).

135. *Id.*

136. Council of Europe, European Charter of Local Self-Government, http://conventions.coe.int/Treaty/EN/Treaties/Html/122.htm (last visited Nov. 21, 2005).

2. INTERNATIONAL INTERVENTIONS INTO CITY DECISION MAKING

It seems uncontroversial to categorize the activities just mentioned as city initiatives.[137] The status of the next two topics—the role of urban governance in international development and international human rights law—is much more ambiguous. Progress on international development policy and human rights is often linked with city empowerment. Cities, it is said, are themselves the best vehicles to improve the quality of urban management and to foster the rights of their citizens.[138] But these aspects of international local government law can just as easily be seen as restrictions on city power rather than as efforts to enable it. As we shall see, urban governance reform has become part of the agenda of international financial institutions as they make development policy, and human rights protections are the product of agreements entered into by national governments, not by the cities themselves. Indeed, these international interventions into city affairs stem from long-standing concerns about local corruption and local disregard for minority rights, concerns that underlie other international attempts to regulate city powers as well.

a. Good Urban Governance and International Development

In recent years, international organizations have increasingly stressed the importance of good governance to effective economic development.[139] Often, this emphasis is presented as just common sense: if governments are not organized to make proper use of development funds, the money is not likely to serve its purpose. Indeed, the language of good governance is increasingly framed in terms of a world-wide consensus, a consensus embraced by international organizations, by international financial institutions as an aspect of their development policies, and by national governments, including those who are recipients of funds from these financial institutions.

The World Bank's Comprehensive Development Framework highlights the importance of good governance.[140] But, in doing so, it builds on the Monterrey Consensus formulated in 2002 by heads of state and government:

137. As we suggest in Section III, however, the reality is in fact much more complex. *See infra* Section III.

138. *See infra* Section II.B(2)(a).

139. Rittich, *supra* note 88.

140. The World Bank, Comprehensive Development Framework, http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,pagePK:60447~theSitePK:140576,00.html (last visited Nov. 21, 2005).

> Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication, and employment creation. Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing.[141]

This excerpt, like much of the literature about the international push for good governance, seems to have in mind reform of national government practices and national legal rules. But UN Habitat's Global Campaign on Urban Governance makes clear the role of cities in this effort.[142] Cities, the Campaign's concept paper argues, are the engines of economic and social development, and good urban governance is the key ingredient in its success.[143] Cities themselves, the concept paper suggests, understand this and want to embrace good governance.[144] As a result, UN-Habitat adopts an "enabling approach" to progress in this area: it seeks "to increase the capacity of cities and other stakeholders to practice good urban governance."[145] The concept paper also makes clear, however, that the achievement of the campaign's goals—sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement, and citizenship and security—will often require new national legislation.[146] Moreover, as another UN-Habitat paper documents, good urban governance is not just a worthwhile goal that nations should adopt.[147] Important aspects of its goals are a binding obligation of international law—"a legally binding human right."[148]

Good urban governance, then, is three things simultaneously: an international legal obligation, a matter for national legislation, and a method of empowering cities.

> [T]he Global Campaign on Urban Governance proposes to take action on three fronts. First, by exploring the links between international law and the principles of good governance, the Campaign will provide a substantive and legal basis to promote normative debate on the principles of good urban governance. This work will also

141. Monterrey Consensus, Confronting the Challenges of Financing for Development: A Global Response 3, http://www.un.org/esa/ffd/Monterrey-Consensus-excepts-aconf198_11.pdf (last visited Nov. 21, 2005).
142. CONCEPT PAPER, *supra* note 9.
143. *Id.* at 4.
144. *Id.* at 9.
145. *Id.* at 3, 8.
146. *Id.* at 3–4.
147. United Nations Human Settlement Programme, International Legal Instruments Addressing Good Governance 5 (2002), http://www.unhabitat.org/campaigns/governance/documents/Intl%20legal%20instruments%20addressing%20good%20gov.pdf (last visited Nov. 21, 2005).
148. *Id.*

> support the ongoing "Dialogue on Decentralisation," the follow-up activity to the World Charter of Local Self-Government. Second, the work on legislation will support the preparation of national campaigns by examining Government commitments to international and human rights legislation. Third, the Campaign will provide support to countries seeking to revise national, state/provincial or local legislation to provide for more inclusive urban governance.[149]

However it is implemented, UN-Habitat's definition of good urban governance would substantially change local government law around the world. The goal of sustainability would affect both the process of environmental planning and its focus: it involves establishing a consultative process for decision making and includes poverty reduction, as well as historical preservation, in its goals. Subsidiarity envisions developing "clear constitutional frameworks for assigning and delegating responsibilities and commensurate power and resources from the nation to the city level and/or from the city level to the neighborhood level."[150] Equality envisions quotas for women as members of local authorities as well as the revision of regulatory frameworks.[151] Efficiency is designed to promote public-private partnerships, management contracts for delivering public goods, and "equitable user-pay principles" for municipal services.[152] ("[G]overnance is not government," the report makes clear. "[G]overnance includes government, the private sector, and civil society.")[153] Transparency and accountability includes matters as detailed as the reduction of administrative discretion in permit processing and codes of conduct for public officials.[154] Civic engagement refers not only to promoting elections of municipal officials but also to holding referenda on important development issues.[155] Finally, security covers matters ranging from ensuring the poor's access to employment and credit to developing a metropolitan-wide system of policing.[156]

Domestic local government law now controls the resolution of every one of these issues. Given the current ambiguities, it is not clear which of these topics—and they are only illustrative of the list UN-Habitat has prepared—would be discretionary with city officials, required as conditions for receiving funds from international financial organiza-

149. UN-HABITAT, The Global Campaign on Urban Governance-Legislative Reform, http://www.unhabitat.org/campaigns/governance/activities_3.asp#Legislation (last visited Nov. 21, 2005).
150. CONCEPT PAPER, *supra* note 9, at 13.
151. *Id.* at 14.
152. *Id.*
153. *Id.* at 8.
154. *Id.* at 15.
155. CONCEPT PAPER, *supra* note 9, at 15.
156. *Id.* at 12–15.

tions, determined by national legislation, or a mandate of international law. Indeed, it might be hard to distinguish among these possibilities: the World Bank, for example, seems likely to support cities that have signed on to the good governance agenda over those that have not.[157] What is clear is that good urban governance has the potential of becoming a substantive agenda that will make international local government law an important vehicle for defining local power. Already, according to UN-Habitat, efforts to implement the agenda are "underway or are planned in Nigeria, Tanzania, Burkina Faso, Senegal, India, The Philippines, Nicaragua, Jamaica, Brazil, Cuba, Peru and the Balkans."[158]

b. International Human Rights Law

The current international emphasis on human rights could become an equally important transformative vehicle for local government law. The campaign for human rights shares many of the ambiguities—and ambitions—of the focus on good urban governance. Indeed, the two efforts can be seen as part of a common agenda. The goal of the Global Campaign for Urban Governance, according to the concept paper, is an "inclusive city, a place where everyone, regardless of wealth, gender, age, race or religion, is enabled to participate productively and positively in the opportunities cities have to offer."[159] One way to make this possible is the international effort to secure economic, social, and cultural rights—specifically, the rights to education, housing, and health care.[160]

Much has been written about the complexities involved in the attempt to secure these rights. We seek here not to review this extensive literature but to focus on an aspect that the literature largely overlooks: the role of cities in this effort. In many parts of the world, education, housing, and health care are local matters. Local governments (or local public authorities) often run schools, provide and regulate housing, and

157. THE WORLD BANK, CITIES IN TRANSITION 20 (2000), http://www.worldbank.org/html/fpd/urban/strategy/CitiesSummary.pdf (last visited Nov. 21, 2005) ("In selecting cities for assistance, the Bank . . . would . . . target aid to cities showing a determination to help themselves." *Id.*) [hereinafter CITIES IN TRANSITION].

158. UN-HABITAT, The Global Campaign on Urban Governance-Campaign Overview, http://www.unhabitat.org/campaigns/governance/campaign_overview.asp (last visited Nov. 21, 2005).

For The World Bank's projects, see The World Bank, Urban Development-Projects & Policies, http://www.worldbank.org/urban (follow "Projects & Policies" hyperlink) (last visited Nov. 21, 2005).

159. CONCEPT PAPER, *supra* note 9, at 3.

160. *See* United Nations, International Law, http://www.ohchr.org/english/law/index.htm (last visited Nov. 21, 2005).

offer health care services. If internationally recognized human rights are implicated in the provision of these local services, important city activities, along with city finances, will have to be organized to take them into account.

