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Remedies for Government Breach: Lessons from The United States and a Zone of Appealable Remedies for Southeast Asia

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Remedies For Government Breach

LESSONS FROM THE UNITED STATES AND A ZONE OF APPEALABLE REMEDIES FOR SOUTHEAST ASIA

INTRODUCTION

What happens when a government breaches a contract?[1] Can the government be held to specific performance?[2] Will the government be responsible only for out-of-pocket expenses if the project is cancelled or can it also be liable for lost profits? These questions have critical implications for parties that contract with governments. In the United States, the sanctity of a private right of contract has largely prevailed, yet vestiges of sovereign immunity with respect to government contracts remain.[3] On the other hand, for private parties interested in contracting with a Southeast Asian government, the risks and liabilities associated with a government's breach remain relatively unknown—whether that breach is due to political changes, environmental concerns, government debt problems, or a host of other possible grounds.[4] The fear for the private contractor is, of course, that when confronted with a government breach, it will be left "holding the bag."[5]

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[1] *See* Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. AND ECON. REV. 313, 314 (1999) (envisioning specific circumstances of a government breach of contract).

[2] *See generally* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979) (providing an overview of specific performance as an "extraordinary remedy" available only when damages are inadequate).

[3] *See* MARILYN E. PHELAN ET. AL., SOVEREIGN IMMUNITY LAW 77–84 (2019).

[4] *See generally* John Hurley et. al., *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, 3 J. OF INFRASTRUCTURE, POL'Y, AND DEV. 139, 139 (2019) (exploring the problem of government debt in the context of the Belt and Road Initiative); Blake H. Berger, *Malaysia's Cancelled Belt and Road Initiative Projects and the Implications for China*, THE DIPLOMAT (Aug. 27, 2018), https://thediplomat.com/2018/08/malaysias-canceled-belt-and-road-initiative-projects-and-the-implications-for-china/ [https://perma.cc/W8LE-BJ3Z] (identifying cancelled projects and analyzing the underlying reasons such as political changes and environmental concerns).

[5] *See* L. Katherine Cunningham & Tara D. Pearce, *Contracting with the State: The Daring Five—The Achilles' Heel of Sovereign Immunity*, 31 ST. MARY'S L.J. 255, 256 (1999) (describing the position of a private contractor faced with a government breach: "Yes, I know you think we [the government] breached our contract, but you cannot sue me for those breaches including our failure to pay you. Why, you ask? Because I say so, that's why. Yes, I know that I waived any immunity from liability when we entered into the contract, but you still cannot sue me to enforce liability unless I allow you to do so, which I do not").

In Southeast Asia, an increasing number of large infrastructure projects require the involvement of private and public entities from many countries, complicating the applicable contract law in one of the world's fastest growing economic regions.[6] As at least a movement in Malaysia looks to revise the public contract laws and other governments maintain a more fluid regulatory system,[7] there is an opportunity to note the learned and unlearned lessons of American jurisprudence and compare them to the varied present states of the law in Southeast Asia.[8] The upshot is that several Southeast Asian countries have uncodified laws relating to government contracts and practices that range from not enough protections for private parties to too many protections that are subject to varying enforceability.[9]

On average, Organization for Economic Cooperation and Development (OECD) countries spend 11.9 percent of Gross Domestic Product (GDP) on government contracts for goods or services procurement—a sum certainly large enough to warrant attention.[10] In Southeast Asia, the importance of government contracts is even more acute as regional economic productivity reaches new heights and large, internationally-funded infrastructure projects proliferate.[11] Specifically, the Association of Southeast Asian Nations (ASEAN)[12] is an important epicenter of economic activity.[13] ASEAN recently became the world's fifth largest economy with a GDP of $2.8 trillion and a population of 650 million people.[14] Moreover, in 2017, China's Communist Party incorporated the Belt

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[6] *See generally Reconnecting Asia Project, "Reconnecting Asia Project Database,"* CTR. FOR STRATEGIC AND INT'L STUDIES, https://docs.google.com/spreadsheets/d/1KrNbneUU_97zilAVPWU-eEprwOYpPCo69hv2vp4hOOM/edit#gid=1987188535 [https://perma.cc/37AE-EURN] (a database constructed by the Center for Strategic and International Studies that documents all belt and road initiative projects in detail) [hereinafter *CSIS Database*].

[7] Datin Grace Xavier, *Need for a Public Procurement Law*, NEW STRAIGHTS TIMES (Feb. 4, 2019), https://www.nst.com.my/opinion/columnists/2019/02/457405/need-public-procurement-law [https://perma.cc/E9W2-HMM5]; *see also infra* Section II.A (detailing the concerns associated with uncodified remedies that vary by executive branch decree).

[8] *See infra* Part III.

[9] *See infra* Part II.

[10] *See generally* OECD, GOVERNMENT AT A GLANCE 2017 (2017), https://www.oecd-ilibrary.org/governance/government-at-a-glance-2017_gov_glance-2017-en [https://perma.cc/KK5J-3PV4].

[11] *See generally* Hurley et al., *supra* note 4 (discussing the pervasiveness of Chinese investment in Southeast Asia and identifying the potential dangers, such as unmanageable debt).

[12] ASEAN is an international organization, similar in concept (but markedly different in practice) to the European Union. It consists of Brunei, Indonesia, Thailand, Cambodia, Laos, Vietnam, the Philippines, Malaysia, Myanmar, and Singapore.

[13] Int'l Monetary Fund, *World Economic Outlook: Challenges to Steady Growth*, WORLD ECON. & FIN. SERV. (Apr. 2018), https://www.imf.org/en/Publications/WEO [https://perma.cc/3KMB-U6VW]; *see also* U.S.-ASEAN Bus. Council, *What Is ASEAN*, ASEAN MATTERS FOR AM., AM. MATTERS FOR ASEAN (July 24, 2019), https://www.usasean.org/why-asean/what-is-asean [https://perma.cc/87EK-8LQD].

[14] *See* U.S.-ASEAN Bus. Council, *supra* note 13.

and Road Initiative (BRI) into its Constitution.[15] The BRI aggregates Chinese investment vehicles[16] to fund major infrastructure projects in Asia and beyond.[17] Total capital estimates are in the trillions of U.S. dollars, including "as high as $8 trillion."[18] Amid such a flurry of funding, investors and manufacturers across the globe will surely see an increase in transactions with Southeast Asia.[19]

Though international investment treaties may provide a framework for foreign direct investment, these agreements rarely offer a holistic contract template that entirely supplants domestic law. Bilateral Investment Treaties (BITs) sometimes provide further guidance and have been a means for a foreign investor to bring suit against a state.[20] A BIT is an agreement between two states that specifies the treatment of cross-border investments and usually allow for arbitration of disputes in fora such as the International Centre for the Settlement of Investment Disputes.[21] Between 1990 and 2009, investors or foreign firms brought a breach action against a public entity in ninety-four emerging economies, mostly in Latin America, under the auspices of a Bilateral Investment Treaty.[22]

A different but related option for foreign investment protection is the proliferation of investor-state dispute settlement (ISDS) tribunals.[23] These tribunals are intended to provide foreign

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[15] The Chinese Communist Party voted to add the language "following the principle of achieving shared growth through discussion and collaboration, and pursuing the Belt and Road Initiative" into its Constitution, affirming its commitment to President Xi Jinping's infrastructure projects throughout Asia. An Baijie, *Xi Jinping Thought Approved for Party Constitution*, CHINA DAILY (Oct. 24, 2017), http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/24/content_33644524.htm [https://perma.cc/7KX3-8NEJ]; *see also* Hurley et al., *supra* note 4, at 139.

[16] These institutions include the China Development Bank, the Export-Import Bank of China, and the Agricultural Development Bank of China. *See* Sebastian Ibold, *BRI Institutions*, BELT & ROAD INITIATIVE (Sept. 9, 2021), https://www.beltroad-initiative.com/institutions-and-mechanisms/ [https://perma.cc/27AC-TFJX].

[17] *See generally CSIS Database*, *supra* note 6 (a database constructed by the Center for Strategic and International Studies that documents all BRI projects in detail).

[18] *See* Hurley et al., *supra* note 4, at 140.

[19] *See* ASEAN, *ASEAN Investment Report 2018*, ASEAN: STATEMENTS (Nov. 12, 2018), https://asean.org/speechandstatement/asean-investment-report-2018-published/ [https://perma.cc/36CJ-D5J4] (outlining a 12 percent increase between 2016 and 2018 in foreign direct investment alongside other data showing increasing investment).

[20] Rachel L. Wellhausen, When Governments Break Contracts: Foreign Firms in Emerging Economies 45–52 (June 2012) (unpublished PhD thesis) (on file with Mass. Inst. Of Tech.).

[21] Jared Wong, *Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 137 (2006).

[22] *See* Wellhausen, *supra* note 20, at 45–46.

