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Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties

By Calvin A. Hamilton* and Paula I. Rochwerger**

I. Introduction

The Bilateral Investment Treaty (BIT) is a useful tool in creating a friendly environment for companies seeking to invest or do business in foreign countries.[1] Since the late 1980s, BITs have come to be universally accepted instruments for the promotion and legal protection of foreign investments.[2] The treaties, which aim to encourage foreign investment, provide investors with rights against states and state authorities that damage investment projects by, for example, breaking agreements, applying discriminatory regulations, revoking essential licenses or confiscating property.[3] A BIT exists between two states and establishes a legal framework for

1. *See* Mark S. Bergman, Note, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1, 2–4 (1983) (acknowledging that maintenance of stable investment climates along with other positive benefits prompted use of BITs); *see also* Patricia McKinstry Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Program*, 33 AM. U. L. REV. 931, 934 (1984) (explaining how BIT is beneficial to both investing companies and host countries); Timothy A. Steinert, Note, *If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People's Republic of China*, 2 J. CHINESE L. 405, 415 (1988) (commenting that BIT is intended to foster mutually favorable investment climate).

2. *See* 1 J. EUGENE MARANS ET AL., MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES § 1.19 (2d ed. 1993 & Supp. 2002) (stating that U.S. BIT program was initiated in early 1980s); N.J. Schrijver, *A Multilateral Investment Agreement From a North-South Perspective*, *in* MULTILATERAL REGULATION OF INVESTMENT 17, 25 (E.C. Nieuwenhuys & M.M.T.A. Brus eds., E.M. Meijers Inst. & Kluwer L. Int'l 2001) (observing that BITs have become major vehicles for promoting and protecting foreign investment); *see also* Rick Jervis, *Emerging Europe: Czechs Again May Face International Arbitration–Nomura Will Argue Government Breached Treaty*, WALL ST. J. EUR., Sept. 28, 2001, at 25 (highlighting that many former communist countries entered into BITs with Western countries following collapse of the Soviet bloc in 1989).

3. *See* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES" 396 (Martinus Nijhoff 1993) (surveying key elements of BITs as including fair and equitable treatment, free transfer of proceeds, nondiscriminatory expropriatory measures, and arbitration); Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 257–62 (1994) (outlining basic BIT protections); Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 625 (1993) (highlighting that BIT initiative enabled investors to address ineffectiveness of international law standards regarding expropriation and recovery for damages).

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the treatment of investment flows between the two nations.[4] The parties to a claim under such a treaty are an investor of one state party (known as the investor's home state) and the state where the particular investment was made.[5]

The United States has been utilizing these treaties mostly with developing countries since the end of World War II.[6] In recent years, there has been huge growth in the number of investment protection treaties entered into by developed and developing states, the most common of which are BITs.[7] There are now about 2,000 BITs in force worldwide.[8] Over 140 states are

4. *See* U.N. CTR. ON TRANSNAT'L CORPS., BILATERAL INVESTMENT TREATIES 1 (Graham & Trotman 1988) (describing legal framework and its salient features); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 111–28 (1986) (discussing U.S. BIT legal standards on investment flow between nations); Barry J. Roger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 COLUM. J. EUR. L. 289, 313–14 (2000) (analyzing framework of U.S.-European Community agreement of 1995 and its effect on antitrust practices).

5. *See* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW 101 (Oceana Publications 1997) (employing "home state" and "host state" jargon in reference to BITs); *see also* Bernardo M. Cremades, *Disputes Arising Out of Foreign Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 82 (2004) (questioning BIT arbitration provisions between "home state" and "host state"); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program in the United States*, 21 CORNELL INT'L L.J. 201, 212 (1988) (discussing core protections afforded to "host state" by BITs).

6. *See* Case Concerning Barcelona Traction, Light & Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 47 (Feb. 5) (noting that BITs rapidly proliferated since World War II to protect foreign investments); Wayne Sachs, *The "New" U.S. Bilateral Treaties*, 2 INT'L TAX & BUS. LAW. 192, 195–97 (1984) (arguing that transition from FCN to BIT occurred not in 1980s but in 1950s as both share common purposes). *But see* Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 30 & n.147 (1989) (stating that the U.S. BIT program began in 1981 despite arguments that BIT and FCN are analogous in principle or that BIT merely reinforces FCN policy).

7. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 640–43 (1998) (explaining why so many developing countries decide to enter into BITs); J. Steven Jarreau, *Anatomy of a BIT: The United State–Honduras Bilateral Investment Treaty*, 35 U. MIAMI INTER-AM. L. REV. 429, 430 (2004) (acknowledging the flurry of recent BITs while relying on U.S.–Hond. BIT as paradigm); *see also* Don Wallace, Jr. & David B. Bailey, Comment, *The Inevitability of National Treatment of Foreign Direct Investment With Increasingly Few Exceptions*, 31 CORNELL INT'L L.J. 615, 620 (1998) (positing that pervasiveness of developing countries' embrace of BITs is attributable to liberalization movement).