As was the case with good governance, many people see the furthering of human rights and city empowerment as going hand-in-hand. By this they mean both that the decentralization of power will promote greater access to education, housing, and health care and also the reverse: that cities' promotion of these human rights will further the prospect of local self-government.[161] The Founding Declaration of United Cities and Local Governments emphasizes the first point. Cities' "responsibilities in housing, health and education allow us to develop responses adapted to the needs of our communities,"[162] the Founding Declaration asserts, and it adds: "[w]ell aware of the needs of our communities, local governments propose the creation of a legal framework favorable to increasing the fundamental rights of all citizens, including the right to education, health care, [and] access to housing. . . ."[163] *Local Rule: Decentralization and Human* Rights, a report issued by the International Council on Human Rights, emphasizes the second point: "[w]ere decentralization explicitly linked to human rights, the case for its legal foundation would be strengthened."[164] Yet, as everyone knows, international human rights are the product of efforts of international organizations and of covenants signed by nation-states, not the world's cities. They, not cities, are responsible for the creation of the "framework" that the Founding Declaration calls for. Thus they, not cities, will articulate what these rights mean.

Whoever ultimately defines economic, social, and cultural rights, their implementation, like that of the campaign for good urban governance, will inescapably have an impact on local government law. Consider only a few examples. According to the United Nations Economic and Social Council, the right to education includes the right of all children, regardless of their nationality or legal status, to attend public schools.[165] The right to adequate housing covers matters such as reducing racial segregation, providing basic infrastructure, and limiting forced

161. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, LOCAL RULE: DECENTRALISATION AND HUMAN RIGHTS (2002), http://www.ichrp.org/ac/excerpts/96.pdf (last visited Nov. 21, 2005) [hereinafter LOCAL RULE].

162. UCLG FINAL DECLARATION, *supra* note 10, ¶ 21.

163. *Id.* ¶ 26.

164. LOCAL RULE, *supra* note 161, at 35.

165. UN ECONOMIC AND SOCIAL COUNCIL, RIGHT TO EDUCATION: SCOPE AND IMPLEMENTATION ¶ 34 (2003).

evictions.[166] The right to health extends "to the underlying determinants of health, such as access to safe and potable water and adequate sanitation."[167] In many parts of the world, responsibility for these issues has been delegated by national or sub-national governments to cities. As a result, local government law now determines school admission policies, rules about racial segregation and evictions, and the provision of water and sanitation. Enforcement of economic, social, and cultural rights would thus do more than enhance individual well-being. It would affect the allocation of power to cities, making international local government law one of the ways that city services would be designed. Even now, among other projects, UN-Habitat is working with the governments of Brazil, Burkina Faso, Morocco, and Senegal to secure tenure for people living in informal settlements and slums,[168] and with the governments of Kenya, Tanzania, and Uganda to improve water and sanitation in more than a dozen cities near Lake Victoria.[169]

3. CONCLUSION

A statement by UN-Habitat about local power seems worth quoting as a conclusion to this subsection. Although it speaks of developing countries and economic development, much of what it says also applies to developed countries and to matters such as urban governance and human rights. What's striking to us about the quotation is the scope and ambition of the international agenda for cities that it envisions.

> For a variety of reasons, many of them political, cities in most developing countries have not been given the tools needed to play the strong role that modern economic theory would assign to them. They are still relatively dependent upon highly centralized political and bureaucratic systems that are too often unresponsive to urban needs. Such cities may not be granted sufficient authority or financial means to deal with acute pains of growth, let alone chronic poverty. Without sufficient resources and proper capabilities, cities will continue to be perceived as a developmental problem not a solution. Until member states of the United Nations become more confident in their own local authorities, express that confidence in a generous and practical articulation of sovereignty that welcomes national subsidiarity in matters local, the national developmental toolkit will remain functionally deficient.[170]

166. UN ECONOMIC AND SOCIAL COUNCIL, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE RIGHT TO ADEQUATE HOUSING (1993).

167. UN ECONOMIC AND SOCIAL COUNCIL, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: PHYSICAL AND MENTAL HEALTH ¶ 23 (2003).

168. UN-HABITAT, RESPONDING TO THE CHALLENGES OF AN URBANIZING WORLD: UN-HABITAT ANNUAL REPORT 15 (2005), http://www.unhabitat.org/documents/UN-HABITAT_AR_2005.pdf (last visited Nov. 21, 2005) [hereinafter UN-HABITAT ANNUAL REPORT].

169. *Id.* at 23.

170. UN-HABITAT, THE UN-HABITAT STRATEGIC VISION 5 (2003), http://www.unchs.org/documents/HabVision030505Public.pdf (last visited Nov. 21, 2005) [hereinafter STRATEGIC VISION].

C. *International Controls on City Land Use Powers*

The campaigns for urban governance and human rights are works-in-progress. They are just beginning to have an impact on city governments. The cases decided by international arbitration tribunals dealing with local land use decisions, to which we now turn, leave this world of "progressive realization."[171] City land use decisions are being intensively reviewed—and sometimes overturned—by tribunals acting pursuant to international trade and investment agreements.[172] This kind of international legal regulation of local land use power is potentially of great significance to the word's cities. No aspect of municipal legal power more visibly shapes city life than the regulation of real estate development. Cities throughout the world have significant authority in this area, even though national and sub-national governments impose many limitations on its exercise. Now, the international legal system is imposing its own limitations on city authority, and, in doing so, transforming the traditional domestic legal relationship between cities and higher levels of government.

1. INTERNATIONAL ECONOMIC LAW AND CITIES

The cases we examine below are part of a body of law known as international economic law. The cases demonstrate that international local government law can be quite law-like. In these cases, a local government action has occasioned what amounts to a lawsuit, and the dispute has been resolved by a kind of judicial decision—usually by an arbitration panel overseen by the International Center for the Settlement of Investment Disputes. These decisions are important, however, for reasons that go beyond the fact that they constitute "hard" law. The broad corpus of international trade and investment agreements offers a potential counterweight to the broad statement from the UN-Habitat just quoted. There, representatives of the international community warned that, unless cities are "granted sufficient authority or financial means to deal with acute pains of growth," they will "continue to be perceived as a developmental problem not a solution."[173] The agreements we discuss in this section reflect an opposite concern: that the grant of authority to local governments is itself a development problem. Cities have too much power, the cases suggest, and they use it to thwart foreign investors' projects.

171. *See supra* notes 165–67.
172. *See infra* Section II.C(2).
173. STRATEGIC VISION, *supra* note 170, at 5.

Two of the four land use cases we consider here concern provisions of the North American Free Trade Agreement (NAFTA), an agreement among the United States, Mexico, and Canada. Another arises from an investment dispute between Mexico and a Spanish company, and the final case involves a dispute between Chile and a Malaysian firm. These cases review provisions that can be found in many other trade agreements between the United States and other countries—such as the recently approved Central American Free Trade Agreement—and in equivalent trade and investment agreements between countries around the world. There has been dramatic growth in the number of agreements reached, and all told there are now more than 1,500 bilateral investment agreements worldwide.[174] These agreements are significant in their own right, but some have also sought to use them as the building blocks for even more ambitious (but as yet unsigned) multilateral agreements, such as the Free Trade Agreement of the Americas, which would substantially expand NAFTA both in terms of the countries covered and in the kinds of protections provided,[175] and the Multilateral Agreement on Investment, which is intended for adoption by the twenty-nine member countries of the Organization for Economic Cooperation and Development.[176] Although neither of these broader agreements is likely to be adopted in the near future, they nonetheless demonstrate the potential reach of this emerging body of law.

Because the cases that we examine are representative of the kinds of international disputes that will likely arise in the next several decades, certain of their common features deserve special emphasis. The agreements they interpret usually guarantee foreign investors a minimum level of treatment and provide them with protections against expropriation—protections that often exceed the level that domestic law would provide.[177] A foreign company can thus enjoy more rights than domestic competitors operating in the same country. Indeed, the conferral of such

174. *See* United National Conference on Trade and Development, *New Records Being Set in Global Foreign Direct Investment Despite Financial Crises—Some Gain Possible for 1998*, http://www.unctad.org/Templates/webflyer.asp?docid=3151&int ItemID=2024&lang=1 (last visited Nov. 28, 2005).

175. Jacqueline Granados, *Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189 (2005).

176. Stephen J. Canner, *The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 657 (1998).

177. *See, e.g.*, Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 59–86 (2003) (discussing how arbitral interpretations of Article 1110 threaten to impose a compensation requirement more expansive than the Fifth Amendment to the U.S. Constitution).

extra protection is a key goal of such agreements given concerns about the legal systems in some countries. Some of the agreements permit only states to bring claims, but many confer rights directly on private actors. Consistent with the traditional conception of international law, these agreements typically do not make cities directly liable to these private actors and do not directly preempt local laws. The international legal obligation runs only against the nation-state and the remedy for breach is typically compensation rather than injunctive relief.