[23] *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. OF INT'L L. 1, 3–4 (2019).

investors with a means to bring suit against a member state,[24] but problems often arise as to adjudication.[25] In the first instance, ISDS tribunals apply the law of the treaty where available before turning to the applicable domestic law, which may often be supplanted by the treaty text.[26] Domestic law remains relevant, however, when the treaty is silent or defers to national law on subjects such as contract or property law.[27] Importantly, the use of ISDS tribunals has not taken hold in ASEAN to the degree that it has in other regions.[28] ASEAN states have been the subject of only thirty-three ISDS claims, all of which have been relatively unsuccessful for the investors who brought suit.[29]

As a result of alternatives that fail to fully supplant domestic court systems and law, parties often contract around treaty provisions or apply domestic contract law in the absence of treaty guidance.[30] Though a state may waive sovereign immunity from the jurisdiction of a tribunal pursuant to an international investment agreement, that waiver likely does not include a waiver of immunity from execution of any award of that tribunal, making it difficult for parties to receive a payout of a monetary award.[31] This lack of an enforcement mechanism makes the forum's contract law incredibly relevant for topics such as the appropriate measure and type of damages.[32] Indeed, it means that, given predictable conditions, private parties may prefer to pursue claims against the government in domestic adjudicatory bodies.[33]

As infrastructure projects proliferate in Southeast Asia, the private entities that fund, construct, and supply such endeavors

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[24] References to ISDS tribunals are included as provisions in various treaties as a means to provide basic legal protections to companies abroad without infringing on any state's ability to regulate as an alternative to normal domestic judicial proceedings. *See* Off. of the U.S. Trade Rep., *The Facts on Investor-State Dispute Settlement*, THE USTR ARCHIVE: BLOG (Mar. 2014), https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors [https://perma.cc/5VQM-HSLH].

[25] *See* Arato, *supra* note 23, at 3.

[26] *See id.* at 3–4, 8, 10.

[27] *See id.* at 47–50.

[28] *See* Luke Nottage & Sakda Thanitcul, *International Investment Arbitration in Southeast Asia: Guest Editorial*, SYDNEY L. SCH., 18–19 (Nov. 2016) (unpublished manuscript) (on file with Social Science Research Network Electronic Library at http://ssrn.com/abstract=2862272) [https://perma.cc/RY23-4FWC].

[29] *See id.*

[30] *See* Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351, 355–56 (2016).

[31] *See* Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et. al., eds.), 302, 321 (2009) (concluding that international agreements do not address "that 'last bastion' of sovereignty—State immunity from execution of assets").

[32] *See* Arato, *supra* note 30.

[33] *See* Bjorklund, *supra* note 31, at 321.

need to know the possible outcomes of a government's breach of contract.[34] Though compensatory and restitution damages are definitively different methods of calculating damages,[35] their purpose is to serve as a baseline level of remedy available to private parties. In the American system, compensatory damages are "[d]amages sufficient in amount to indemnify the injured person for the loss suffered,"[36] while restitution damages are awarded "when the defendant has been unjustly enriched at the plaintiff's expense."[37] In essence, compensatory damages are calculated based on the plaintiff's loss, while restitution is calculated from the defendant's gain.[38] In the context of a public contract that is the subject of a government breach, private parties often seek compensatory damages for expenses incurred prior to the government's breach rather than restitution damages.[39]

In addition to the monetary interests of both the government and the private contractor, any consideration of remedies against the government must also note the unique factors at play when the government is the breaching party. For example, expectation damages seek to place the injured party in the position she would have been in had the original contract been completed.[40] Yet, it is difficult to transfer this notion to a government breach because one party to the contract, the government, has the unilateral power to change the law such that the parties' expectations are derogated *ex post*.[41] In another stark contrast, the government cannot be as easily judged to have acted immorally if a newly elected government comes to power on the promise of exiting the contract.[42] Yet, the interests of economic efficiency and genuine reliance (to engender the notion that contracts with the government can be trusted and are not tainted with a prohibitive amount of risk) would support the idea that government breach should be little different than a private party's breach.[43]

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[34] *See generally CSIS Database*, *supra* note 6.

[35] *See generally* David Pearce & Roger Halson, *Damages for Breach of Contract: Compensation, Restitution and Vindication*, 28 OXFORD J. OF LEGAL STUD. 73, 73 (2008) (comparing restitution and compensation damages and identifying a crossover theme of vindication of contractual rights).

[36] *Damages: compensatory damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[37] *Damages: restitution damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[38] Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 975–76 (2011).

[39] *See infra* Part I.

[40] *See* Melvin A. Eisenberg & Brett H. McDonnell, *Expectation Damages and the Theory of Overreliance*, 54 HASTINGS L.J. 1335, 1335 (2002).

[41] *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 506–08, 521 (1999).

[42] *See infra* Part I; *see also, e.g.*, *id.* at 468 (for an example involving the cancellation of government contracts for the privatization of the Toronto's Pearson International Airport).

[43] *See* Hadfield, *supra* note 41, at 510–21.

In recent years, the United States Supreme Court has confronted the issue of balancing government interests and those of a private party to a government contract, revealing that the American legal system continues to struggle with the notion of appropriate remedies for government breaches.[44] The issue is often whether a given remedy may be pursued against a government and if that remedy may be awarded.[45] These questions are particularly acute when a remedy against the government becomes available after a breach resulting from the government's lawmaking capacity.[46] A comparison of U.S. law to that of several Southeast Asian countries provides helpful insights to the problems ASEAN countries encounter and the solutions that are possible.[47]

This note argues that the lack of clear and codified public contract law in Southeast Asia presents a substantial risk to private contractors and that the extreme variance in public contract law is detrimental to both parties involved. Accordingly, ASEAN should seek the codification of public contract laws and a certain degree of harmonization within a zone of remedies that is appealable to all parties in the event of a government breach. This note recommends that ASEAN nations enact laws that provide, at the very least, restitution damages, but not go as far as to allow an award of specific performance against the government. Part I reviews American law governing public contract remedies and highlights the problem with awarding specific performance. Part II surveys the present state of Southeast Asian public contract laws. Part III articulates the appealable zone between restitution or compensatory damages and specific performance. Part IV explains that the Association of Southeast Asian Nations (ASEAN) can codify this zone of appealable remedies and agree upon its adoption by member states, thereby providing a unique and effective method of implementation.

I. GOVERNMENT BREACH IN THE UNITED STATES

A. Origins of Sovereign Immunity

Sovereign immunity is based on the English maxim "the King can do no wrong" such that "the Crown of England [is not] suable unless it has specifically consented to suit."[48] This

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[44] *See infra* Part I.

[45] *See infra* Part I.

[46] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 858–60 (1996) (holding the federal government liable in damages for a breach of contract caused by a change in federal law).

[47] *See infra* Part III.

[48] Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–02 (2001).

immunity from suit is particularly applicable when the government legislates itself into a breach of contract, because unless the government has consented to suit, the aggrieved party has no recourse against the government.[49] Scholars of law and economics have come to the similar conclusion that the government should not have a duty to pay private parties for harms resulting from a change in government practice or law,[50] while other scholars describe it as an "anachronistic relic."[51] A critical scholar described sovereign immunity as a "judicial state of mind conditioned by the spectre that its relinquishment will bankrupt the sovereign and result in governmental paralysis."[52]

The government's complete immunity from suit has been greatly curtailed over the years, but has not been completely eliminated.[53] There is also an important distinction to be found within the confines of sovereign immunity: that between sovereign immunity from suit and from liability.[54] In formalizing a contract, a court will find that the government waives immunity from liability, but that does *not* mean that a private party may sue the sovereign for damages, as separate immunity from suit persists.[55] The U.S. federal government has dealt with the immunity from suit issue by waiving immunity in most circumstances through statutory law,[56] while the states have taken varied approaches that largely resulted in the waiver of immunity from suit by the late 1970s.[57]

Particularly, this issue comes into play when "the new government may have different preferences from the current one."[58]

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[49] *See id.* An example of a government legislating itself into a breach of contract was the passage of the 1990 Outer Banks Protection Act, which made illegal several existing oil exploration contracts involving land off the North Carolina Coast that to which the federal government was party. Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 605 (2000) ("[*Held*:] The government broke its promise, repudiated the contracts, and must give the companies their money back.").

[50] Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 615–16 (1986); *see also* Fischel & Sykes, *supra* note 1, at 380.

[51] *See* Chemerinsky, *supra* note 48, at 1201.

[52] John E. H. Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 ADMIN. L. REV. 39, 57 (1969).

[53] *See infra* Part I.

[54] *See* Cunningham & Pearce, *supra* note 5, at 256–57 (describing the "double shield" of sovereign immunity's applicability to immunity from suit and immunity from liability).

[55] *See, e.g.*, Fed. Sign v. Tex. S. U., 951 S.W.2d 401, 403–06 (Tex. 1997) (noting that a government—there the state of Texas—waives immunity from liability when it enters a private contract).

[56] *See infra* Section I.B.

[57] *Sovereign Immunity*, 93 HARV. L. REV. 189, 189–98 (1979).

[58] Abraham L. Wickelgren, *Damages for Breach of Contract: Should the Government Get Special Treatment?*, 17 J. OF L., ECON. & ORG. 121, 139 (2001); *see also, e.g.*, Thomas Stanton, *Sovereign Immunity*, 38 J. ST. B. OF CAL. 177, 177 (1963) (discussing the elimination of government immunity for tort claims and related developments in California).