8. *See* Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533, 1546 (2003) (citing that approximately 2,000 BITs are in force); *see also* George M. von Mehren et al., *Navigating Through Investor-State Arbitrations—An Overview of Bilateral Investment Treaty Claims*, 59 DISP. RESOL. J. 69, 70 n.1 (2004) (observing that according to U.N. Conference on Trade and Investment, some 2,099 BITs in force as of Jan. 1, 2002); Gustavo Capdevila, *Rights/Trade: Bilateral Trade Treaties Said to Undermine Rights*, INTER PRESS SERV., July 21, 2004, *available at* 2004 WL 59284745 (stating that about 2,000 BITs are in force worldwide).

party to at least one such treaty, two-thirds of which were concluded in the 1990s.[9] These 2,000 BITs have been created in order to define and protect the rights of foreign investors.[10] They have been supplemented by other investment protection mechanisms and multilateral instruments such as NAFTA and the Energy Charter Treaty.[11]

Foreign direct investment is the lifeblood of the global economy.[12] The phenomenal increase in flows of foreign direct investment in this era of globalization has stimulated the development of legal mechanisms to protect the stated investment.[13] Understanding the valuable rights that investors may reap from the numerous BITs in force today and awareness of the

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9. *See* UNCTAD, World Investment Report 2003, *FDI Policies for Development: National and International Perspectives*, 89 (2003), *available at* http://www.globalpolicy.org/socecon/ffd/fdi/2003/wirlight.pdf (last visited Sept. 14, 2004) (providing exact figures); *see also* Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1232 n.161 (1998) (verifying the two-thirds ratio); Gus Van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 YALE HUM. RTS. & DEV. L.J. 113, 137 n.118 (2000) (verifying the two-thirds ratio).

10. *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, art. I to Protocol, *reprinted in* 21 I.L.M. 927, 928–49 (1982) (announcing purpose of investment protection and defining investor's rights throughout); Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 634 (1998) (concluding from philosophical premises that BITs are deeply liberal in their purpose and historical development); *see also* Nancy J. Goodman, Recent Development, *International Trade: Poland Bilateral Investment Treaty—A Reflection of United States Efforts to Shape the Economic Development of Eastern Europe*, 32 HARV. INT'L L.J. 255, 256–57 (identifying particular BIT provisions that grant more investor protections than usually found in standard BIT).

11. *See* Vicki Been & Joel C. 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, 50–51 (2003) (describing regulatory amalgam of NAFTA, Energy Charter Treaty, and BIT principles); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 44, 68–71 (2003) (contrasting BIT and NAFTA approaches to investment protection and arbitration procedures); Cynthia D. Wallace, *The Legal Framework for Regulating the Global Enterprise Going into the New WTO Trade Round—A Backward and a Forward Glance*, 16 TRANSNAT'L LAW. 141, 147–48 (2002) (discussing how NAFTA and Energy Charter Treaty can make up for BIT deficiencies).

12. *See* Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INV. 173, 174 (2002) (stating that foreign direct investment constitutes "lifeblood" of globalization); Van V. Mejia, *The Modern Foreign Investment Laws of the Philippines*, 17 TEMP. INT'L & COMP. L.J. 467, 482 (2003) (stating that investments are "lifeblood" of developing nation); *see also* Stacy Allen Morales & Barbara Ann Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1597 (1984) (proclaiming that U.S. investments abroad make up "lifeblood" of current global economy); Michael M. Phillips, *The Economy: U.S. Trade Deficit Won't Fuel Dollar Panic, Survey Suggests*, ASIAN WALL ST. J., June 21, 2004, at A8 (noting that foreign capital has become the "lifeblood" of American economy), *available at* 2004 WL-WSJA 82360178 (last visited Sept. 23, 2004).

13. *See* Cremades & Cairns, *supra* note 12, at 175–81 (discussing meteoric growth of foreign direct investment as root cause of BITs); Alan S. Greenspan, *Thoughts About the Transitioning Market Economies of Eastern Europe and the Former Soviet Union*, 6 DEPAUL BUS. L.J. 1, 8–9 (1993) (affirming that formal legal structure attractive to foreign investors is required for viable market economy); Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 489, 499 (assessing effectiveness of BIT and NAFTA depoliticization of investment disputes); Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C. J. INT'L L. & COM. REG. 511, 540–41 (1996) (proposing that Cuba adopt BIT framework and multilateral agreement provisions in order to enable further foreign investment).

institutions and mechanisms in place for the protection of these rights are crucial for the continued growth and development of the world economy.

II. The Development of the BIT

A. Origins of the BIT

Following World War II, a number of treaties were established between the U.S. and other nations.[14] These treaties, known as treaties of friendship, commerce or navigation (FCN treaties), were the cornerstone of how the United States sought to rebuild its commercial relations with other counties after the Second World War.[15] The ability to sign FCN treaties with developing countries was hampered, however, by the fact that the U.S. FCN treaties often contained clauses that were not commercial in nature, such as provisions that regulated human rights practices or touched upon the personal or religious rights and practices of a country.[16] Given these extra-commercial conditions, many developing nations were reluctant to enter into FCN treaties with the United States.[17]

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14. *See* Alvarez, *supra* note 6, at 30 & n.147 (listing U.S. BITs with nations, including Honduras, Gabon, Burundi, Costa Rica, Sri Lanka, Malaysia, U.S.S.R., Hungary, Czechoslovakia, and PRC); Gudgeon, *supra* note 4, at 106 (listing U.S. BITs with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada); Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution*, 36 URB. LAW. 99, 110 & n.55 (2004) (observing that since 1977, U.S. BIT program has led to creation of 37 BITs).