Still, in order to ensure a favorable climate for foreign investment worldwide, provisions of international trade agreements are increasingly targeting the exercise of ordinary local governmental powers.[178] Moreover, even if the risk of cities' international legal liability remains low, international agreements often prompt states to exert strict regulatory control over their local governments. Some states have suggested that international agreements enable national governments to justify greater supervision of local policymaking than domestic politics alone would permit.[179] At the very least, many nation-states, such as Canada, seem to be taking local compliance quite seriously.[180]

178. This expansionary trend can be seen by comparing the terms of the General Agreement on Tariffs and Trade (GATT), an agreement from the 1940s that comes under the umbrella of the World Trade Organization (WTO), with subsequent WTO agreements, such as the 1994 General Agreement on Trade in Services (GATS). As one commentator explains, "the GATS provision on national treatment . . . embraces all policies that might discriminate between domestic and foreign suppliers. . . . More important, the GATS article on market access extends beyond traditional concerns of access for foreign service suppliers to encompass all policies which restrict access to a market." Christopher Findlay, *Services Sector Reform and Development Strategies: Issues and Research Priorities*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, POLICY ISSUES IN INTERNATIONAL TRADE & COMMODITIES, STUDY SERIES NO. 8, at 15 (2001) *available at* http://www.unctad.org/en/docs/itcdtab9_en.pdf (last visited Nov. 21, 2005). When the World Trade Organization subsequently surveyed businesses regarding the government regulations that most concerned them, they highlighted quintessentially local ones like zoning and land use permitting. Thus, while it is by no means clear that the GATS covers these local matters, the possibility that it does is real. Ellen Gould, International Trade Agreements: Recent Developments of Interest to Local Governments 8 (August 2004).

179. *See* Ward Ferdinandusse, *Out of the Black-Box? The International Obligations of State Organs*, 29 BROOK. J. INT'L L. 45, 66–71 (2003).

180. *See* Department of Foreign Affairs and International Trade, A Guide for Canadian Municipalities (2005), http://www.dfait-maeci.gc.ca/tna-nac/fcm/intro2-en.asp (last visited Nov. 21, 2005). Canada has published—and placed online—an extensive guide to municipal obligations under international trade agreements. The guide is clearly intended to allay local concerns that cities are being stripped of traditional powers by international trade agreements. Yet its opening sentence implicitly (and perhaps unintentionally) concedes the dramatic extent to which international trade regulation now influences local policymaking: "This Guide is intended to help municipalities deal with the day-to-day questions that may arise regarding provisions in trade agreements relevant to areas of municipal activity, i.e., regulation (e.g. zoning and environmental regulation), government purchasing, financial assistance and public-private partnership." The guide's description of local best practices makes clear its

While international agreements are giving national governments new reasons to police their cities, they also encourage cities to assert themselves in reaction. In 2000, the California state senate established a select committee on international trade policy in response to the fact that the state and its cities have become "increasingly obligated under trade rules and policies,"[181] and several California cities have passed resolutions opposing the adoption of the Free Trade Agreement of the Americas. The National League of Cities has begun to place these issues on its agenda, lobbying the U.S. Trade Representative to ensure that cities are heard as new agreements are forged and old ones are implemented.[182]

Whether international economic law ultimately will promote more central supervision than local resistance cannot now be known. What is clear is that, for the foreseeable future, international economic law will have an increasingly important influence on the domestic legal powers that cities exercise.

2. CITY LAND USE POWER AND INTERNATIONAL TRADE AGREEMENTS

We discuss below four illustrations of the emerging international jurisprudence that deals with cities' land use powers. The four cases represent two categories of legal problems. The first set of cases concerns a recurring flashpoint in central-local relations: the siting of waste treatment facilities. The second set involves the heart of local land use policy: permitting or refusing to permit commercial and residential projects. The emerging legal framework is in its infancy, and many of the

disciplinary aims: "[W]hile international trade obligations create additional considerations that municipal governments must take into account, to the extent that municipalities' regulatory practices are transparent and non-discriminatory the chance of trade issues arising is greatly minimized." *Id.* As cities internalize the central government's pro-investment goals, they may refrain from pursuing certain policies that would be lawful domestically but that might raise international legal concerns. Some Canadian cities, for example, have scrapped a proposed inter-local agreement for this reason. *See* STEVEN SHRYBMAN, PUBLIC-PRIVATE PARTNERSHIPS: ASSESSING THE RISKS ASSOCIATED WITH INTERNATIONAL TRADE, INVESTMENT AND SERVICES AGREEMENTS (2002), http://www.cupe.ca/updir/P3s%20&%20Trade%20Agreements%20.doc (last visited Nov. 21, 2005).

181. The Senate Select Committee on International Trade Policy and State Legislation, *California: Our Laws at Risk*, CALIFORNIA STATE SENATE, *available at* http://www.sen.ca.gov/ftp/SEN/COMMITTEE/SUB/BP_INTER_TRADE/_home/LETTERHEAD_LAWS_RISK.HTM (last visited Nov. 21, 205).

182. Local resistance seems to have been unusually strong in Canada. According to one anti-GATS website, over sixty municipalities have passed resolutions opposing Canada's signing on to the General Agreement on Trade in Services. GATSwatch, Stop the GATS Attack: Involving Local and Regional Governments, http://www.gatswatch.org/locgov-list.html (last visited Nov. 21, 2005).

agreements involved are not even a decade old. But the cases are exemplary of the role that international economic law is playing—and certainly can play—in reshaping city power. They show that international law is doing more than limiting city power as part of a general effort to limit governmental regulatory authority. It is also transforming the legal relationship between cities and higher levels of domestic government. As these cases suggest, some arbitration decisions take a restrictive view of city governmental authority, even though foreign investors do not always prevail against municipalities. Either way, however, the decisions deal with the very heart of domestic local government law: the extent of local discretion to implement policies not explicitly authorized by the central government, the proper degree of city influence into central government decision making, and the degree of flexibility that either the central or the local government has to re-think its land use policies after the initial agreement with investors has been made.

a. Siting Waste Treatment Facilities

The first two cases, dealing with the siting of waste treatment facilities, have an impact on two of the important doctrines of local government law just mentioned: the extent of a city's authority when the nature of its delegated power is ambiguous and the legitimacy of a central government decision to follow the wishes of localities when its own statutory mandate is ambiguous.

(i) Metalclad. If one case symbolizes the influence of international trade and investment agreements, it is *Metalclad v. United Mexican States.*[183] The case concerned a U.S. company, Metalclad, which had purchased a landfill in the Mexican municipality of Guadalcazar. After the company failed to secure permission to operate the landfill either through the Mexican judicial system or the nation's regulatory authorities, it brought a claim under the North American Free Trade Agreement.[184] The arbitration panel determined that Mexico breached its obligations to provide "fair and equitable treatment"[185] and to refrain from taking action "tantamount to an expropriation."[186] This was one of the first decisions under NAFTA to find for a private investor, and the arbitration panel's multi-million dollar award against Mexico attracted fierce criticism.[187] As we explain below, important aspects of the opin-

183. 40 I.L.M. 36 (2001).
184. *Id.*
185. *Id.* at 50.
186. *Id.* at 51.
187. *See, e.g.*, Anthony DePalma, *NAFTA's Dirty Little Secret*, N.Y. TIMES, Mar. 11, 2001; David Barkin, *The Social and Environmental Impacts of the Corporate Re-*

ion were ultimately reversed. Nevertheless, the panel's decision in *Metalclad* remains important. For many, it reveals international law's potential to preempt policy decisions that had long been thought to be primarily of domestic concern.[188] Whatever the truth of the allegations concerning the local authority's motivations, the panel decision did not rest on a finding of local corruption.

The ruling was particularly striking because the government action was hardly the kind that ordinarily requires compensation. Mexico had simply prohibited a landfill from continuing to operate. A similar action would not entitle a company to receive compensation under the Due Process or Takings Clauses of the U.S. Constitution.[189] *Metalclad* thus suggested that NAFTA imposed broad new restrictions on governmental efforts to protect the environment or ensure the health and safety of citizens.

Our interest in *Metalclad*, however, lies elsewhere: its relationship to the development of international local government law. Often overlooked in the criticism of *Metalclad*'s expansive view of expropriation is the fact that the outcome of the case turned on a dispute over the scope of city power in Mexico. Metalclad ran into trouble when Guadalcazar asserted the power to prohibit the construction and operation of the landfill.[190] The company responded that Guadalcazar lacked power under Mexican law to do so and that higher-levels of the Mexican government had assured it of that fact.[191] The company further argued that, even if the city had some permitting authority, it could only deny a permit for defects in the manner of construction, not on the basis of a determination about where landfills should be sited.[192] The siting issue was for the central government to decide.[193] In other words, the opposition of the local community to the waste treatment site, like that of nearly a dozen neighboring cities, was simply beside the point.

sponsibility Movement in Mexico Since NAFTA, 30 N.C. J. INT'L L. & COM. REG. 895, 912 (2005).