That a new government has varying preferences from the previous government is, naturally, often the case.[59] A particularly stark example of this concept occurred in Canada regarding a highly publicized dispute over Toronto Pearson International Airport in the 1990s.[60] Canada's conservative government reached a privatization agreement for the airport, but was later ousted by Jean Chrétien's liberal party, which promised to cancel the contracts.[61] The new government attempted to pass legislation that would prohibit the privatization consortium from bringing breach of contract claims against the government, but the legislation stalled and the dispute ended in a $60 million settlement.[62] This example demonstrates that while the concept of sovereign immunity has existed for centuries, statutes and jurisprudence have limited its applicability to government contracts while preserving the doctrine's foundational status.

B. The Waiver of Sovereign Immunity

The waiver of sovereign immunity began as a statutory solution to adjudicating disputes with the government but ultimately became the basis of jurisprudential doctrines that have eroded traditional sovereign immunity yet fall short of its total eradication. Initially, the U.S. Congress provided compensation for breach of contract on a case-by-case basis, but "by 1832 Congress was spending fully half of its time adjudicating private bills of one kind or another."[63] Thereafter, Congress created the Court of Claims,[64] which it refined in the Tucker Act of 1887.[65] The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States."[66] The Little Tucker Act—a cousin of the Tucker Act—provides the U.S. District Courts with "original jurisdiction, concurrent with the [Court of Claims]" for contracts "not exceeding $10,000 in amount."[67] In 1982, the Federal Courts

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[59] *See* Hadfield, *supra* note 41, at 467.

[60] *See id.* at 476–77.

[61] *See id.* at 476.

[62] *See id.* at 476-77.

[63] Brian R. Levey, *Tortious Government Conduct and the Government Contract: Tort, Breach of Contract, or Both*, 22 PUB. CONT. L.J. 706, 713 (1992) (citing Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 644 (1985)).

[64] *See* An Act to Establish a Court for the Investigation of Claims Against the United States, ch. 122, 10 Stat. 612 (1855).

[65] *See* 28 U.S.C. § 1491.

[66] 28 U.S.C. § 1491(a)(1).

[67] 28 U.S.C. § 1346(a)(2).

Improvement Act allowed departmental review boards to hear cases alongside the reconstituted Claims Court.[68] As discussed below, the jurisdictional inclusion of departmental review boards provides an interesting comparison to some ASEAN countries.[69]

In terms of remedies, the Tucker Act contains what has been called an implied prohibition on the use of specific performance.[70] In regard to money damages, a court award of "monetary relief shall be limited to bid preparation and proposal costs."[71] Generally, these remedy limitations were established by the United States Supreme Court under the doctrines of *unmistakability* and *sovereign acts*.[72] Based on the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*,[73] government contracts are subject to an assumption that the government has not waived sovereign immunity unless they state a clear intent to do so in unmistakable terms.[74] In *Bowen*, the State of California sought to withdraw from the federal social security system, but did not complete the existing statutory process to do so when Congress revoked the states' ability to withdraw from the system, with retroactive effect.[75] The Court reminded the parties that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[76]

The second doctrine, that of sovereign acts, developed far earlier to solve the problem of a government that legislates itself into breaching a contract. The solution, first iterated in *Horowitz v. United States*, was a sort of legal separation that left the legislative powers of government unrestrained, but the same government still potentially responsible for paying restitution or compensatory

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[68] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, 96 Stat. 25 (1982).

[69] *See infra* Section III.A.

[70] Though the Tucker Act provides the Court of Claims with injunctive powers, the courts have long held that a specific waiver of sovereign immunity is required for an order of specific performance against the government. U.S. DEP'T OF JUSTICE, CIVIL RESOLUTION MANUAL, § 219 SPECIFIC PERFORMANCE, https://www.justice.gov/jm/civil-resource-manual-219-specific-performance [https://perma.cc/C7CT-G238] (providing case citations).

[71] 28 U.S.C. § 1491(b)(2).

[72] *See infra* Section I.C; s*ee also* K. McKay Worthington, Note, *Is Your Government Contract Worth the Paper It's Written On—An Examination of Winstar v. United States*, 1996 COLUM. BUS. L. REV. 119, 127–31 (1996).

[73] Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986) [hereinafter Bowen v. POSSE].

[74] *Id.* ("Rather, we have emphasized that '[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).

[75] *Bowen v. POSSE*, 477 U.S. at 48–49.

[76] *Id.* at 52 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).

damages.[77] There, the Court said that the United States "cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."[78] Indeed, "under *Horowitz*, the contracting government is separated from the lawmaking branch, and independent acts by the latter are considered to be 'public and general.'"[79]

In addition to these theories based on sovereign immunity, remedies against the government are confined to those that Congress has specifically provided for in a statute.[80] In *Office of Personnel Management v. Richmond*, the U.S. Supreme Court declined to apply the doctrine of equitable estoppel against the United States, thereby precluding the award of damages to an individual party that was otherwise unauthorized by law.[81] The plaintiff in the case relied on advice from a federal employee as to the income cap for disability benefits, and the Federal Circuit awarded damages based on estoppel.[82] The Supreme Court reversed, clarifying that contract remedies against the government are limited to those provided by statute.[83] *United States v. Bormes* further restrained the use of other remedies when the Court held that the Tucker Act controls, unless a specific statute provides a "detailed remedial scheme."[84]

The Supreme Court has held that the Tucker Act is a waiver of sovereign immunity,[85] but the exceptions and doctrines briefly noted here represent the fact that "sovereign immunity has not been wholly abandoned and the federal government retains certain rules, privileges, and limitations on liability."[86] With a line of cases beginning in the late 1990s, however, these

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[77] *See* Horowitz v. United States, 267 U.S. 458, 461 (1925).

[78] *Id.*

[79] Seon J. Lee, *Does Mobil Oil Weaken the Sovereign Defenses of Government Breach-of-Contract Claims—An Analysis of the Unmistakability Doctrine and the Sovereign Acts Doctrine*, 31 PUB. CONT. L.J. 559, 565 (2002) (quoting Horowitz v. United States, 267 U.S. 458, 461 (1925)).

[80] *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 431–32 (1990).

[81] *See id.*

[82] *See id.* at 417–19.

[83] *Id.* at 431–32.

[84] *See* United States v. Bormes, 568 U.S. 6, 15 (2012).

[85] *See* 28 U.S.C. § 1491; United States v. Mitchell, 463 U.S. 206, 212 (1983) (holding that Congress's grant of jurisdiction over certain cases, including contract claims against the government, "constitutes a waiver of sovereign immunity with respect to those claims"). The U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit have succeeded the Court of Claims. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, 96 Stat 25 (1982); Federal Courts Administration Act of 1992, Pub. L. No. 102–572, Tit. IX, sec. 901, 106 Stat. 4506 (1992) (codified as amended at 28 U.S.C. § 1).

[86] Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies*, (May 2, 2006) (Harvard Law School Federal Budget Policy Seminar Briefing Paper available http://www.law.harvard.edu/faculty/hjackson/ContractClaims_22.pdf) [https://perma.cc/2QUQ-3NDZ].

privileges and limitations on liability have been somewhat eroded such that, in many cases, the government is now treated akin to a private party for purposes of breach of contract.[87]

C. The Government as a Private Party

In *United States v. Winstar Corp.*, the Supreme Court was confronted with a case that would traditionally have called for the application of the sovereign acts doctrine and other arguments for the unique treatment of government contracts.[88] Importantly, the Court declined to apply those doctrines and treated the dispute much like a contract between two private parties.[89] In *Winstar*, the savings and loan ("thrift") industry was supported by contracts with the federal government, which Congress effectively invalidated by means of subsequent legislation prohibiting the government to perform certain conduct under those contracts.[90] Ultimately, the Court held the government liable for breach of contract.[91]

The Court splintered, however, on the degree to which the government can impliedly waive sovereign immunity and the applicability of the doctrines of unmistakability and sovereign acts.[92] A majority of the justices rolled back the remaining restraints on sovereign immunity by further limiting the applicability of the doctrines of unmistakability and sovereign acts.[93] Overall, *Winstar* meant that the government bore the financial risk for changes to the law.[94] Bluntly, the Court held "that private parties' contractual rights against the government trumped the government's power to legislate in the public interest without regard to its earlier agreement."[95] Though the U.S. Court of Federal Claims has distinguished this obligation from when the government changes the regulatory interpretation of a law,[96] *Winstar* represents a strong endorsement of the private right to contract and the importance of reliability in contracts with the federal government.[97] It was the exemplar of a series of cases that

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[87] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 858–59 (1996).

[88] *See* Horowitz v. United States, 267 U.S. 458, 461 (1925) (calling for the application of sovereign immunity to the "public and general acts [of] a sovereign").

[89] *See* Fischel & Sykes, *supra* note 1, at 320; *Winstar*, 518 U.S. at 908–10.

[90] *See Winstar*, 518 U.S. at 856–59.

[91] *See id.* at 910.

[92] *See generally id.* at 911 (Breyer, J., concurring); *id.* at 924 (Rehnquist, CJ., dissenting).

[93] *See* Fischel & Sykes, *supra* note 1, at 320–21; *Winstar*, 518 U.S. at 908–10.

[94] *See id.* at 321.

[95] *Id.*

[96] *See* United Launch Servs., LLC v. United States, 139 Fed. Cl. 664, 685–86, *cert. denied*, 139 Fed. Cl. 721 (2018) (distinguishing *Winstar* because the disputed law's "legality and enforceability is a matter for judicial determination and is not based on the government's views").