15. S*ee* MARANS ET AL., *supra* note 2, at § 1:18 (defining United States FCN treaty practice by dividing it into pre-World War II and post-World War II periods); Ronald W. Brown, *Economic and Trade Related Aspects of Transborder Data Flow: Elements of a Code for Transnational Commerce*, 6 NW. J. INT'L L. & BUS. 1, 39 (1984) (describing United States FCN treaty participation in post-World War II era); Sean D. Murphy, *The Elsi Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391, 394–95 (1991) (stating that FCN treaties concentrated on the rebuilding of Europe and Far East after World War II).

16. *See* Bergman, *supra* note 1, at 7 (describing how the broad range of commercial and industrial activities covered by FCN treaties decreased their utility as an investment protection device); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 719–20 (2001) (explaining the decline of FCN treaties due to the breadth of commercial relationships dealt with in the treaties). *See generally* Beth Ann Isenberg, Note, *The Evolving Conflict Between Employment Discrimination Laws and Immunity under Title VII of the Civil Rights Acts and Article VIII of the FCN Treaty Between the United States and Japan—The Papaila Case*, 60 ALB. L. REV. 1441, 1453–55 (1997) (describing employment discrimination practices that arise due to conflicting standards of FCN treaty provisions and Title VII of the Civil Rights Act of 1964).

17. *See* Vandevelde, *supra* note 3, at 624–25 (noting that countries were unwilling to conclude FCN treaties with the United States); Robin, *supra* note 1, at 940–41 (stating that the United States has not signed FCN treaties with many developing countries). *See generally* Jeff Nemerofsky, *Litvinov Lives? U.S. Investors May Be Playing Russian Roulette*, 8 MSU-DCL J. INT'L L. 487, 496–97 (1999) (indicating that no new FCNs have been negotiated since the mid-1960s).

This situation was in direct contrast to the fact that many of these countries did enter into treaty agreements with European nations.[18] This was due to the fact that the European BIT model dealt only with issues of an exclusively commercial nature and did not venture into additional controversial matters as did the American agreements. The European countries were therefore more successful in obtaining agreements in developing countries than the Americans were. Subsequently, the United States decided to rework its model agreement and pattern it after the European BIT.[19]

B. The Changing Nature of the BIT

BITs are no longer concluded exclusively between capital-exporting and capital-importing countries; an increasing number of BITs are concluded between developing countries themselves.[20] Bilateral investment treaties are playing an increasingly important role in international investment relations worldwide, including South-South cooperation.[21] The 1990s saw a rapid increase in the number of BITs and, by the end of the decade, the universe of these treaties

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18. *See* International Centre for Settlement of Investment Disputes, *Bilateral Investment Treaties 1959–1999* (2004) (providing a complete listing of parties to Bilateral Investment Treaties), *available at* http://www.worldbank.org/icsid/treaties/ii-country.pdf (last visited Sept. 23, 2004) [hereinafter International Centre] (noting that the first BITs originated in Europe in the late 1950s); Guzman, *supra* note 7, at 653 (stating that by the time the U.S. FCN treaty program wound down, many European nations had negotiations and agreements with developing countries through Bilateral Investment Treaties); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655 (1990) (indicating that the first BIT was signed by West Germany and Pakistan in 1959).

19. *See* Gudgeon, *supra* note 4, at 109 (discussing the situation which led to the recommendation of the European BIT model); Vandevelde, *supra* note 5, at 208 (noting the U.S. need for an investment protection treaty program comparable to that of the Europeans); Michael S. Kimm, Note, *Domestic Employees and Title VII Versus Foreign Employers and FCN Treaties: A 21st Century Perspective*, 9 B.U. INT'L L.J. 95, 136–37 (1991) (explaining the U.S. response to the European BIT program).

20. *See* International Centre, *supra* note 18; Matthew W. Barrier, *Regionalization: The Choice of a New Millennium*, 9 CURRENTS: INT'L TRADE L.J. 25, 27 (2000) (stating the increase of BITs among developing countries); Richard B. Bilder & Marcia A. Wiss, *World Investment Report 1995: Transnational Corporations and Competitiveness*, 90 AM. J. INT'L L. 713, 714 (1996) (noting the beginning of negotiations in the mid-1990s between Organization for Economic Cooperation and Development countries).

21. *See* United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959–1999* at iii, U.N. Doc. UNCTAD/ITE/IIA/2 (Internet ed. 2000) [hereinafter UNCAD] (stating the increase in South-South cooperation). *See generally* Jorge M. Guira, *MERCOSUR as an Instrument for Development,* 3 NAFTA: L. & BUS. REV. AM. 53, 94–5 (1997) (explaining the costs and benefits of South-South integration alliances); Douglas E. Matthews*, Lome IV and ACP/EEC Relations: Surviving The Lost Decade*, 22 CAL. W. INT'L L.J. 1, 26–27 (1991) (providing example of South-South cooperation and describing UNCTAD's involvement in promoting South interest); Malcom D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIG,* 33 HARV. INT'L L.J. 103, 118 (1992) (noting that ICSID's dispute resolution regarding BITs have involved South/South combinations).