188. *See, e.g.*, Vincent Frakes, *In the Driver's Seat: NAFTA's Chapter 11 as a Judicial Vehicle for the Expansion of Investor Rights*, 1 BUS. L. BRIEF 49, 50 (2005) (criticizing panel decision); *but cf.* MICHAEL TREBILOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 464 (3d ed. 2005) (asserting that "it is quite likely that the local authority acted for reasons having nothing to do with conservation, but connected to the company's refusal to pay bribes to local officials.").

189. *See* Been & Beauvais, *supra* note 177, at 59–86 (discussing how arbitral interpretations of Article 1110 threaten to impose a compensation requirement more expansive than the Fifth Amendment to the U.S. Constitution).

190. *Metalclad*, 40 I.L.M. at 43–44.

191. *Id.* at 42.

192. *Id.* at 48.

193. *Id.* at 50.

Domestic legal proceedings failed to determine the extent of Guadalcazar's permitting authority prior to the NAFTA tribunal's ruling. But, rather than barring the company's NAFTA claim,[194] the company argued the NAFTA violation inhered in the fact that the scope of the city's authority was unclear. NAFTA's investor protections, it contended, included what amounted to a duty of regulatory transparency, and Mexico breached that duty because of its opaque rules and regulations regarding local authority over landfills.[195] The lack of clarity, Metalclad argued, facilitated what amounted to a bait and switch: the company was induced by Mexican officials to invest, but then had the rug pulled out from under it after its costs were sunk and local opposition grew.[196]

The NAFTA arbitration panel agreed. It ruled that Mexico breached its duty to "ensure a transparent and predictable framework for Metalclad's business planning and investment"—and thus its obligation, under NAFTA Article 1105, to provide "fair and equitable treatment."[197] According to the panel, the breach resulted from the central government's failure to stop the municipality from asserting its expansive view of its domestic legal authority.[198] The panel further determined that Mexico's "permitting or tolerating the conduct of the municipality in relation to Metalclad" constituted a "measure tantamount to expropriation in violation of NAFTA Article 1110(1)," especially given the representations of Mexican officials that local approval was not needed.[199]

This is the aspect of *Metalclad*'s analysis that bears directly on the legal power of cities. In defending itself before the NAFTA tribunal, the Mexican government explained that there was a substantial central/local conflict within Mexico as to which level of government should control the location of waste treatment facilities.[200] Cities have obvious reasons for resisting landfills, although they also have legitimate interests in influencing decisions to site them in their midst. The Mexican government argued that Metalclad had tried to bypass this domestic

194. At one point, an informal pact between Metalclad and the central government did seem to authorize the company to proceed with its plans, but that agreement ultimately fell apart. *Id.*

195. Investor's Memorial, Metalclad Corp v. United Mexican States, ICSID (W. Bank) ¶ 212, *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladInvestorMemorial.pdf (last visited Nov. 21, 2005).

196. *Id.* ¶¶ 166, 177.

197. *Metalclad*, 40 I.L.M. at 50.

198. *Id.*

199. *Id.*

200. Mexico's Post-Hearing Submission, Metalclad Corp v. United Mexican States, ¶¶ 200–208, *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladMexicoPostHearingBrief.pdf (last visited Nov. 21, 2005).

dispute.[201] It had pursued what the Mexican government called a "top-down strategy" by seeking support and commitments from central government officials so that it could ignore Guadalcazar's assertion of local power.[202] Thus, the Mexican government argued, a determination that Metalclad had been denied fair and equitable treatment would penalize the country for not having conclusively determined which level of government should have the final say on this issue.

Of course, nations could ensure regulatory transparency by making it clear that cities either possess or do not possess extensive local land use powers. Yet it is difficult to allocate authority in a way that is transparent and empowering of cities at the same time. Delegations of authority to cities cannot be unlimited because they threaten both central authority and private autonomy. For that reason, in the United States, the interpretive canon known as Dillon's Rule empowers the central government to determine the legitimacy of a city's attempt to subject private actors to novel regulations of their conduct.[203] It instructs courts to construe local powers narrowly in the absence of a clear and express legislative delegation of power.[204] Because of its limits on local power, Dillon's Rule has been very controversial. Many of those who pressed for home rule as an alternative sought to allow cities more leeway to make decisions without express legislative authorization.[205]

In key respects, the NAFTA tribunal's decision in *Metalclad* mirrors Dillon's Rule. Faced with an emerging grass-roots environmental movement, Guadalcazar re-interpreted its existing permitting authority to close down a landfill site. It contended that it could deny a permit not only on the basis of defects in construction but also on the basis of concerns about the location of the site itself. Like a court applying Dillon's Rule, the *Metalclad* panel portrayed this novel assertion of local power as a threatening intrusion on the private sphere that the central government had not clearly authorized. For that reason, it found the government had acted unlawfully. *Metalclad* crafted a rule that limited the ability of cities to make their own interpretations of local regulatory authority, thus taking a position on a central issue of Mexican local government law.

201. *Id.* ¶ 305.
202. Mexico's Rejoinder to Metalclad's Reply, Metalclad Corp v. United Mexican States, at ¶ 16(d), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/metmexb.pdf (last visited Nov. 21, 2005).
203. *See* FRUG, FORD & BARRON, *supra* note 1, at 138–158.
204. *Id.*
205. Barron, *Reclaiming Home Rule, supra* note 18.

On appeal, the Supreme Court of British Columbia disagreed with the panel's finding that Article 1105 imposes a duty of transparency, and it questioned the breadth of the panel's approach to expropriation.[206] That approach, it noted, could encompass "a legitimate rezoning of property by a municipality or other zoning authority."[207] The Supreme Court, however, did not reverse the panel's alternative Article 1110 finding that Mexico was ultimately liable for imposing an "ecological decree" that would have prevented the siting of any treatment facility at any time.[208] Still, by limiting liability to the issuance of ecological decree, the Supreme Court did reverse the panel's key impact on local government law: the aspect of its decision that found that Mexico had unlawfully acquiesced in Guadalcazar's attempt to block the landfill.[209]

While the Supreme Court's decision should be a welcome development to those concerned by a potential international imposition of Dillon's Rule for the world's cities, the panel decision remains a significant legal development. Those concerned that international trade and investment agreements can reach down and preempt seemingly "local" regulatory actions legitimately cite the *Metalclad* panel's decision as evidence that international economic law can effect major changes in existing legal understandings. But the concerns raised by the *Metalclad* panel's decision should not be limited to the international legal system's capacity to extend the scope of private immunities from governmental regulation. They should also focus on the way in which the international legal system can, in the course of expanding private property rights, re-structure the legal relationship between cities and higher levels of government within a nation-state. After all, Dillon's Rule was itself very much bound up with a late nineteenth century effort to expand private property rights through judicial action. *Metalclad* thus reveals international law's potential to perform a function strikingly similar to one that domestic local government law has performed.

206. United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R.3d 359, ¶¶ 68, 93.

207. *Id.* ¶ 99.

208. *Id.* ¶ 133.

209. *Id.* ¶¶ 135–36. In addition, the concerns raised by the *Metalclad* panel's expansive interpretation led the NAFTA Free Trade Commission in July of 2001 to issue "Notes of Interpretation of Certain Chapter 11 Provisions." The notes address, among other things, Article 1105, and state that the phrase "the minimum standard of treatment in accordance with international law" in Article 1105(1) refers to the customary international law minimum standard of treatment. The notes further state that "a determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." *See* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

(*ii) TECMED.* A similarly centralizing logic underlies the subsequent arbitration panel decision in *TECMED, S.A. v. United Mexican States.*[210] *TECMED* also concerns a foreign investor that had been denied the right to operate a waste treatment facility, and it, too, awards compensation to the foreign investor. Although decided pursuant to an investment agreement between Mexico and Spain rather than under NAFTA, *TECMED*, like *Metalclad*, requires compensation for regulatory action that would be lawful under the domestic law of the United States and many other countries. And *TECMED's* impact on the legal status of cities, like the *Metalclad* panel's, goes well beyond the fact that it restricts seemingly ordinary governmental regulation.