[97] *See* Fischel & Sykes, *supra* note 1, at 320.

placed limitations on the theories of unmistakability and sovereign acts that continued with cases such as *Bormes*.[98]

Perhaps most importantly, "*Winstar* revealed that the majority of the Justices reject the application of special defenses for the government and instead favor treating the government as a private actor in a breach-of-contract action."[99] The Court identified a federal common law of contracts, much like the doctrine to which private parties are held, but subject to additional statutory restrictions such as those contained in the Tucker Act.[100] In *Winstar*, that distinction left the government with the liability for a change in federal law. Importantly, that meant that the government's potential exposure could be at least $10 billion in damages.[101] Despite this enormous potential liability, the Supreme Court has reaffirmed the notion that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[102]

In the *Winstar* decision, the Court is clearly wary of opening the door to allow an injunctive order such as specific performance against the government.[103] The result could be private actors dictating government action by means of contractual obligations. Nevertheless, the cases that followed *Winstar* displayed a slow erosion of past principles prohibiting awards of specific performance, which was sparked by the proliferation of specific performance awards in disguise.[104] In a case decided soon after *Winstar,* offshore oil companies sought compensation for oil exploration contracts awarded by the federal government after they were rendered a nullity by congressional legislation in order to protect a specific area off the coast of North Carolina.[105] The contracts were conditioned on the federal government providing certain regulatory permissions, which it was now statutorily prohibited from providing.[106]

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[98] United States v. Bormes, 568 U.S. 6, 15 (2012) (limiting remedies against the government to the Tucker Act absent a statute with a "detailed remedial scheme").

[99] *See* Lee, *supra* note 79, at 561.

[100] An example of a statutory restriction is the unavailability of quasi-contract suits against the federal government. *See* W. Stanfield Johnson, *Hercules, Winstar, and the Supreme Court's Conspicuous and Potentially Consequential Error*, 44 PUB. CONT. L.J. 199, 231 (2015).

[101] *See* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 155 (1998).

[102] Mobil Oil Expl. & Producing Se. v. United States, 530 U.S. 604, 607–08 (2000) (quoting United States v. Winstar Corp., 518 U.S. 839, 895 (1996)).

[103] *See* United States v. Winstar Corp., 518 U.S. 839, 871 (1996).

[104] *See, e.g.*, *Mobil Oil*, 530 U.S. at 613–20, 624 (2000); Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 190–91 (2012); Bowen v. Massachusetts, 487 U.S. 879, 882–83, 901–08 (1988).

[105] *See Mobil Oil*, 530 U.S. at 607–10.

[106] *See id.* at 607.

Accordingly, the Court found that this constituted a repudiation of the contract by the United States.[107] The Court focused on the issue of remedies, observing that the oil companies sought restitution damages for their initial payments rather than damages for a full breach of contract.[108] Pursuant to *Winstar*, and because the company sought only restitution damages, the Court treated the government as it would have treated a private party.[109] Simply put, "the oil companies gave the United States $156 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the government from keeping that promise . . . . therefore the government must give the companies their money back."[110]

In doubling down on the importance of contract enforcement, the Court reaffirmed that whenever possible, the government should be treated as a private party in a breach of contract case.[111] Though a monetary award, the Court's holding in *Mobil Oil* found the government liable for exercising its sovereign power to legislate.

D. An Incomplete Picture and the Role of Specific Performance

In cases such as *Bowen* and *Salazar*, the delineation of restitution and specific performance is far from clear, and courts reach inconsistent outcomes as they weigh the competing interests of the private party to the contract and those of the government.[112] Though the Tucker Act impliedly prohibits specific performance, courts have found creative ways of circumventing this prohibition.[113] The first veiled use of specific performance has to do with the source of government money to pay damages, which is known as the judgment fund or non-appropriated funds.[114] The second is a type of order akin to specific performance that requires the government to spend money in a certain way.[115] An analysis of these examples reveals that ASEAN states ought to be careful not to allow for an order of specific performance against the government.

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[107] *See id.* at 613.

[108] *Mobil Oil*, 530 U.S. at 623.

[109] *Id.* at 624.

[110] *Id.* at 624.

[111] *See id.* at 607–08.

[112] *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 190 (2012); Bowen v. Massachusetts, 487 U.S. 879, 882 (1988).

[113] *See* Seamon, *supra* note 101, at 156–58.

[114] *See* Paul F. Figley, The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse, 18 U. PA. J. CONST. L. 145, 147 (2015).

[115] *See infra* Section I.D.2.

1. Non-appropriated Funds

One of the problems with damage awards against the government has been determining the necessary appropriation to provide funds owed to private parties.[116] Congress largely solved that problem by providing an indefinite appropriation for judgments against the government, which are reimbursed by agencies.[117] Sometimes, however, the remedy is less clear. In *Salazar v. Ramah Navajo Chapter*, the Supreme Court ordered the government to pay private contractors based on a statutory requirement that Congress had failed to fully fund.[118] The Indian Self-Determination and Educational Assistance Act directed the federal government to pay "contract support costs"[119] to tribes that privately contracted for services that the federal government would otherwise provide, but made such payments "subject to availabl[e] appropriations."[120] Between 1994 and 2001, Congress appropriated funds that were not sufficient to pay all applicable costs, so the Secretary of the Interior paid all tribes partial costs with the available appropriation.[121]

The Supreme Court held that the federal government was required to pay the full amount of the contract support costs, despite the fact that Congress had not appropriated sufficient funds.[122] The majority determined that "it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."[123] The Supreme Court again chose to treat this case as a contractual obligation between the federal government and the tribes, despite the fact that the statute contains language to limit the payment in the event of insufficient appropriation.[124] Even Chief Justice Robert's dissent—in the company of Justices Ginsburg, Breyer, and Alito—focused on the majority's failure to apply what, to them, was clearly limiting statutory language.[125] Neither remarked that, in essence, the Court's decision orders

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[116] *See Salazar*, 567 U.S. at 185.

[117] 31 U.S.C. § 1304; 41 U.S.C. § 7108 ("Any judgment against the Federal Government on a claim under this chapter shall be paid promptly" and such payments "shall be reimbursed to the fund . . . by the agency whose appropriations were used for the contract.").

[118] *Salazar*, 567 U.S. at 185.

[119] 25 U.S.C. § 5325 (formerly 25 U.S.C. § 450j-1(a)(2)); *Salazar*, 567 U.S. at 198.

[120] 25 U.S.C. § 5325 (formerly 25 U.S.C. § 450j-1(a)(2)).

[121] *Salazar*, 567 U.S. at 187.

[122] *Id* at 201.

[123] *Id.* at 190.

[124] 25 U.S.C. § 5325 (formerly 25 U.S.C. § 450 j-1(b)).

[125] *Salazar*, 567 U.S. at 201–02.

the government to appropriate and disperse money which Congress has chosen not to appropriate.[126]

The Court's decision in *Salazar* is reminiscent of an order of veiled specific performance.[127] Though the tribes clearly relied on the federal government's promise to provide funds and the government broke that promise, the Court's choice to treat this as a breach of contract over a matter of congressional discretion in appropriations allowed a remedy that goes beyond payout of restitution damages and imitates an order of specific performance.[128] Pursuant to the Court's decision, so long as the Indian Self-Determination and Educational Assistance Act remains on the books (and it still is),[129] the federal government will have to fully pay any and all "contract support costs,"[130] regardless of what Congress chooses to appropriate, unless it otherwise amends the statute's requirements.[131]

2. Specific Performance as Monetary Relief

One of the earliest and arguably more extreme orders of veiled specific performance against the government sanctioned by the United States' highest court was in the case of *Bowen v. Massachusetts*.[132] In *Bowen*, the federal government refused to reimburse the state of Massachusetts for Medicaid expenditures under a certain category of care.[133] Specifically, the Secretary of Health and Human Services deemed the state's "provision of medical and rehabilitative services to patients in intermediate care facilities for the mentally [disabled]" uncovered by the federal Medicaid program because the services were administered by the State Department of Education, not the Department of Mental Health.[134] The majority viewed the Secretary's decision as covered by the Administrative Procedure Act (APA)[135] rather than a decision resulting from the breach of a contractual relationship between Massachusetts and the

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[126] *See* Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424–25 (1990) (describing the importance of the appropriations clause and its limit on dispersing money without congressional authorization).

[127] *See Salazar*, 567 U.S. at 201.

[128] *See id.*

[129] *See* 25 U.S.C. § 5325 (formerly 25 U.S.C. § 450j-1(a)(2)).

[130] 25 U.S.C. § 5325 (formerly 25 U.S.C. § 450j-1(a)(2)).

[131] *See Salazar*, 567 U.S. at 200–01 (offering that Congress "could reduce the Government's financial obligation by amending ISDA to remove the statutory mandate compelling the BIA to enter into self-determination contracts, or [give] the BIA flexibility to pay less than the full amount of contract support costs").

[132] Bowen v. Massachusetts, 487 U.S. 879 (1988).

[133] *Id.* at 882.

[134] *Id.* at 885–86.