looked dramatically different.[22] The number of treaties quintupled, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s.[23]

By the end of 1999, out of the total 1,857 BITs, 737 (40 per cent) were between developed and developing countries (compared with 260—or 68 per cent—at the end of 1989), 476 (26 per cent) between developing countries (compared with 40—or 10 per cent—at the end of 1989), 253 (14 per cent) between developing and Central and Eastern European countries (compared with 23—or 6 per cent—at the end of 1989), 276 (15 per cent) between developed and Central and Eastern European countries (compared with 51—or 13 per cent—at the end of 1989), and 104 (6 per cent) between Central and Eastern European countries (none at the end of 1989).[24] There are only a few (11) BITs between developed countries, the reason being that investment relations among developed countries are dealt with through a number of instruments adopted under the auspices of the OECD, to which all developed countries belong.[25]

It is not only the number of BITs that has been growing, but also the number of countries involved, from two at the end of the 1950s to 48 at the end of the 1960s, 69 at the end of the 1970s, 102 at the end of the 1980s, and a total of 173 at the end of the 1990s, including coun-

22. *See* UNCAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at iii (noting the rapid increase in the number of BITs); S. K. Date-Bah, *11th Biennial Conference of the International Academy of Commercial and Consumer Law: Facilitating and Regulating Private Investment in a Developing Economy*, 22 PENN ST. INT'L L. REV. 3, 9 (2003) (stating the significant increase in the number of BITs and the changing pattern of the countries involved). *See generally* Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 305–06 (2004) (indicating the growth of BITs within the last ten years).

23. *See* UNCAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at iii (noting the increase of treaties from the 1980s to the 1990s); Antonio R. Parra, *The Role of ICSID in the Settlement of Investment Disputes*, 16 NEWS FROM ICSID 1, 5–8 (1999) (stating the remarkable increase in the number of BITs during the 1990s), *available at* http://www.worldbank.org/icsid/news/n-16-1-5.htm (last visited Sept. 23, 2004). *See generally* The Harvard Law Review Association, *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 1999–2000 (1994) (indicating the increase in the number of BITs from the 1980s through the mid-1990s).

24. *See* UNCAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 4 (providing statistical BIT information through to the end of 1999); United Nations Conference on Trade and Development, *World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development* at 6–8 (2000) (indicating worldwide statistical BIT data through to the end of 1999); Riyaz Dattu, *A Journey From Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275, 304–05 (2000) (noting number of BITs signed throughout the 1990s).

25. *See* UNCAD, *supra* note 21, at 4 (indicating the number and reason for a few BITs between developed countries). *See generally* SHIHATA, *supra* note 3, at 18 (noting that the OECD have worked together on guidelines to regulate behavior of OECD investors abroad). *See generally* Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 395–96 (1998) (explaining the limited number of BITs between developing countries due to the inability to address market failures).

tries from all regions.[26] Overall, Western European countries have concluded the largest number of BITs (904), representing 40 per cent of all BITs.[27] Of these, 658 BITs, 73 per cent, were concluded with developing countries—270 with Asia, 209 with Africa, and 179 with Latin America and the Caribbean.[28] A total of 235 were concluded with Central and Eastern European countries.[29] They have also concluded nine treaties among themselves.[30]

On September 22, 2003, the United States and the European Commission signed a political Understanding preserving U.S. bilateral investment treaties with eight countries that are acceding, or are candidates for accession, to the European Union (EU) (Czech Republic, Estonia, Latvia, Lithuania, Poland, the Slovak Republic, Bulgaria and Romania).[31] This Understanding aims to maintain a positive investment environment in the accession states while furthering the objective of assuring compatibility between the obligations of U.S. BITs and the

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26. *See* UNCAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 4 (providing statistical BIT data from the 1960s through the 1990s); Antonio R. Parra, *ICSID and Bilateral Investment Treaties,* 17 NEWS FROM ICSID 1, 7 (2000) (noting the increase of number of BITs and countries involved from the 1960s through the 1990s), *available at* http://www.worldbank.org/icsid/news/n-17-1-7.htm (last visited Sept. 23, 2004); Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Contribution of BITs to Cuba's Foreign Investment Program*, 32 LAW & POL'Y INT'L BUS. 529, 530 (2001) (noting the growing number of BITs and Cuba's involvement in the 1990s).

27. *See* UNCAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 16 (providing Western European statistical BIT data); International Centre, *supra* note 18 (providing a complete list of parties to the Bilateral Investment Treaty). *See generally* Mary T. Kaloupek, Note, *Drafting Dispute Resolution Clauses For Western Investment and Joint Ventures in Eastern Europe*, 13 MICH. J. INT'L L. 981, 996 (1992) (stating that many states have eagerly negotiated BITs with Western European countries).

28. *See* UNCAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 16 (providing statistical BIT data between Western European countries and developing countries); International Centre, *supra* note 18 (providing a complete listing of parties to Bilateral Investment Treaties).

29. *See* UNCTAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 16 (reporting that Western European countries made 235 BITs with Central and Eastern European countries). *See generally* Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 653 (1995) (observing that the number of BITs has burgeoned since Central and Eastern European countries as well as the former Soviet Union have signed BITs with industrial countries); UNCTAD, *Trends in International Investment Agreements: An Overview* 47 (1999), *available at* http://r0.unctad.org/p166/Module2002Bangk/Module3/trenads.pdf (last visited Sept. 14, 2004) (citing BITs' usefulness in transforming Central and Eastern Europe into a market-type economy).