In 1996, Cytrar, an affiliate of TECMED, a Spanish concern, purchased a landfill from an agency of the Mexican municipality of Hermosillo. Cytrar secured the necessary operating permit from Mexico's national environmental agency.[211] The permit provided that it could be renewed annually, and the agency granted Cytrar's first renewal request but denied the second.[212] In ruling for TECMED on its two main claims—that the permit denial was "tantamount to an expropriation"[213] and that it denied "fair and equitable treatment, under international law"[214]—the arbitration panel put great weight on the environmental agency's reason for denying the request.[215] Long before Cytrar came on the scene, local officials in Hermosillo had established the landfill and supported its operation.[216] But, as Hermosillo began to grow, the landfill soon abutted a substantial urban population.[217] In 1994, the Mexican government established regulations that barred landfills within twenty-five kilometers of any settlement of more than 10,000 people.[218] These regulations did not apply retroactively, and thus they did not cover the landfill in Hermosillo.[219] But they did fuel the mounting local opposition. When reports surfaced that Cytrar was shipping hazardous waste to the landfill, local community groups began a campaign to shut it down, repeatedly invoking the 1994 regulations.[220] Eventually, the opposition movement won the support of elected officials within Her-

210. TECMED v. United Mexican States, 43 I.L.M. 133 (2004).
211. *Id.* at 137–38.
212. *Id.* at 138.
213. *Id.* at 157.
214. *Id.* at 144.
215. *TECMED*, 43 I.L.M. at 164.
216. *Id.* at 138.
217. *Id.* at 160.
218. *Id.* at 159.
219. *Id.*
220. *TECMED*, 43 I.L.M. at 159–60.

mosillo, and city leaders began to pressure the national government to stop the landfill.[221] After intensive negotiations with local officials and Cytrar about the landfill's possible relocation, the environmental agency denied the requested permit renewal.[222] The arbitration panel concluded that the agency based its decision largely on its respect for the intensity of the local opposition.[223]

One could view the environmental agency's action as exhibiting a healthy respect for local self-government. The arbitration panel, however, saw its deference to local political opposition as evidence that the foreign investor's international legal rights had been violated.[224] *TECMED* involved an investment agreement between Spain and Mexico, but the legal provisions in the trade agreement in dispute are almost identical to the ones in *Metalclad.* The panel explained that governmental action that strips an investment of its value is not "tantamount to an expropriation" if it is a "proportionate" regulatory response.[225] The panel determined, however, that the agency responded to local "socio-political" concerns about the landfill's location rather than to evidence of negligent or dangerous conduct by Cytrar.[226] The local political opposition, the panel noted, was also not so great that it touched off unrest sufficient to cause a "serious emergency."[227] As a result, the investor had been forced to bear a disproportionate burden. The mere fact that a growing city did not want a landfill site in its midst did not provide the federal bureaucracy with a sufficient basis for depriving a foreign investor of its expected return.

The panel also suggested that an expert administrative agency's decision to defer to local political officials was particularly worrisome because it injected the views of local voters into what would otherwise be a decision based solely on technical expertise.[228] The panel noted the foreign investor "has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for authorities that will issue the decisions that affect such investors."[229] Technical expertise, unlike politics, gives no preference

221. *Id.* at 160.
222. *Id.* at 160–61.
223. *Id.* at 163.
224. *Id.* at 173.
225. *TECMED*, 43 I.L.M. at 167–68.
226. *Id.*
227. *Id.* at 172.
228. *Id.* at 166–67.
229. *Id.* at 164.

to the arguments of residents. At the same time, a central government's administrative decisions may be more subject to influence by foreign investors than local politics.

TECMED, like *Metalclad*, limits what cities can do. The result in *TECMED* is striking: a national environmental agency is penalized for basing its regulatory decision on its respect for a city's views about its future growth. The *Metalclad* panel construed the duty of fair treatment to cast doubt on an assertion of city power that arguably challenged the central government's position on the issue. *TECMED* construed the protection against expropriation to undermine a central government's decision to defer to an assertion of city power. Either way, the international legal agreement supplies the basis both for limiting land use regulation and for centralizing it.

b. Commercial and Residential Real Estate Development Projects

The two cases just considered concerned a locally undesirable land use. The two cases we now discuss involve the local regulation of land uses that cities compete to promote—commercial and residential development. These cases are similar in their outcomes to those just discussed. They too set forth interpretations of international trade agreements that restrict a city's discretion to shape real estate development within its borders. But, in doctrinal terms, they address a different matter: the ability of either the central or local government to change its land use policy once an initial understanding with a foreign investor has been reached.

(i) MTD Equity. Decided by an arbitration panel in 2004, *Republic of Chile v. MTD Equity*[230] is the most recent of the cases we discuss. A Malaysian investment company, MTD Equity, brought a challenge pursuant to a 1992 investment agreement between the governments of Malaysia and Chile.[231] The dispute arose after MTD Equity failed to secure the right to develop a satellite city in the relatively small Chilean municipality of Prique.[232] The company purchased the necessary land for more than $30 million after securing a foreign investment contract from Chile's Foreign Investment Commission.[233] That contract permit-

230. 44 I.L.M. 91 (2005).
231. *Id.* at 92.
232. MTD Equity's proposal contemplated "a township of 600 hectares of Fundo El Principal de Prique, which will be a self-sufficient satellite city, with houses, apartments for diverse socioeconomic strata, schools, hospitals, universities, supermarkets, commerce of all sorts, services, and all other components of necessary self-sufficiency." *Id.* at 97.
233. *Id.* at 97–98.

ted MTD Equity to invest foreign capital in the Prique project, although it did not purport to confer the right to develop.[234]

MTD Equity ultimately failed to secure permission to develop because Chile's urban planning policy favored urban growth in regions other than Prique's.[235] Indeed, national planning policy sought to keep the Prique region relatively free of dense urban development.[236] But because this Chilean urban planning policy was already well established at the time MTD Equity began investing in the Prique project, the company argued it had been subjected to a bait and switch.[237] The central government of Chile had induced it to invest in a project that it had no intention of authorizing. That inducement violated the national obligation to treat foreign investors fairly and equitably. The arbitration panel agreed, relying heavily on the expansive interpretations of investors' rights set forth in *Metalclad* and *TECMED*—even though neither concerned the trade agreement at issue.[238]

The panel's decision has serious implications for central/local legal relations. The government of Chile conceded that its existing urban planning policy prevented the kind of development MTD Equity contemplated.[239] But it contended that the policy was not set in stone. On the contrary, there was an ongoing legal and administrative battle over proposals to modify national urban planning rules. To Chile, the dispute demonstrated "the functioning of the administrative regime and the Chilean democracy. . . . This does not imply arbitrary conduct, but the normal process of creation of standards under a democratic and transparent system."[240] The panel's own findings suggest that MTD Equity recognized the potential for a modification of the national planning policy.[241] While Metalclad pursued a top down strategy to bypass local opposition to its landfill, MTD Equity appears to have pursued a bottom up strategy. It courted the Prique municipal government in hopes of getting it to change its local zoning rules and to petition the national government to approve the change as conforming to the existing regional plan. The city supported MTD Equity, not surprisingly given the amount of development it promised. But ultimately the national authorities declined to approve the requested modification, in part because other changes to the regional plan had been made in nearby areas.[242]

234. *Id.* at 118.
235. *MTD Equity*, 44 I.L.M at 100–01.
236. *Id.* at 116.
237. *Id.* at 106.
238. *Id.* at 105–06, 122–23.
239. *Id.* at 118.
240. *MTD Equity*, 44 I.L.M at 111.
241. *Id.* at 99.
242. *Id.*

In ruling against Chile, the arbitration panel attributed little significance to this internal struggle over national planning policy between Prique and the national government. Instead, it relied on the national urban planning policy that was in place at the time MTD Equity first invested.[243] Its ruling thus discourages the national government from permitting foreign investors to pursue the kind of bottom-up strategy MTD Equity attempted. The extent of the national government's commitment in its investment agreement is the only issue, and that commitment can be changed only by further negotiations between the national government and the foreign investors. Cities have no role in this process. Yet a city stands a much better chance of freeing itself from anti-growth planning rules if it has a proposed development on the table. Sometimes the city might be unsuccessful in getting the central government to change its position, as it was in this case. But sometimes the effort might succeed. The panel's decision thus strips cities that feel burdened by existing national planning rules of a means of changing them. To be sure, the panel's decision might induce future foreign investment from which cities may benefit. But if a national government becomes reluctant to commit to foreign investors to avoid liability—or alters its land use planning rules in ways that discourage local development—the decision suggests no role for cities (working with foreign investors) to influence these decisions. There certainly seems to be no requirement that the national government pay attention to the interests of Chilean municipalities when agreeing (or failing to agree) with foreign investors on development projects.