[135] 5 U.S.C. §§ 701–706.

federal government.[136] The alternative, argued by the Secretary and U.S. Government, would have barred review of the agency action at issue in the District Court and instead allowed a claim for monetary relief to be heard in the Claims Court pursuant to the Tucker Act.[137] Because the Court chose to review the agency action under the APA, the Court held that the district court could reverse the agency determination to withhold funding.[138]

In holding that the courts could overrule the agency's review board pursuant to the APA, the Court effectively ordered the federal government to pay Massachusetts $6.4 million.[139] In careful wording, the majority says that the district court's decision "did not purport to be based on a finding that the Federal Government owed Massachusetts that amount, or indeed, any amount of money."[140] Ultimately, however, the Court admitted "it is likely that the Government will abide by this declaration and reimburse Massachusetts the requested sum."[141] Yet, for the Court, the payment to Massachusetts as a result of the district court decision "is a mere by-product."[142]

In his dissent to *Bowen,* Justice Scalia took issue with the Court's decision to rely on the APA rather than the Tucker Act.[143] For Justice Scalia, Massachusetts' complaint was a case against the United States seeking money damages, which falls under the jurisdiction of the Claims Court.[144] The premise is that *Bowen* involved a case for money damages,[145] and the "States . . . like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress."[146] For Justice Scalia, the remedy of specific relief is at play when the majority determines that money damages in the Claims Court are inadequate, and the State may therefore turn to the district court for injunctive relief under the APA.[147]

3. The Enduring Vestiges of Sovereign Immunity

The two preceding cases have dealt with when the nongovernmental party to a contract, in some way or another,

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136 *See* Bowen v. Massachusetts, 487 U.S. 879, 904 (1988).
137 *See id.*
138 *Id.* at 909–10.
139 *See id.*
140 *Id.* at 909–10.
141 *Id.* at 910.
142 *Id.*
143 *Id.* at 922–23 (Scalia J., dissenting).
144 *See id.* at 930.
145 *Id.* at 913–17.
146 Block v. North Dakota *ex rel.* Bd. Of Univ. and Sch. Lands, 461 U.S. 273, 280 (1983).
147 *See Bowen*, 487 U.S. at 925–27 (Scalia, J. dissenting).

achieves an award against the government that resembles an order for specific performance.[148] In cases such as *Salazar*, an award of specific performance against a government has the interesting effect of allowing a private party to legislate via a breach of contract claim.[149]

It must be noted, however, that the government retains protections beyond those founded in sovereign immunity. In *General Dynamics Corp. v. United States*, the court again exercised its "common-law authority to fashion contractual remedies in Government-contracting disputes."[150] There, the government prevailed when a contractor brought an otherwise valid breach of contract case over a military project. The government defended its breach by invoking state secrets.[151] The Supreme Court held that in such a case regarding national security, "[r]ather than tempt fate, we leave the parties to an espionage agreement where we found them the day they filed suit."[152] Leaving the parties where they began left the contractor without $1.2 billion in what would likely have been restitution damages.[153] Government protections such as those in *General Dynamics* exhibit the persistence of legal protections that have their roots in sovereign immunity and they take various forms in both the United States and Southeast Asia.[154]

II. GOVERNMENT BREACH IN SOUTHEAST ASIA

ASEAN[155] was established in 1967 with the stated goals of political cooperation and economic expansion.[156] In 2003, the ASEAN member states decided to create the ASEAN Community, with a goal of cooperation and integration based on three separate "pillars": the Political Security Community, the Economic Community, and the Socio-Cultural Community.[157] The ASEAN Charter entered into force in 2008, and the bloc has undertaken a sector-by-sector effort to harmonize regulations and agree upon further cooperation.[158] ASEAN is often compared to the European

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148 *See supra* Section I.D.2.

149 *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 201 (2012).

150 Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011).

151 *Id.* at 480.

152 *Id.* at 486.

153 *See id.* at 489–90.

154 *See id.* at 486–87.

155 As noted above, ASEAN consists of Brunei, Indonesia, Thailand, Cambodia, Laos, Vietnam, the Philippines, Malaysia, Myanmar, and Singapore.

156 *See Overview*, ASEAN, https://asean.org/asean/about-asean/overview/ [https://perma.cc/L9SJ-EFVY].

157 *See id.*

158 *See id.*

Union (EU), with citations to the shared goal of "economic integration" in a single market and the extensive conclusion of bloc-wide free trade agreements.[159] ASEAN, however, remains an intergovernmental organization rather than a supranational organization and does not have the power to legislate on a regional scale.[160] Instead, the ASEAN secretariat and representatives adopt agreeable regulatory frameworks, which are transmitted to the countries for adoption on a national level.[161]

As noted by a recent compilation of the contract laws of Asia, the "story of the contract laws of Asian jurisdictions is the story of the borrowing of foreign laws and their subsequent evolution in their new homes."[162] As Chen-Wishart notes, the origins of many Southeast Asian legal systems are in either the common law or the civil law of Europe.[163] Singapore[164] and Malaysia[165] have strong common law influences, while Indonesia[166] has a strong civil law influence. The Philippines[167] was initially a civil law country under colonial Spain, but has notable common law influences from the United States.[168] Thailand[169] might be described as an amalgam of various civil law systems, but serves as a prime example of how several

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[159] *See* Tommy Koh, *Asean and the EU: Differences and Challenges*, THE STRAIGHTS TIMES (Aug. 22, 2017), https://www.straitstimes.com/opinion/asean-and-the-eu-differences-and-challenges [https://perma.cc/KY9B-KS5T].

[160] *See id.*

[161] Herein lies one of the significant differences between the EU and ASEAN: The only means of implementation is incorporation of agreed texts into domestic law on a voluntary basis. Accordingly, ASEAN members must agree on regulatory frameworks to ensure harmonization before implementation. *See id.*

[162] Mindy Chen-Wishart, *Comparative Asian Contract Law on the Remedies for Breach of Contract: Transplant, Convergence, and Divergence*, *in* STUDIES IN THE CONTRACT LAWS OF ASIA: REMEDIES FOR BREACH OF CONTRACT 401 (2016).

[163] *See id.* at 402.

[164] *See generally* Wendy Chang Mun Lin & Jack Tsen-Ta Lee, *Legal Systems in ASEAN: Singapore*, ASEAN L. ASSOC., https://aseanlaw.institute/wp-content/uploads/2020/02/ALA-SG-legal-system-Part-1.pdf [https://perma.cc/B58T-EJJF] (providing a detailed history and overview of the legal system).

[165] *See generally* Asmida bt Ahmad et al., *Legal Systems in ASEAN: Malaysia*, ASEAN L. ASSOC., https://aseanlaw.institute/wp-content/uploads/2020/02/ALA-MAL-legal-system-Part-1.pdf [https://perma.cc/3HML-4VPU] (providing a detailed history and overview of the legal system).

[166] *See generally* Dr. Paulus E. Lotulung et al., *Legal Systems in ASEAN: Indonesia*, ASEAN L. ASSOC., https://aseanlaw.institute/resources/ [https://perma.cc/YB79-ZUS8] (providing a detailed history and overview of the legal system).

[167] *See generally Southeast Asian Legal Research Guide (ARCHIVE): Introduction to the Philippines & its Legal System*, UNIV. OF MELBOURNE LIBR. GUIDES, https://unimelb.libguides.com/c.php?g=402982&p=5443355 [https://perma.cc/BNB5-6STG].

[168] *See generally id.* (providing further details on the historical traditions of the Philippines' legal system).

[169] *See generally Legal Systems in ASEAN: Thailand*, ASEAN L. ASSOC., https://aseanlaw.institute/resources/ [https://perma.cc/RVY9-HF4V] (providing a detailed history and overview of the legal system).

Southeast Asian countries have adapted the systems of other countries to create a decidedly unique tradition of law.[170]

European colonies in Southeast Asia often applied the law of their home country rather than a codified contract law that was specific to the colonial territory.[171] As a result, many of the laws that govern public contracts are relatively new, and a few countries continue without codified systems—an important reality that must be rectified.[172] The description of Southeast Asian public contract laws that follows is in no way holistic. It serves only as a basis for comparison and synthesis of a zone of appealable remedies.[173]

A. Uncodified Remedies

A few countries continue without specified remedies for private parties who contract with the government.[174] In Indonesia, for example, government procurement is often governed by Presidential Decrees rather than statute—meaning that it is subject to frequent change and contains few details and binding provisions.[175] Indonesia's most recent Presidential Decree[176] is silent as to issues pertaining to remedies for a government breach of contract.[177] The Presidential Decree does not contain any provisions for interim relief, a procedure to obtain a final order in a government contract suit, or a provision for damages, leaving the law guiding government contracts almost entirely to the discretion of government agencies under the supervision of the executive.[178]

Indonesia is not alone in the way it approaches the law of government contracts, and to the Indonesian government's credit, it has at least collected administrative procedures regarding procurement in a single governmental decree.[179] The

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[170] *See* Chen-Wishart, *supra* note 162, at 404.

[171] *See, e.g.*, T. Olawale Elias, Note, *Form and Content of Colonial Law*, 3 INT'L AND COMP. L. Q. 645 (Oct.,1954) (describing the contract law that was applicable to British colonies as predominantly British common law).

[172] *See infra* Part III.

[173] *See infra* Part III.