30. *See* UNCTAD, *Bilateral Investment Treaties 1959–1999, supra* note 21, at 16 (adding that Western European countries have made nine treaties among themselves); UNCTAD, World Investment Report 2003, *supra* note 9, at 89 (explaining that newer BITs tend to be concluded in different regions and have investment commitments in a separate chapter, as opposed to earlier, intraregional BITs). *See generally* UNCTAD, *Media Summary: Bilateral Investment Treaties Quintupled During the 1990s* 1–5 (Dec. 15, 2000), *available at* http://r0.unctad.org/en/press/pr2877en.pdf, (last visited Sept. 14, 2004) (citing statistics of BITs from studies conducted worldwide).

31. *See Signature of Bilateral Investment Understanding*, EUR. UNION PRESS RELEASES—EUR. COMM'N, Sept. 23, 2003 (adding that provisions in the BITs contrary to the European Union's legislation were amended prior to the eight countries' accession), *available at* 2003 WL 60919499; *Washington Stresses Importance of Investment Agreements with Future Eastern European Member States, Despite Concessions Made on National Treatment*, AGENCE EUROPE, Sept. 23, 2003 (adding that Slovenia and Hungary were excluded because they had no BIT with the U.S.), *available at* 2003 WL 58353301; *see also* Press Release, State Department, State Dept.'s Anthony Wayne at European Institute in Washington (Sept. 12, 2003) (quoting State Department official Anthony Wayne's announcement that the European Commission had endorsed a political understanding preserving U.S. BITs with EU accession states), *available at* 2003 WL 2050239.

obligations of membership in the EU.[32] This recent agreement demonstrates the continuing importance of the BIT in recent years despite the creation and growth of Multilateral Agreements on Investment (MAIs) between nations.[33]

III. The Basic Features of the BIT

The fundamental elements of BITs, including their objectives, format and broad underlying principles, have changed little over the years. Their main provisions typically deal with the scope and definition of foreign investment (which in most cases includes tangible and intangible assets, direct as well as portfolio investments, and existing as well as new investments); admission of investments; national and most-favored-nation treatment; fair and equitable treatment; guarantees and compensation in respect of expropriation and compensation for war and civil disturbances; guarantees of free transfer of funds and repatriation of capital and profits; subrogation on insurance claims; and dispute-settlement provisions, both state-to-state and investor-to-state.[34]

In addition, some BITs include provisions regarding transparency of national laws; performance requirements; entry and sojourn of foreign personnel; general exceptions; and extension of national and most-favored-nation-treatment to the entry and establishment of invest-

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32. *See Agreement on Amendment to Bilateral Investment Agreements Between Washington and Future Member States*, AGENCE EUROPE, Sept. 9, 2003 (noting the U.S.'s approval of the compatibility of its objectives with those of the EU members) *available at* 2003 WL 58352861; Press Release, State Department, Bilateral Investment Treaties with European Union Accession States, (Sept. 5, 2003) (presenting State Department official Richard Boucher's comments on the Understanding), *available at* 2003 WL 2050095; *U.S. Bilateral Investment Treaties to be Preserved*, BNS BALTIC BUS. NEWS, Sept. 6, 2003, (citing the U.S. embassy to Lithuania, which observed that the parties to the Understanding intended to adjust their BITs to their EU membership obligations), *available at* 2003 WL 58982182.

33. *See* Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 85 (2003) (questioning what benefits additional to those reaped by BITs could be reaped by multilateral agreements). *But see* Clayton Yeutter, *How to manage trade in a new world order*, JOURNAL OF COMMERCE, (Jan 12, 2004), *available at* 2004 WL 72179532 (insisting that BITs cannot substitute an effective multilateral accord). *See generally* DR. ANDREW WALTER, BRITISH INVESTMENT TREATIES IN SOUTH ASIA: CURRENT STATUS AND FUTURE TRENDS 17 (2000), *available at* http://personal.lse.ac.uk/wyattwal/British%20Investment%20Treaties%20in%20South%20Asia.pdf (last visited Sept. 14, 2004) (stating that Europe has shifted from a BITs network toward a promotion of a multilateral investment regime, notwithstanding MAIs' lack of success).

34. *See 2002 A Record Year for Liberalizing FDI Laws and Regulations*, M2 PRESSWIRE, Aug. 21, 2003 (concurring that these provisions have held constant over time), *available at* 2003 WL 62358767; Susan A. Aaronson, *International Investment Carousel: When it Comes to Rules for International Investment, It's Time to Stop Riding the WTO*, THE INTERNATIONAL ECONOMY, Jan. 1, 2004, at 56 (listing the provisions as general definitions), *available at* 2004 WL 71800238; UNCTAD, *World Investment Report 2003, supra* note 9, at 89 (adding that the scope and content of BIT provisions have become more standard).

ments.[35] Within these broad themes, the exact content of BIT provisions varies considerably, even between BITs signed by the same country, reflecting different approaches as well as bargaining positions.[36] Over the years, as practice develops, some provisions in BITs have tended to become more elaborated.[37]

Modern BITs have retained broad uniformity in their provisions. Virtually all bilateral investment treaties cover four substantive areas: admission, treatment, expropriation and the settlement of disputes.[38] In respect of provisions dealing with disputes between one of the parties and the investors having the nationality of the other party, most BITs provide for arbitration under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force in 1966.[39] The activities arising pursuant to the ICSID Convention will be described in further detail below.