(ii) Mondev International. The final case, *Mondev International Ltd. v. United States*,[244] is a variant on *MTD Equity.* But rather than treating the central government's land use planning laws as determinative once formulated, *Mondev* suggests that local land use planning rules might be treated the same way.

The case concerned a proposal to develop Boston's so-called combat zone.[245] The dispute began after the city, in conjunction with the Boston Redevelopment Authority, entered into a phased development agreement with Mondev, a Canadian company, in the 1970s. The agreement contemplated first building a shopping mall, parking garage, and hotel, and, in a second phase, building retail spaces, an office building, and a department store.[246] Portions of the plan were completed, but others

243. *Id.* at 120.
244. 42 I.L.M. 85 (2003).
245. The "combat zone" was an adult entertainment district in downtown Boston. Wikipedia, Combat Zone, http://en.wikipedia.org/wiki/Combat_zone (last visited Nov. 22, 2005).
246. *Mondev*, 42 I.L.M at 92.

were not.[247] A newly elected Boston mayor, Raymond Flynn, decided that price established under the agreement was grossly unfair to the city in light of soaring real estate prices.[248] Delays and controversies ensued. Eventually, the developer sued the city and the Redevelopment Authority in state court for breach of contract.[249] Although the Supreme Judicial Court of Massachusetts found that the city had attempted to back out of the deal as its land use values increased (in a manner that the jury found to be in bad faith), it nevertheless concluded the city had not breached the contract.[250] The reason was that Mondev itself had not complied with the terms of the contract—in particular, with a number of its conditions—and that the city had never actually repudiated the contract.[251] The court also held that the Redevelopment Authority was immune from suit as a statutory matter.[252]

Not content with the court's ruling, Mondev refashioned its claim as a NAFTA-based challenge, claiming violations of its rights to fair treatment and protection from expropriation.[253] The arbitration panel rejected the claims but on narrow grounds. It found that the negotiations between the city and the developer pre-dated NAFTA and thus could not support a claim under that agreement.[254] The only post-1994 state conduct at issue was the Supreme Judicial Court ruling and the state law grant of sovereign immunity to the Redevelopment Authority.[255] The panel concluded that neither the court's decision nor the statutory grant constituted a NAFTA violation.[256] The panel pointedly noted, however, that the city and the Redevelopment Authority had been found by state juries to have acted in bad faith.[257] And it suggested that the same conduct might violate NAFTA if it occurred after 1994.[258] Moreover, while the panel decided that the conferral of immunity on the Redevelopment Authority was not itself a treaty violation, it noted that NAFTA independently permitted a private investor to sue the United States for conduct that the Redevelopment Authority undertook.

247. *Id.*
248. Chris Mooney, *In Our Own Backyard*, THE PHOENIX, http://www.bostonphoenix.com/boston/news_features/top/features/documents/01791880.htm (last visited Nov. 21, 2005).
249. *Mondev*, 42 I.L.M 85.
250. Lafayette Place Assocs. v. Boston Redevelopment Auth., 694 N.E.2d 820 (Mass. 1998).
251. *Id.* at 829–30.
252. *Id.* at 836.
253. *Mondev*, 42 I.L.M. at 86.
254. *Id.* at 98.
255. *Id.*
256. *Id.* at 115.
257. *Id.* at 93.
258. *Mondev*, 42 I.L.M. at 98.

The *Mondev* panel ultimately decided in favor of Boston and its Redevelopment Authority.[259] But its decision suggests the possibility of a damage recovery under NAFTA much broader than that provided by the domestic law of the United States. Even if a city's change of policy might not be considered a breach of contract under domestic law—let alone a taking of property—it could still constitute the grounds for a NAFTA violation. Moreover, even if the state sought to free a city's redevelopment authority from liability, that immunity would be effective only as a matter of domestic law and not of international law. This combination of positions is likely to limit a city's flexibility when it seeks to change its land use policy after having made an initial deal with a foreign investor. As a result of the international investment agreement, a city or redevelopment authority could act in a way that would generate a multimillion-dollar damages award against the United States. The threat of this liability might well convince the national government to find ways to limit city discretion in order to limit its own liability. One way to do so would be to pass national legislation that preempted treatment of foreign investors inconsistent with national economic policy; another would be to convince state governments to reign in errant cities. Overall, *Mondev* hardly ratifies local governmental discretion in dealing with international land developers. Instead, it suggests that even if domestic law makes it difficult for developers to seek recompense when deals go sour, international law may not.

3. CONCLUSION

All four of the cases just discussed demonstrate how arbitration decisions made under international trade agreements have the potential of limiting city power over land use by formulating rules of international local government law. They do more than restrict land use regulation. They take positions on the extent to which local as opposed central actors should be permitted to assume control over domestic land use policy. It is important to appreciate how this branch of international local government law is being developed. The decisions are being made by arbitration tribunals—that is, not by officials or tribunals at any level of government: local, state, national, or international. Moreover, the decision makers' task is to focus on the interpretation of treaty language, and there is considerable evidence that they are interpreting this language in ways that substantially depart from the domestic law of the nations involved.[260] More importantly, for our purposes, there is no

259. *Id.* at 115.
260. Been & Beauvais, *supra* note 177.

reason to believe that, when they are interpreting the treaty language, the decisions makers even know that they are formulating rules of international local government law, let alone what the other elements of this emerging legal field are. Their focus is on the rights of investors and the obligations of the national government. Any impact on city power or central/local relations is likely either to be overlooked or treated as irrelevant. This aspect of international local government law, in short, is being crafted in a decentralized fashion by ad-hoc decision makers unconnected to the city networks, international organizations, and international human rights efforts described earlier. And yet these decision makers, more than any others we have examined, are the most advanced in formulating the "hard law" aspects of international local government law.

III. A Framework for International Local Government Law

International local government law has an oxymoronic quality. How can the world possibly establish a legal regime aimed at promoting the interests of its most local jurisdictions? Yet, as international legal institutions have broadened their jurisdictional reach, they are increasingly shaping the future of the world's cities. Those now engaged in this enterprise need a framework for understanding the complex relationship between international legal rules and the exercise of local governmental power. We offer such a framework here.

For us, it is important that a framework for international local government law both attend to the threat that international local government law poses to diversity and recognize the controversial ways in which international local government law influences the future development of the world's cities. It is also important to consider all the matters discussed in the last section—networks, municipal foreign policy, the World Charter, urban governance, human rights, and the decisions of arbitration tribunals—together. Doing so highlights the complexities and inter-relationships of these varied interventions into domestic local government law. The cases just discussed focus on one aspect of city power: the impact of city land use decision making on foreign investors. But they do not take into account related aspects of city land use policy, such as the human rights effort to protect the right to adequate housing, the urban governance campaign's recognition of the importance of historical preservation, UN-Habitat's work on behalf of the Millennium Agenda's goal of improving the lives of slum dwell-

ers, and the World Charter's insistence that "[w]here powers are delegated to them by a central and regional authority, local authorities shall be given discretion in adapting their implementation to local needs."[261] Similar inter-relationships exist for issues affecting city power ranging from the organization of the city government to the provision of city services. When considering the appropriateness of international interventions into domestic local government law, one needs to have a comprehensive picture of what they are and how they complement or contradict each other.[262]

A. *International Local Government Law and the Threat to Diversity*

The word "cities" covers far too many kinds of entities to be treated as if they have the same interests or concerns. This variety is obvious simply from the reference in the preamble of the Constitution of United Cities and Local Governments to its membership: "the populations of rural and urban communities; small, medium and large towns; [and] metropolises and regions."[263] As the leadership of United Cities and Local Governments demonstrates, Istanbul and South Bay, Florida, are both cities. Yet the substantive development of international local government law will not affect these cities in the same way. Indeed, concepts like good urban governance and local self-government have different meanings for large megacities as well. Istanbul is not Shanghai. Each city needs to be understood in terms of its relationship to its region, the country in which it is located, and its own internal dynamics. International local government law also has to take into account the thousands of suburbs that surround many of the world's major cities. Autonomy for every local government in the world could lead to social and economic division within metropolitan areas rather than to progress on the effort to provide the poor with access to education, housing, and health care.

Local autonomy, in short, is not an unproblematic human good. No doubt, empowered city governments can contribute a good deal more to the issues that are important to the international community than

261. World Charter of Local Self Government 4(4). *See* United Nations Centre for Human Settlements (Habitat) World Associations of Cities and Local Authorities Coordination, Towards a World Charter of Local Self Government, http://www.gdrc.org/u-gov/charter.html (last visited Nov. 21, 2005).

262. Given the range of interventions that the international legal system is presently engaged in, the commentary that critiques NAFTA because it intrudes on local sovereignty therefore seems to us too narrow.