[174] *See* RICHO ANDI WIBOWO, PREVENTING MALADMINISTRATION IN INDONESIAN PUBLIC PROCUREMENT: A GOOD PUBLIC PROCUREMENT LAW AND COMPARISON WITH THE NETHERLANDS AND THE UNITED KINGDOM 250–51 (2017); Christopher Yukins & James Ruairi Macdonald, *Capacity Building in Public Procurement: Burma-Myanmar—A Case Study*, 44 PUB. CONT. L.J. 749, 750 (2015) (citing World Bank, Public Procurement System in Myanmar 1–8 (June 2014) (unpublished approach paper)).

[175] *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), SNAPSHOT ASSESSMENT OF INDONESIA'S PUBLIC PROCUREMENT SYSTEM 8–9 (June 2007).

[176] Presidential Decree No. 16 (2018) (Indon).

[177] *See* WIBOWO, *supra* note 174, at 250–51.

[178] *See id.*

[179] *See id.* at 250.

Presidential Decree also outlines procedures for agencies to follow when forming and performing contract.[180] For instance, "Myanmar has several presidential and agency orders that guide public procurement, but no comprehensive public procurement law."[181] The uncertain state of remedies for government breach in Indonesia shows that codification is the essential first step to clarity for those who contract with the government.

B. Insufficient Remedies

Other Southeast Asian countries offer some protection for private contractors, but these protections fall short of providing restitution for a private party that suffers a governmental breach of contract.[182] Malaysian law currently provides unclear remedies against the government, but there is a growing movement that advocates for lawmakers to consider revisions to the country's public contract law in an effort to increase its comprehensiveness.[183] Current statutory law does not provide any specific remedies in the event of a government breach, but delineates a nonrefundable deposit scheme to assure the government that the contract will be performed, which is notably not a solution for private parties.[184] Other Malaysian laws provide that a party to a "frustrated contract," defined as when "a contract has become impossible of performance," may be eligible for restitution or compensatory damages.[185] That statute specifically says that the aforementioned provision "shall apply to contracts to which the government is a party in like manner as to contracts between subjects."[186] Importantly, however, restitution or compensatory damages are apparently unavailable in the event of a government breach that is not defensible based on a theory of impossibility.[187]

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[180] *See id* at 101–02 (describing the Presidential Regulation as including a requirement of equal treatment toward bidding private parties).

[181] *See* Yukins & Macdonald, *supra* note 174, at 750.

[182] *See generally* Contracts Act of 1950, Act 136, (Malay.); UN Off. on Drugs and Crime, Open-ended Intergovernmental Working Grp. on Prevention, *Malaysia's Government Procurement Regime*, Malaysian Submission in Response to U.N. Doc. CAC/COSP/WG.4/2016/4 (2016), https://www.unodc.org/unodc/en/corruption/WG-Prevention/session7.html [https://perma.cc/TSJ4-QW2Z] (click on "Malaysia" under the page heading titled "Information Provided By States Parties and Signatories in Advance of the Meeting") (outlining the legal sources and purposes of Malaysian public procurement without clear availability of damages for an injured private party).

[183] *See* Xavier, *supra* note 7.

[184] *See* UN Off. on Drugs and Crime, *supra* note 182, § 7.5.

[185] Civil Law Act of 1956, Act 67, § 15 (Malay.); *see also* UN Off. on Drugs and Crime, *supra* note 182, ¶ 16.

[186] Act 67, Civil Law Act of 1956 § 16 (Malay.).

[187] *Id.*; *see generally* Steven L. Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUB. CONT. L.J. 229, 239–40 (1986) (describing the nature of impossibility in government contracts and what each party may have to show).

Despite the lack of clarity as to the specific remedy a government contractor may seek, Malaysian law does provide that contractors may bring suit against the government.[188] Specifically, "any claim against the Government which . . . arises out of any contract made by the authority of the Government . . . shall be enforceable by proceedings against the Government."[189] Essentially, a contractor can bring suit against the government for breach of contract if they could bring a suit against a private party for the same issue—but the remedies for such a contractor remain ambiguous.

C. Restitution

Unlike the examples covered above, several Southeast Asian countries explicitly allow a party to seek restitution damages from the government without necessarily requiring a specific cause for breach.[190] For instance, Singapore and the Philippines offer restitution damages against the government in a breach of contract situation.[191] In Singapore, the courts can "order the contracting authority to pay to the applicant the costs . . . reasonably incurred by the applicant for the purposes of procurement" or, if no expense has been made, the "costs of the challenge proceeding."[192] Accordingly, a government contractor can receive compensatory damages for its partial performance or reasonable preparation for performance in the event of a breach.[193] If the contractor did not yet begin performance but participated in a bidding process, the courts in Singapore could order the government "to pay to the applicant the costs of participation in the qualification of suppliers, or the costs of tender preparation."[194] The contractor could even simply bring suit against the government to note the breach and recoup the expense of that proceeding.[195]

The Philippines also generally offers restitution awards against the government.[196] Filipino law requires that, in the event of a dispute between the government and a private contractor, the parties proceed with such claims in arbitration.[197] Accordingly,

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[188] *See* Government Proceedings Act of 1956, Act 359, § 4 (Malay.).

[189] *Id.*; *see also*, UN Off. on Drugs and Crime, *supra* note 182, ¶ 16.

[190] Government Procurement Act of 1997, Act 14, §§ 17–18 (Sing.); Government Procurement Reform Act, Rep. Act No. 9184, § 67 (Phil.).

[191] Government Procurement Act of 1997, Act 14, §§ 17–18 (Sing.); Government Procurement Reform Act, Rep. Act No. 9184, § 67 (Phil.).

[192] Government Procurement Act of 1997, Act 14, §§ 17–18 (Sing.).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] Government Procurement Reform Act, Rep. Act No. 9184, § 67 (Phil.).

[197] *Id.* at § 59.

many of the rules regarding possible remedies against the government for breach will be specific to the arbitral agreement attached to the contract.[198] Arbitral decisions can be appealed to the Court of Appeals of the Philippines.[199] The specifics of the Filipino law concerning government contracts largely go to remedies that are available to the government as against the private party, including restitution and liquidated damages.[200] Indeed, a liquidated damages provision is statutorily required in all government contracts.[201] Because much of the detail is contained in the arbitral agreements, the law does not contain specific provisions on the remedies available to private contractors, leaving the law relatively unclear and certainly not guaranteed.[202]

D. More Than Restitution

Still other countries may offer remedies that go beyond restitution in ways that could be considered overly restrictive for the government and provide a party with outsized power. In Thailand, a private party to a government contract may bring a case in the country's system of Administrative Courts.[203] The Thai Administrative Courts have the authority to deliver a judgment granting retrospective or prospective effect to an award of money damages.[204] By those terms, the Administrative Court could award expectation damages. The court can also order "the performance or omission of an act," which implicates the possibility for an order of specific performance.[205] Indeed, in Thailand, specific performance against the government may be ordered directly.[206]

A contract with the Thai Government, however, subjects significant limitations on the private party and cannot be terminated under the law of private contracts.[207] Instead, unique circumstances must be met that give the government significant power to unilaterally alter or terminate a contract.[208] Accordingly, though the courts may theoretically order the government to

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[198] *Id.*

[199] *Id.* at § 60.

[200] *Id.* at §§ 67–68.

[201] *Id.* at § 68.

[202] *Id.* at § 59.

[203] An Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542, § 42 (Thai.) (unofficial translation).

[204] *Id.*

[205] *Id* at ¶ 72.

[206] *Id.*

[207] *See* Kosit Prasitveroj, *Administrative Contract under Thai Law: Procurement and Remedy in an Event of Breach*, ASIA LAW NETWORK (June 27, 2018), https://learn.asialawnetwork.com/2018/06/27/administrative-contract-thai-law-procedure-remedy-event-breach/ [https://perma.cc/N9DE-SJSX].

[208] *See id.* (citing Supreme Administrative Court Decision No. Or. 676/2554).

perform under the contract, it is highly unlikely a case would successfully proceed to the point where the court would do so.[209] Similarly, in Malaysia, an injunction may be awarded against the government but cannot be granted if it would "interfere with the public duties of any department or Government in Malaysia."[210]

This brief survey of several ASEAN states has shown the extreme variance in the remedies available to a private party in the event of a government breach of contract. On one end are uncodified systems of compensation in the event of a government breach in Indonesia, and on the other end is the ability to order prospective monetary relief or specific performance in Thailand. Between these antipodes lie systems that allow for restitution or compensation damages, like Singapore and the Philippines, and those that have codified systems that fall short of assuring damages, like Malaysia's deposit scheme. Somewhere within this range is a zone of remedies for ASEAN that provides private parties with predictability when contracting with a government.

III. A PROPOSED ZONE OF REMEDIES FOR ASEAN

In search of a scheme that adequately accounts for the interests of the government and the private party to a public contract, there is no need for Southeast Asian states to adopt a completely uniform standard. Nor should it necessarily adopt the American system, which has significant failings that the United States Supreme Court continues to interpret with arguably varying success. Instead, this Part stakes out the boundaries of a zone of remedies that are appealing to both the government and the private parties, within which Southeast Asian states should legislate rules and adjudicate claims in which a private party seeks a remedy against a government for breach of contract. This zone of remedies entails: (1) codification of available remedies against the government, (2) restitution damages, at minimum, and (3) the exclusion of specific performance.