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35. *See* UNCTAD, *World Investment Report 2003, supra* note 9, at 89 (noting that current issues surrounding BITs include pre-establishment and post-establishment national treatment, most-favored-nation treatment, prohibitions of performance requirements, among others); *see also* Kenneth J. Vandevelde, *The BIT-Program: A Fifteen-Year Appraisal, The Development and Expansion of Bilateral Investment Treaties*, 86 AM. SOC'Y INT'L L. PROC. 532, 534–35 (1992) (listing transparency as one of the BIT's goals). *See generally* Symposium, *The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 657, 661 (1998) (distinguishing U.S. BITs from European BITs, the U.S. allowing national treatment and most-favored-nation treatment for the right to establish and operate an entity and a ban on a large number of performance requirements).

36. *See* UNCTAD, *Media Summary: Bilateral Investment Treaties Quintupled During the 1990s* 2 (Dec. 15, 2000), *available at* http://r0.unctad.org/en/press/pr2877en.pdf, (last visited Sept. 14, 2004) (observing BIT provisions as reflecting different approaches and bargaining positions); UNCTAD, *Trends in International Investment Agreements*, *supra* note 29, at 46 (commenting that such flexibility allows for possible International Investment Agreements, or IIAs); *see also* UNCTAD, *World Investment Report 2003, supra* note 9, at 89 (observing that despite BITs' constancy in scope and content, provisions in individual BITs continue to vary).

37. *See* UNCTAD, *Bilateral Investment Treaties 1959–1999*, 28 (2000), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf, (last visited Sept. 14, 2004) (observing that some BITs have become elaborated over the years); *see also* AAPL v. Sri Lanka, 30 I.L.M. 577, 583 (1990) (asserting that the treaty in dispute includes both certain substantive rules explicitly stipulated as well as "additional rules incorporated therein, either by reference or by implication"). *See generally* UNCTAD, World Investment Report 2003, *supra* note 9, at 89, (noting that language of BIT provisions have differed in recent years from earlier ones).

38. *See* Marie-France Houde & Katia Yannaca-Small, *Relationships between International Investment Agreements*, OECD, (May 2004), *available at* http://www.oecd.org/dataoecd/8/43/31784519.pdf, (last visited Sept. 14, 2004) (stating that U.S. and European models of BITs have these areas in common); *ICSID*, *The World Bank Group, at* http://www.worldbank.org/icsid/treaties/intro.htm (last visited Sept. 14, 2004) (citing the ICSID's observations on modern BITs); *see also* United States: President's Statement Announcing United States Foreign Direct Investment Policy (Dec. 26, 1991), 31 I.L.M. 488, 489 (1992) (listing treatment, expropriation and settlement of disputes among commitments within U.S. BITs to investment reform).

39. *See* Symposium, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 812–13 (2002) (specifying the number of BITs designating ICSID as an arbitration forum as at least 1,500); *ICSID*, *at* http://worldbank.org/icsid/treaties/intro.htm (last visited Sept. 14, 2004) (observing that most BITs stipulate ICSID for arbitration); *see also* CMS Gas Transmission Co. v. Arg., 42 I.L.M. 788, 800 (July 17, 2003) (holding that certain terms and clauses do not bar the assertion of jurisdiction by an ICSID tribunal under the treaty in question).

A. The Function of the BIT

BITs are intended to promote foreign investment through the granting of national treatment and the elimination of most restrictions on capital and profit remittances.[40] They also allow countries to accept international arbitration as a means of solving disputes that might have arisen between the host state and foreign investors.[41] The adoption of bilateral treaties aids the promotion and protection of foreign investment for countries seeking to advance their development process through national and international policy instruments.[42]

The BIT is not only an important tool for investor protection but also a crucial policy instrument.[43] BITs can have an influence in the development of regional and multilateral investment instruments.[44] Sometimes, model BITs prepared by individual countries reflect their positions and expectations on international foreign direct investment rules and stan-

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40. *See* A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L. & POL'Y 57, 71 (1998) (defining "national treatment" as "the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, no less favorably than domestic enterprises in like situations"); Jeffrey Lang, Symposium, *The International Regulation of Foreign Direct Investment: Obstacles & Evolution*, 31 CORNELL INT'L L.J. 713, 717 (1998) (stating that most BITs apply national treatment only after an investor has gained market access); Nitya Nanda, Opinion: *Push Hard for Quality FDI*, THE HINDU BUS. LINE, June 7, 2004 at 8 (reporting that assurances to foreign investors of free remittances of profits and dividends were complemented by BITs), *available at* 2004 WL 79756870.