263. UCLG Constitution, *supra* note 8, at Preamble.

domestic local government law now permits. But cities have their dark side as well. Sometimes, they can be a hindrance, not a help, to the international agenda. *Local Rule: Decentralisation and Human Rights*[264] provides a helpful summary of the pros and cons of the decentralization of power to local governments:

For:	**Against:**
• Promotes democracy because it provides better opportunities for local residents to participate in decision-making.	• Undermines democracy by empowering local elites, beyond the reach or concern of central power.
• Increases efficiency in delivery of public services—delegation of responsibility avoids bottlenecks and bureaucracy.	• Worsens delivery of service in the absence of effective controls and oversight of standards.
• Leads to higher quality of public services, because of local accountability and sensitivity to local needs.	• Quality of services deteriorates due to lack of local capacity and insufficient resources.
• Enhances social and economic development, which rely on local knowledge.	• Gains arising from participation of locals offset by risks of increased corruption and inequalities between regions.
• Increases transparency, accountability, and the response capacity of government institutions.	• Promises too much and overloads capacity of local governments.
• Allows greater political representation for diverse political, ethnic, religious, and cultural groups in decision making.	• Creates new or ignites dormant ethnic, religious rivalries.
• Increases political stability and national unity by allowing citizens to better control public programmes at the local level.	• Weakens states because it can increase regional inequalities or lead to separatism or undermines national financial governance.
• Spawns ground for new political ideas and leads to more creative and innovative programmes.	• Gains in creativity offset by risk of empowering conservative local elites.

Given these complexities, it is a mistake to think that the ingredients of international local government law can be formulated by consensus. Yet notions of consensus are common place in the documents we have

264. LOCAL RULE, *supra* note 161, at 8.

reviewed in this article.[265] No doubt, city-to-city exchanges on best practices can help the world's cities on a variety of technical issues.[266] But the role of cities in furthering the ambitious agenda embraced by United Cities and Local Governments, UN-Habitat, and other world organizations—and the role of international law in determining that role—is likely to produce not just disagreement but different answers in different places. This point is widely recognized, as it is in the Founding Declaration for United Cities and Local Governments:

> Respecting the differences and diversity of the different regions of the world, and conscious of the fact that local government is an integral part of the national structure of each country and needs to adapt to the national context, we commit ourselves to advocate decentralization processes that develop a democratic system of governance and an adequate basic service provision for, by and with the community.[267]

Integrating this vision of diversity with the desires to spread best practices, define standards of good urban governance, defend basic human rights, and enforce treaty protections against expropriation will be no easy matter.

Our concern about the desire for consensus in international local government law parallels Richard Sennett's analysis of what he calls "the neutral city."[268] Sennett's discussion of the neutral city focuses on the grid: the familiar pattern of urban design constructed by a series of straight streets meeting a right angles. Imposing a grid pattern on urban space has been a significant act of public power,[269] but behind what appears to be an uncontroversial frame has lurked a substantive direction for city life. There is, Sennett argues, a "connection between neutralizing space and economic development."[270] The grid undermined the importance of the natural features of a city's geography by organizing the city, whatever it looked like, into a rational pattern. By doing so, it transformed the city's landscape into "a space for economic competition, to be played upon like a chessboard. It was a space of neutrality, a neutrality achieved by denying to the environment any value."[271] International local government law has the potential of functioning like the grid. Appeals to neutral-sounding values like best practices, good

265. UN-Habitat's Strategic Vision is exemplary of this vision of consensus. *See* STRATEGIC VISION, *supra* note 170.

266. *See* Best Practices, *supra* note 7.

267. UCLG FINAL DECLARATION, *supra* note 10, ¶ 31.

268. RICHARD SENNETT, THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES 41 (1990).

269. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1993).

270. SENNETT, *supra* note 268, at 53.

271. *Id.* at 55.

urban governance, and human rights not only potentially conflict with the goal of diversity but—like notions of local autonomy and united cites and the language of consensus itself—can hide a substantive agenda for cities. Like the grid, international local government law too can organize cities as a space for economic competition, one that makes less visible the social (rather than, as in the case of the grid, the natural) environment on which it is imposed.

B. *International Local Government Law and the Substance of City Making*

The concern that international local government law might foster a substantive agenda could easily have been anticipated. After all, domestic local government law has long done more than provide a backdrop for the exercise of city power. It has implemented substantive ideas about how cities should develop. Domestic local government law in the United States provides a clear example. In the late nineteenth century, proposals to reform local government law produced a battle between a conservative, laissez faire view of the city and a more social conception advocated by leading figures in the Progressive Movement.[272] Other reformers promoted a third, more bureaucratic conception of the city, seeking, for example, to substitute city managers for mayors and nonpartisan elections for partisan ones.[273] Current American local government law is a product of the clash between these (as well as other) conceptions of the proper role of cities in American life.

Concepts such as these are by no means unique to the United States. Guido Martinotti has identified three distinct conceptions of cities that have been adopted throughout the world.[274] A "first generation" understood cities principally as serving their own residents and focused on providing municipal services to these residents.[275] A "second generation" emphasized cities' relationship with nonresident users, such as tourists and commuters, and focused on attracting these outsiders by building convention centers, sports stadiums, theme parks, and the like.[276] A third generation has stressed that a city's main goal should be attracting worldwide business and has focused on making the city

272. For an account of this debate, see Barron, *Reclaiming Home* Rule, *supra* note 18, at 2309–21.

273. *Id.* at 2300–09.

274. Guido Martinotti, *A City for Whom? Transients and Public Life in the Second-Generation Metropolis, in* ROBERT BEAURAGARD & SOPHIE BODY-GENDROT, THE URBAN MOVEMENT: COSMOPOLITAN ESSAYS ON THE LATE-20TH-CENTURY CITY 160–65 (1999).

275. *Id.* at 160–62.

276. *Id.* at 160–62.

attractive to business executives.[277] The city powers appropriate for this third conception may well conflict with those needed to support the first.

In our view, the substantive conception of the city that currently predominates in international local government law is what we call the "private city." This conception resonates with Martinotti's third generation city. But we take the term "private city" from the title of Sam Bass Warner's classic history of Philadelphia, a case study of what Warner describes as the American tradition of city making.[278] "Under the American tradition," Warner says, "the first purpose of the citizen is the private search for wealth; the goal of a city is to be a community of private money makers."[279] He continues:

> The tradition of privatism has always meant that the cities of the United States depended for their wages, employment, and general prosperity upon the aggregate successes and failures of thousands of individual enterprises, not upon community action. It has also meant that the physical forms of American cities, their lots, houses, factories, and streets have been the outcome of a real estate market of profit-seeking builders, land speculators and large investors. Finally, the tradition of privatism has meant that the local politics of American cities have depended for their actors, and for a good deal of their subject matter, on the changing focus of men's private economic activities.[280]

Warner's book is explicitly an examination of an American tradition. It is perhaps not surprising that it is this American tradition that we find embraced in the early development of international local government law. This embrace is most apparent in the cases, such as those reviewed above, seeking to protect foreign investors under international trade agreements. These cases render suspect the aspects of domestic local government law that run counter to the perceived interests of private foreign investors, regardless of whether these aspects promote central administrative deference to city decisions or enable the city to assert independent regulatory authority.

Other ingredients of international local government law that we have discussed in this article seem to be tending in the same direction. The World Bank is the most explicit in this regard. "Urbanization, when well managed," its major report *Cities in Transition* states, "facilitates sustained economic growth and thereby promotes broad social welfare gains."[281] The critical word in the sentence just quoted is "thereby." As

277. *Id.* at 165.
278. SAM BASS WARNER, THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF GROWTH (1968).
279. *Id.* at x.
280. *Id.* at 4.
281. CITIES IN TRANSITION, *supra* note 157, at 2.