A. The Need for Codification

The starting point must be codification of the rules regarding a private party's ability to seek breach of contract remedies against a government. Several Southeast Asian countries, including Indonesia and Malaysia, have not codified the rules governing remedies against the government relating to

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[209] *See id.*

[210] Specific Relief Act of 1950, Act 137, §§ 53–54 (Malay.).

procurement contracts.[211] Codification is not necessarily always desirable or possible,[212] but in identifying an appealable zone of contract remedies against the government it is a necessary first step. In addition to the inherent value of predictability, codification provides assurances to the private party that there is some sort of recourse available to it in the event of a government breach.[213] For governments, it is advantageous to be able to consider bids from competitive contractors. Naturally, a private party will be wary of entering into a contract with a government that does not acknowledge the rights and obligations that apply to *both* parties, as parties to a private contract undoubtedly would expect.[214]

Due to the ambiguities of state immunity, codification must address the "'last bastion' of sovereignty—State immunity from execution of assets."[215] Public contract regimes must include procedures by which the private party can recoup any award it receives in the appropriate tribunal. In the United States, Congress provided a standing appropriation[216] and direction that any judgment against the government "shall be paid promptly."[217] The payment of claims, however, must follow a clear process of adjudication to ensure the predictability of enforcement.[218] In the United States, for example, this is done through the Court of Claims or departmental review boards of the executive branch.[219] Other systems, so long as they are clearly codified, can give effect to available remedies. In Thailand, cases are processed in the Administrative Courts, while in the Philippines all cases are sent to arbitration or the Construction Industry Arbitration Commission.[220] Importantly, Filipino cases are appealable to the Court of Appeals,[221] such that the administrative agency that is the government party to the contract does not have the final word as to their own potential breach.

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[211] *See supra* Part II.

[212] *See generally* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. OF INT'L L. 435 (2000) (exploring the history and various arguments relating to codification of legal systems around the world and the varying success of their implementation).

[213] *See id.* at 454.

[214] *See* Wasseem Mina, *Does Contract Enforcement Matter for International Lending?*, 13 APPLIED ECON. LETTERS 359, 362–64 (2006) (an empirical study showing the detrimental effects of governmental contract repudiation on the government's ability to obtain financing).

[215] *See* Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et. al., eds.), 302, 321 (2009).

[216] 31 U.S.C. § 1304.

[217] 41 U.S.C. § 7108(a).

[218] *See* Mina, *supra* note 214 (elucidating the necessity of government contract enforcement for the predictability of government financing).

[219] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, 96 Stat. 25 (1982).

[220] Government Procurement Reform Act, Rep. Act No. 9184, § 54 (Phil.).

[221] *Id.* § 60.

For countries such as Malaysia and Indonesia, the codification of the procedures to attain any remedy at all for a government breach is an important first step.[222] Next, as has been the subject of most of the sections above, is the type of remedy that is available to the private party.

B. The Minimum of Restitution

There is likely to be no single remedy that finds the proper balance of interests in every legal system.[223] Variances—such as the additional remedies provided by Singapore[224]—are not as consequential as the importance of *at least* the presence of restitution damages against the government. As long as restitution or compensatory damages and a means of adjudication are clearly established, preferably by statute, private contractors have a predictable and adequate recourse in the event of a government's breach.[225]

Restitution damages strike an appealing balance between government and private party interests by providing for the recoupment of reasonable expenses while protecting the government from more severe remedies, such as specific performance.[226] Under a regime that offers restitution damages, the government would be responsible for changes in the statutory or regulatory frameworks, but such liability would be confined to payments already made by the private party.[227] If compensatory damages are offered, they would allow the private party to recoup its costs in preparing to perform the contract.[228] Because damages would be limited to reasonable expenses incurred, a government would not be responsible to pay the full price of the contract, nor would it be required to pay lost profits to the private party.

By establishing restitution as a minimum compensation, countries could still legislate other remedies and protections for the government. For example, restitution could be implemented in conjunction with the existing deposit schemes employed by countries

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[222] *See supra* Part II.

[223] *See* Chen-Wishart, *supra* note 162, at 401.

[224] *See supra* Part II.

[225] *See* Roberto Caranta, *Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation*, 8 REV. OF EURO. ADMIN. L. 75, 75–76 (2015) (reviewing changes to EU procurement remedies and the importance of predictability).

[226] *See* Rendleman, *supra* note 38, at 975–76 (describing the various remedies available and the common measure of restitution).

[227] *See Damages: restitution damages*, *supra*, note 37.

[228] *See Damages: compensatory damages*, *supra*, note 36.

such as the Philippines and Malaysia.[229] The possibility of restitution damages would provide the private party with assurances in the event of a government breach while maintaining the government security of the deposit. Some states' laws already implement a minimum of restitution damages by another name. For instance, Singapore's provision that allows private parties to recoup the costs of a bid if the government breaches a contract (or the cost of the proceeding if no costs have been incurred) is in line with this recommendation.[230] Though Singapore's statute describes the compensation available to private parties in terms of compensatory damages,[231] it is likely to provide a similar baseline of restitution compensation by the government. Indonesia's uncodified provision for the government to receive damages in the event of a private party's breach of a contract, however, is insufficient to meet this minimum standard, as it provides no specific recourse for a private party faced with a government breach.[232]

C. Why Specific Performance Goes Too Far

Specific performance warrants special attention as a potential breach of contract remedy against a government because the result would be to give a private party the ability to force a change in government policy. Moreover, continuity of government action, particularly when it applies to high-cost procurement projects, is an important consideration for parties interested in contracting with the government and for governments in terms of controlling their overall expenditures.[233] From a law and economics perspective, a government's "consistent action over time can be quite important in fostering desired expectations."[234] Yet, a private party's ability to receive an order of specific performance against the government goes too far. Not only would such an ability represent a significant abdication of government authority to regulate the private economy and adapt to social needs, it stifles the public's ability to express policy preferences in a democratic system.[235]

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[229] *See* Government Procurement Reform Act, Rep. Act No. 9184, § 27 (Phil.) (requiring a bid security depending on the situation); UN Off. on Drugs and Crime, *supra* note 182, § 7.5 ((outlining the Malaysian scheme requiring deposits for non-local tender bids).

[230] Government Procurement Act of 1997, Act 14, §§ 17–18 (Sing.).

[231] *See id.* § 18.

[232] *See* RICHO ANDI WIBOWO, PREVENTING MALADMINISTRATION IN INDONESIAN PUBLIC PROCUREMENT: A GOOD PUBLIC PROCUREMENT LAW AND COMPARISON WITH THE NETHERLANDS AND THE UNITED KINGDOM 250–51 (2017).

[233] *See* Kaplow, *supra* note 50, at 576.

[234] *Id.*

[235] *See* Hadfield, *supra* note 41, at 467–68.

Though the Tucker Act allows limited injunctive relief,[236] United States Courts have since required a specific waiver of sovereign immunity to permit injunctive relief such as specific performance against the government[237] including in early cases such as *Lynch v. United States*[238] and *Perry v. United States*.[239] That certain sovereign prerogatives have survived the need for private assurances when contracting with the government was ultimately reaffirmed by *Winstar*.[240] American law waives sovereign immunity as to most money damages suits, but not as to a remedy of specific performance. Singapore and Malaysia also generally prohibit specific performance judgments against the government.[241] As mentioned above, an injunction against the government of Malaysia is permitted, but it cannot interfere with the government's "public duties" and is therefore subject to questionable enforceability.[242]

Yet, the description of American jurisprudence makes clear that a statutory ban on orders of specific performance against the government is not sufficient.[243] Judicial vigilance is also required to prevent specific performance in disguise.[244] There is a stark difference between forcing the government to be monetarily liable for changes in government policy and allowing parties to force the government to conduct an act or forbearance. The *Winstar* case carried a heavy monetary burden for the government, but it did not require the government to continue with the contracts despite the change in the law.[245]

Another consideration is the ability of a contract to entrench the policies of a past government, thereby making them

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[236] 28 U.S.C. § 1491(b)(2).

[237] *See supra* note 70 and accompanying text.

[238] Lynch v. United States, 292 U.S. 571, 581–83 (1934) (relying on sovereign immunity to note that the government can withdraw its consent to be sued at any time, but in revising an insurance program for World War I veterans, Congress could not have meant to do so).

[239] Perry v. United States, 294 U.S. 330, 353–54 (1935) (When a purchaser of a U.S. bond sought to be paid pursuant to the value of a gold dollar at the time of purchase, rather than at present, the Court determined that Congress could not unilaterally alter the government's contractual commitments in such a manner, but the Court would not order the government to do something that could restrain its lawmaking abilities).

[240] *See* Worthington, *supra* note 72, at 134–36.

[241] Specific Relief Act of 1950, Act 137, § 20, 54 (Malay.) (injunctive relief is not available where monetary relief is sufficient or when it interferes with government functions); Government Procurement Act of 1997, Act 14, § 18(3)(b) (Sing.) (describing the tribunal's injunctive authority as limited to ordering the procurement authority to alter its decision or take action relating to the contract).

[242] *Id.* § 54.

[243] *See supra* Part I.

[244] *See* Salazar v. Ramah Navajo Chapter, 567 U.S.182, 192 (2012); Bowen v. Massachusetts, 487 U.S. 879, 882–83 (1988).