41. *See* Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce*, LLOYD'S LIST INTERNATIONAL, June 23, 2004, at 6 (noting that the adjudicating tribunal regularly sits in an independent jurisdiction) *available at* 2004 WL 76673007; *ICSID*, *The World Bank Group*, *at* http://www.worldbank.org.icsid.treaties.intro.htm (last visited Sept. 14, 2004) (stating that almost all modern BITs provide for such arbitration); *see also* Julian Lew, *Interesting Developments in International Commercial Arbitration,* MONDAQ BUS. BRIEFING, June 11, 2003 (noting with particular importance that BITs provide for international arbitration between investor and state), *available at* 2003 WL 57495321.

42. *See* UNCTAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at iii (stating that all countries find BITs useful for promoting and protecting investment). *See generally* Perez-Lopez & Travieso-Diaz, *supra* note 26, at 530 (observing that BITs are being increasingly negotiated among developing countries); Livanos Cattaui, *Multilateral Investment Pacts Should Be on Cancun Agenda*, FIN. TIMES, Jul. 9, 2003, at 12 (arguing that WTO should organize a framework similar to BITs that takes into account development policies and objectives of host governments), *available at* 2003 WL 58503274.

43. *See* Vandevelde, *supra* note 3, at 625–26 (discussing the dual investor protection and policy aims of the United States in promoting BITs); RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS, § 27.3 at 369 (2d ed. 2002) (noting the signing of BITs for investor protection between developed and developing nations because of a lack of multilateral guidelines); *see also Bilateral Investment Treaties: Hearing Before the Senate Foreign Relations Committee,* 104th Cong. (1995) (statement of Donald Abelson, Assistant U.S. Trade Representative) (outlining aims of U.S. BITs).

44. *See* UNCAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at 20–21; Alan Larson, *The Multilateral Agreement on Investment: A Work in Progress*, Statement Before the Subcommittee on International Economic Policy and Trade of the House International Relations Committee (Mar. 6, 1998), in DEP'T OF STATE DISPATCH, April 1998 at 30 (outlining how current BITs were to be used to formulate the MAI); John Dludlu, *SADC Needs A Regional Accord On Investment,* BUS. DAY S. AFR., Nov. 16, 1998 at 3 (reporting that South Africa will work toward multilateral investment protection through BITs).

dards.[45] BITs can also influence national laws.[46] It is therefore of critical importance to monitor the evolution of the substantive provisions in recent BITs.[47]

B. The Content of Treaty Rights

An investor who chooses to pursue a treaty claim must demonstrate that there is an investment within the meaning of the BIT.[48] The investor must also identify the treaty rights relied upon in support of the treaty claim.[49]

As BITs provide a legal framework for the treatment of investments, the definition of investment is fundamental to the jurisdiction of the arbitral tribunal established pursuant to a BIT.[50] The definition of investment is also central to the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), as it extends to "any legal dispute aris-

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45. *See* UNCAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at 20–21; Guzman, *supra* note 7, at 654 (explaining the objectives behind the development of the United States Model BIT).

46. *See* UNCAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at 20–21; KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE 21 (Kluwer Law and Taxation Publishers, 1992) (describing one aim of U.S. BITs as rebutting accepted international law on investments). *See generally* Pope & Talbot Inc. v. Gov't of Can., 41 I.L.M. 1347, 1357 (noting that NAFTA BIT signatories are entitled to protections from the treaties regardless of the limitations of international law).

47. *See* UNCAD, *Bilateral Investment Treaties 1959–1999*, *supra* note 21, at 20–21; David J. Bederman, *Creditors' Claims in International Law,* 34 INT'L LAW. 235, 247 (2000) (noting a trend in recent BITs concerning creditors' rights); MARANS ET AL., *supra* note 2, at § 1:19 (suggesting importance of familiarity with standard BIT provisions in the near future).

48. *See* Dana H. Freyer et al., *Bilateral Investment Treaties and Arbitration,* 53 DISP. RESOL. J. 74, 75 (1998) (outlining conditions that must be met by an investor pursuing a claim under a BIT); Saunders, *supra* note 41, at 6 (stating that the activity at issue needs to be defined as "investment" under the BIT for the claim to go forward); Societe Generale de Surveillance v. Pak. (decision on jurisdiction) 42 I.L.M. 1290, 1312 (holding that the fact that there was an investment within the meaning of the BIT conferred jurisdiction).

49. Cremades, *supra* note 5, at 3. *See* Jarreau, *supra* note 7, at 444 (noting that prior investments can be but are not always defined as investments in a BIT); Richard H. Kreindler & Timothy J. Kautz, *Issues In Drafting And Performance Of Arbitration Agreements In The Context Of Bilateral Investment Treaties And Energy Projects: The Example Of Turkey*, 12–5 MEALEY'S INT'L ARB. REP. 14 (1997) (stating that investors must have standing under the treaty to pursue a claim).