Warner argues, this is the understanding of the relationship between private actors and city government that generates the private city. With this vision in mind, the World Bank has "increasingly focused on policy reform and institutional change, extending the Bank's dialogue deeper into issues of regulation, incentive systems, and the patterns of relationships . . . that determine how cities perform."[282] The World Bank's effort is to promote cities that are "livable," "competitive," and "bankable."[283] This involves, among other steps, eliminating inappropriate regulation and transactions costs, facilitating public-private partnerships, and promoting best practices. The goal, as the Bank emphasizes, is to improve the lives of the poor in the world's cities.[284] Still, the Bank adopts a particular conception of city power to accomplish this objective. This conception not only de-emphasizes the regulatory and redistributive role of city government but de-emphasizes city government itself. Like the World Cities literature, the city is defined economically, not as a government. Indeed, the World Bank's embrace of the language of governance relegates the city government to be just one of the "key stakeholders (local and central governments, utilities, private developers, donors)" who need to generate a consensus about how resources are used to make city improvements.[285]

As noted above, the World Bank and UN-Habitat together co-chair Cities Alliance, the world organization focused on poverty reduction and especially on creating "cities without slums."[286] Cities Alliance's 2004 Annual Report shares much of the vision of the World Bank's *Cities in Transition.*[287] Here again, "cities and towns are essentially markets,"[288] and the focus, once again, is on "unleashing the potential of cities" by modernizing their economies with city-supported infrastructure and private investment.[289] "The most fundamental requirements for a productive urban economy," Cities Alliance argues, "include available and affordable land for firms and for housing and transport networks that promote the mobility of both goods and workers."[290] UN-Habitat envisions a similar strategy in the reports that it

282. *Id.* at 8.
283. *See id.* at 8–12.
284. *Id.* at 1.
285. *Id.* at 11, 12, 14, 16, 22.
286. The Cities Alliance, About Cities Alliance, http://www.citiesalliance.org/about-ca/about-ca.html (last visited Nov. 21, 2005).
287. THE CITIES ALLIANCE, 2004 ANNUAL REPORT, *available at* http://www.citiesalliance.org/doc/annual-reports/2004/2004-annual-report.pdf (last visited Nov. 21, 2005).
288. *Id.* at 4.
289. *Id.* at 3.
290. *Id.* at 7.

issues on its own. Its Strategic Vision is designed "to promote pro-poor urban governance"[291] by understanding "the city as an organizing agent for national development."[292] And, as described above, its Global Campaign on Urban Governance, by emphasizing governance rather than government, expands the role of the private sector by making a consensus of "stakeholders" a key to decision making.[293] Even the Founding Declaration of United Cities and Local Governments combines its defense of local democracy with references to the cities "strategic role in economic development."[294]

It is not just the framework adopted by international local government law that has the potential of fostering the private city. The same tendency can be generated through international local government law's interaction with domestic local government law. To give but one example, cities might want to create better housing for their residents yet lack the legal authority either to provide the housing themselves or to require the private sector to do so. Funding from international sources might nevertheless be available to help support the needed housing, and it would be hard for these cities to turn it down. A city might therefore work with an international funding source and a private entity or nongovernmental organization to enable the private entity or NGO to be the recipient of the funds and provide the housing. This organizational structure might well improve the housing stock, but at the same time it generates privatization rather than city empowerment. It also furthers the fragmentation of city housing policy by putting it into a number of different hands. The reason for this result would not be a city (or even a national) decision that this was the best way to make housing policy. The reason would derive from the interaction between domestic local government law and new international legal interventions into city decision making. The city would adopt this strategy because it has to avoid the limitations imposed on its own authority by the legal system, including limitations that the legal system has imposed on its capacity to generate revenue. Thus, the city would not have the option to provide the housing and to have the city government empowered simultaneously.

As we noted at the outset of this article, we offer this reading of the current direction of international local government law tentatively. The proper organization of city power will no doubt be a continual source

291. STRATEGIC VISION, *supra* note 170, at 10.
292. *Id.* at 2 (Summary).
293. *See supra* Section II.B(2)(a).
294. UCLG FINAL DECLARATION, *supra* note 10, at § 21.

of controversy, and it is too early to declare a victory for any particular conception of the city as the accepted path. There is no reason to doubt the sincerity or potential effectiveness of those who envision city empowerment in terms of the promotion of social inclusion, the rights to education, health, and housing, the alleviation of poverty, and the respect for diversity. References to goals such as these are as common as those that invoke the private city,[295] and these sentiments generate much of the support for city power. References to alternative forms of city organization, other than the private city, are also common. As the Founding Declaration of United Cities and Local Governments makes clear, major cities around the world mix people with different languages, religions, and cultures.[296] As these cities continue to grow, "[l]ocal government is the only sphere of government where new residents have the right to vote and are able to influence the shape of their new home."[297]

> Increased participation is a demand from the citizen and a means to find the legitimacy necessary for strengthening social relationships. The development of new forms of participation across the world, such as neighbourhood councils, e-democracy, participatory budgeting, citizen initiatives and referendums, are examples of this phenomenon.[298]

We are not alone, however, in our concern that the current consensus vision that seeks to unite economic development with the promotion of democratic goals and the alleviation of poverty might end up interpreting these goals in a manner that promotes the private city.[299] As David Kennedy points out, "ideas of human rights often define problems and solutions in ways unlikely to change the economy."[300] Even their most fervent advocates see the protection of economic, social, and cultural rights in terms of "progressive realization," while the protection for foreign investors under international trade agreements and the World Bank's governance agenda are already further advanced. The very fact that the decisions under international agreements are those of arbitrators, not courts, and that development loans are being crafted by the World Bank suggest a privatized version of decision making.

Whether or not our reading of current international local government law is justified, it is time to put a discussion of international local government law onto the agenda of world organizations, national governments, and the organizations of the world's cities. The issue most

295. *See id.*
296. *Id.* at 25.
297. *Id.*
298. *Id.* at 36.
299. Rittich, *supra* note 88, at 23.
300. DAVID KENNEDY, THE DARK SIDE OF VIRTUE 11 (2004).

in need of discussion is not whether cities should be empowered or disempowered. Organizing the city as a private city is itself a form of empowerment. The power that cities exercise when they assume new roles in the global economy, whether through eminent domain or subsidies or other forms of economic development, can be substantial. The Shanghai Municipal Government has demonstrated to the world just how substantial this kind of power can be.[301] Moreover, international trade and investment agreements have the potential to open markets to cities that were formerly foreclosed.[302] In that sense, these international legal interventions empower cities through an embrace of privatism. Yet, as the arbitration cases we have reviewed demonstrate, the embrace of the private city can limit city power as well.

This combination of simultaneous empowerment and disempowerment also characterizes other visions of the city. The notion of participatory government offered by United Cities and Local Governments is frequently seen—properly seen—as a form of democratic empowerment.[303] Yet the American experience has also shown that state requirements of referenda and initiative (say, for tax increases) and even state permissions for these kinds of processes (before affordable housing can be built) can thwart, rather than advance, both city empowerment and the pro-poor agenda of many international organizations.[304]

Rather than thinking in terms of a choice between empowerment or disempowerment, the international community should focus on the kinds of cities it is and should be nurturing through its efforts to empower and disempower local governments. A variety of different ideals for city life need to be imagined in this rapidly urbanizing age, and a range of alternative versions of local government law need to be developed that might help bring them about. We need a vigorous debate about the proper role of international law, nation-states, and of the cities themselves in bringing these different kinds of cities into being. One prerequisite to this debate is to document the multitude of ways in

301. Le-Yin Zhang, *Economic Development in Shanghai and the Role of the State*, 40 URB. STUD. 1549 (2003); Tingwei Zhang, *Urban Development and A Socialist Pro-Growth Coalition in Shanghai*, 37 URB. AFF. REV. 475 (2002). For an overview, see DOUGLAS GUTHRIE, GLOBALIZATION AND CHINA: LOCAL GOVERNMENTS, MULTINATIONAL CORPORATIONS, AND THE TRANSFORMATION OF THE CHINESE SOCIETY (forthcoming 2006).

302. In addition, NAFTA itself, for all of the limits on local power it may impose, has spurred an international city network aimed at establishing a so-called NAFTA highway that would run form Mexico to Canada.

303. GERALD E. FRUG, CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS (1999).

304. DAVID BARRON, GERALD FRUG & RICK SU, THE MYTH OF HOME RULE (2004).

which domestic local government law now empowers and disempowers cities around the world. Another prerequisite is examining in greater detail than we can in this article the interventions into domestic local government law that are now being undertaken by alliances of cities, international financial organizations, world organizations like UN-Habitat, international treaties, and the like.

Discussion about the proper form and content of international local government law cannot be held simply by city representatives, since national and subnational governments (and, we claim, international actors) now define local governmental power. But it also should not be held without city participation, no matter how complicated that is to organize. As Robert Beauregard has convincingly demonstrated, globalization is not just a world-historical force imposed on unwilling cities.[305] City policies have helped determine the kind of globalization that now exists in the world, and city policies will continue to shape its future. "[A]ll activity is local," Beauregard writes, "and . . . the global only comes into being through the integration of numerous locally based actors and activities."[306] This kind of global-local interaction, we believe, is the way to think about formulating international local government law. There is a role for the international local government law in shaping the future of urban life. But that role cannot be defined piecemeal or without an appreciation of its impact on the local government law that now affects every city in the world.

305. *See* Robert Beauregard, *Theorizing the Global-Local Connection, in* WORLD CITIES IN A WORLD SYSTEM, *supra* note 6, at 240–43.

306. *Id.* at 242.