[245] *See* United States v. Winstar Corp., 518 U.S. 839, 856–58, 910 (1996).

unchangeable by subsequent governments.[246] For example, if the Toronto Airport contracts had been subject to a specific performance award against the government, the new government—which had been elected while promising to cancel the privatization plans—would be denied the chance to change the relevant government policies.[247] Similar concerns persist in relation to the BRI, whereby Chinese investment vehicles are focused on procurement contracts, largely for the construction of large infrastructure projects throughout Asia.[248] There, readily available monetary damages against the government pose a similar risk to the possibility of specific performance. For example, Sri Lanka's government has found itself significantly threatened by its commitments to procurement contracts that have left it heavily indebted.[249] The country's Hambantota Port Development Project, which saw contracts go to Chinese companies amidst political upheaval in 2017, was the subject of significant political debate, with the opposition party speculating that the government's actions illegal.[250] When a new government came to power, the contracts and debt agreements had so bound the island nation that the new government had no choice but to hand over the entire port and 15,000 acres of surrounding land to China on a 99-year lease to chip $1.1 billion off of Sri Lanka's $8 billion tab with Chinese state-owned companies.[251] While the situation at Hambantota is highly nuanced,[252] the situation exemplifies the importance of clear remedies in the event of a contractual disagreement and the government's interest to be protected from an order of specific performance.

This problem has always been at play in various jurisdictions,[253] and bright line rules have been impossible to ascertain. It is true that specific performance could be awarded

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[246] *See generally* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011) (exploring the concept of a private party's ability to force government action through contract law).

[247] *See* Hadfield, *supra* note 41, at 476–77.

[248] *See CSIS Database*, *supra* note 6.

[249] *See* Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html [https://perma.cc/E6QE-7H6S].

[250] *Id.*

[251] *See* Kai Schultz, *Sri Lanka, Struggling With Debt, Hands a Major Port to China*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/world/asia/sri-lanka-china-port.html?module=inline [https://perma.cc/G7T9-YMJE].

[252] Deborah Brautigam & Meg Rithmire, *The Chinese 'Debt Trap' Is a Myth*, ATLANTIC (Feb. 6, 2021), https://www.theatlantic.com/international/archive/2021/02/china-debt-trap-diplomacy/617953/ [https://perma.cc/5ZQR-E8SZ] (arguing that factors beyond simply aggressive Chinese tactics led to the dire debt situation relating to Hambantota).

[253] *See, e.g.*, Gibson v. The Council of the City of Manchester [1979] UKHL 6 at 6 (Eng.) (where the Conservative Party made offers for privatization of public housing and the Labor Party subsequently took control of the City Council and ended privatization, the contract was not enforceable because it did not constitute an offer).

as a counter to the government's significant "power to pass legislation that affects its contractual obligations."[254] That power, however, is not one that is in need of limitation if parties can enjoy the assurances of restitution or compensatory damages. Accordingly, an express permission for private parties to pursue an award of specific performance against the government goes too far in preserving the rights of the private party at the expense of the status of the government as a regulating authority hopefully acting based upon the public's interests and preferences.

IV. ASEAN FRAMEWORK AND LEGAL STRUCTURE FOR IMPLEMENTATION

ASEAN is a uniquely effective vehicle for the implementation of a regional scheme of codified laws that provide at least restitution or compensatory damages.[255] ASEAN's regulatory conferences, in addition to legal scholars, often encourage harmonization in areas that ASEAN ministers have not yet approached.[256] A multiplicity of laws may not be the most convenient reality for foreign investment, but alignment within certain parameters, though short of harmonization, is both more attainable and sufficiently predictable for private parties that seek to participate in the economic opportunities of Southeast Asia. At a moment when several countries could benefit from codification,[257] a semi-harmonization is timely and advantageous for a region that has seen steady advances in the area of public procurement.[258]

The use of ASEAN to implement contract remedies against the government of at least restitution or compensatory damages is also advantageous because almost no country in Southeast Asia—with the exception of Singapore—is a party to the current international agreement on government contracts, the World

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[254] *See* Worthington, *supra* note 72, at 124.

[255] *See* Hadi Soesastro, *Implementing the ASEAN Economic Community (AEC) Blueprint*, in DEEPENING ECONOMIC INTEGRATION—THE ASEAN COMMUNITY AND BEYOND 57–58 (2008) (discussing the ASEAN sectoral bodies that work to implement harmonization projects).

[256] Various works have identified paths to harmonization of ASEAN nations' regulations in different economic sectors. *See generally* Elizabeth Siew-Kuan Ng, *ASEAN IP Harmonization: Striking the Delicate Balance*, 25 PACE INT'L L. REV. 129 (2013); Huong Ly Luu, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2 ASIAN J. INT'L L. 291 (2012); Assafa Endeshaw, *Harmonization of Intellectual Property Laws in ASEAN*, 2 J. WORLD INTELL. PROP. 3 (1999).

[257] *See supra* Section III.A.

[258] *See generally* David S. Jones, *Public Procurement in Southeast Asia: Challenge and Reform*, 7 J. OF PUB. PROCUREMENT 3, 3–7 (2007) (detailing the challenges facing public procurement systems in Southeast Asia and the improvements that have been accomplished).

Trade Organization's Agreement on Government.[259] ASEAN has been working toward the realization of a single market by 2025 and has already achieved success in the harmonization of regulations.[260] The ASEAN Secretariat has established bodies to oversee harmonization of various topics such as e-commerce, customs, industry, services, and intellectual property.[261] Those bodies identify dozens of specific topics to be harmonized and draft appropriate legislation or communicate with governments to work toward harmonized regulatory implementation.[262] The World Bank and ASEAN already host an annual forum to exchange ideas about public procurement.[263] ASEAN could host an annual forum dedicated to standardizing contract remedies against governments within the recommended zone discussed above, and ultimately designate an ASEAN body to push all states within the region to adopt the proposed regime.

CONCLUSION

Amidst the BRI and economic expansion of an increasingly economically integrated community in ASEAN,[264] the proliferation of government contracts requires exploration and articulation of the options available to a private party in the case of a government breach of contract. Though the United States has codified the availability of remedies against the government in the case of breach and has banned specific performance against the government, recent case law shows that American codification is not absolute.[265] Specific performance in disguise has been successfully sought against the U.S. government in the form of appropriations and by turning to other statutes, such as the APA.[266] An analysis of these cases has shown the fraught choices for courts

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[259] *See Parties, Observers, and Accessions*, WORLD TRADE ORG.: AGREEMENT ON GOVERNMENT PROCUREMENT, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm [https://perma.cc/7BQM-SJZB].

[260] *See* Video, *ASEAN Economic Community*, ASEAN (Dec. 7, 2015), https://asean.org/asean-economic-community/ [https://perma.cc/TV73-VFHY].

[261] *See Sectoral Bodies Under the Purview of AEM*, ASEAN, https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/ [https://perma.cc/9M3B-H6VQ].

[262] *See* Soesastro, *supra* note 255, at 56–58.

[263] *See* 3rd ASEAN Public Procurement Knowledge Exchange (APPKE) Forum, THE WORLD BANK (Oct. 24–25, 2018), https://www.worldbank.org/en/events/2018/09/26/3rd-asean-public-procurement-knowledge-exchange-forum [https://perma.cc/D8J2-FT54] (when the subject was "Improving Effectiveness of Public Procurement through Data Analytics"); 2nd ASEAN Public Procurement Knowledge Exchange (APPKE) Forum, THE WORLD BANK (Nov. 15–16, 2017) https://www.worldbank.org/en/events/2017/11/15/asean-public-procurement-knowledge-exchange-forum [https://perma.cc/8GQD-HJB8] (where the subject was "Professionalization of Public Procurement to Deliver Sustainable Development Outcomes").

[264] *See* U.S.-ASEAN Business Council, *supra* note 13.

[265] *See supra* Part I.

[266] *See supra* Part I.

when they are asked by a private party to order the government to do something that it has chosen, in its sovereign authority, not to do—like end oil exploration off the Outer Banks and prioritize environmental preservation.[267]

The present state of remedies against the governments in ASEAN countries is widely varied, from entirely uncodified regimes to those that offer more remedies against the government than the United States.[268] The lessons to be learned from the United States and the differing regimes in Southeast Asia inform the identified zone of appealable remedies that should be implemented in the region. That zone is a centrally codified regime that offers at least restitution or compensatory damages against the government, but does not offer specific performance.

ASEAN provides a uniquely effective means of implementation. The regional body has been working to create a single market by harmonizing regulations and laws through a central secretariat that coordinates base language to be adopted by member states.[269] Though it does not precisely mirror the traditional harmonization that is synonymous with ASEAN, this zone of remedies against the government could be easily adopted by ASEAN as the region-wide standard. With plenty of room for state-by-state variation to fit the needs of each country's legal system, the ASEAN platform is an effective means of creating region-wide bounds to remedies such that those who contract with governments know their options, have the legal means to bring them in an adjudicative body, and the ability to recoup their monetary awards. For a region experiencing significant growth and the unprecedented investment of the BRI, predictable recourse in the event of a government breach is crucial to the ASEAN goals of economic expansion and integration.

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[267] *See supra* Part I.C.

[268] *See supra* Part II.

[269] *See supra* Part III.

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