50. *See* Treaty Concerning Business and Economic Relations, Mar. 21, 1990 U.S.-Poland letter of transmittal, 29 I.L.M. 1194, 1197 (stating that BITs provide a legal framework for investment); Matthew B. Cobb, *The Development of Arbitration in Foreign Investment,* 16-4 MEALEY'S INT'L ARB. REP. 12 (2001) (discussing jurisdiction of ICSID); Norah Gallagher & Lawrence Shore, *Bilateral Investment Treaties: Options and Drawbacks* INT. ARB. L. REV. 7(2), 49–53 (2004) (discussing a case where the tribunal determined that its jurisdiction extended only to claims under the BIT).

ing directly out of an investment."[51] Almost all BITs contain a definition of investment.[52] This definition generally combines (i) an illustrative list of assets specifically protected[53] with (ii) an open-ended definition of investment, including all categories of assets, rights and interests.[54] The result is a broad definition of investment that protects everything of economic value, virtually without limitation.[55] This ensures maximum flexibility in the BIT's application.[56] Despite this broad and open-ended definition, certain features of an investment for the purpose of investor-state arbitrations have been established.[57] An investment does not include non-recur-

51. *See* Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Lanco Int'l Inc. v. Argentine Republic (Preliminary Decision on Jurisdiction of the Arbitral Tribunal), 40 I.L.M. 457, 461 (ICSID arbitral tribunal) (noting that the tribunal must analyze the definition of "investment" in the BIT to determine its jurisdiction); Aron Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, in* SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 164, 168 (1966) (opining that the ICSID requirement that the dispute arise out of an "investment" may be folded into the requirement of consent to jurisdiction).

52. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 240 (Cambridge University Press 1994); C.M.S. Gas Transmission Co., 42 I.L.M. at 795–96 (noting that definition of the term "investment" is necessarily left to the individual BIT); Kenneth J. Vandevelde, *Book Review and Note: Bilateral Investment Treaties By Rudolf Dolzer and Margrete Stevens*, 90 AM. J. INT'L L. 545 (1996) (summarizing a chapter in the book that assumes a definition of investment section in all BITs).

53. *See* David P. Fidler, *Foreign Private Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law,* 31 CASE W. RES. J. INT'L L. 293, 312 (1999) (stating that non-comprehensive lists of assets are common in BITs); Wena Hotels Ltd. v. Egypt (proceeding on the jurisdiction), 41 I.L.M. 881, 890 (referencing a non-exclusive list of assets in the BIT at issue); Investment Treaty with Mongolia, June 26, 1995 (defining investment with a non-exclusive list of assets), *available at* 1996 BDIEL AD LEXIS 18.

54. *See* Salacuse, *supra* note 18, at 655 (identifying a trend in recent BITs towards open-ended definitions of investment); SORNARAJAH, *supra* note 52, at 244 (pointing out that BITs are written to protect rights and intangible assets as well as tangible assets); Shane Spelliscy, Note, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes With Foreign Investors* 12 AM. REV. INT'L ARB. 95, 108 (2001) (noting protections extended beyond the conventional understanding of assets).

55. *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 474 (Oxford University Press 2002) (stating that BITs often contain a broad definition of investment); von Mehren, *supra* note 8, at 71 (noting broadness of definitions of investment in some BITs); U.N. CONF. ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1996: INVESTMENT AND INTERNATIONAL POLICY ARRANGEMENTS, at 134 Sales No. E.96.11.A. 14.

56. *See* U.N. CONF. ON TRADE AND DEVELOPMENT, FLEXIBILITY FOR DEVELOPMENT, at 70 (2000) (observing that a broader definition of "investment" confers more flexibility on the agreement), *available at* http://www.unctad.org/en/docs//psiteiitd18.en.pdf; Gudgeon, *supra* note 4, at 113–14 (describing how framers of the U.S. Model BIT shied away from defining investment so as not to limit the applicability of the treaty); VANDEVELDE, *supra* note 46, at 45 (observing how a broad definition of investment leads to flexibility).

57. *See Société Générale*, 42 I.L.M. at 1311 (setting forth components of the broadly defined term "investment"); *see also* Jarreau, *supra* note 7, at 491 (commenting on how the United States-Honduras BIT left the term "investment" broadly defined); Robert A. Schmoll, Note, *NAFTA Chapter 11 and Professional Sports in Canada*, 35 U. MIAMI INTER-AM. L. REV. 429, 1053 (2003) (citing to the definition of "investment" outlined in Article 1139 of NAFTA).

ring transactions such as simple sales and purchases of goods or short-term commercial credits.[58]

There are five recognized characteristics of an investment:

(i) An investment has a certain duration;

(ii) An investment involves a certain regularity of profit and return;

(iii) An investment typically involves an element of risk for both sides;

(iv) An investment normally involves a substantial commitment or contribution;

(v) An investment should be significant for the host state's development.[59]

The content and definition of treaty rights depend on the terms of the specific BIT that creates these rights.[60] As BITs are intended to facilitate investment, they address issues of laws, policies or actions that could impede or endanger investment flows.[61] There is a core of generic

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58. *See* North American Free Trade Agreement, Dec. 17, 1992, art. 1139, *available at* 1992 WL 812394, 15 (specifying what the term "investment" excludes from its definition within the context of bilateral investment treaties). *See generally* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 25–31 (Brill Acad. Pub. 1995) (illustrating how the definition of "investment," which varies from country to country, will dictate which types of assets are excluded); Lawrence W. Newman & David Zaslowsky, *Dispute Resolution Opportunities for Foreign Investors*, N.Y.L.J., Jan. 30, 2004, at col. 1 (observing that NAFTA specifically excludes certain types of assets which do not fall within the definition of investment).

59. *See Société Générale*, 42 I.L.M. at 1311 n.153 (noting that the central characteristics of an investment are that it possesses a "certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development."); *see also* Fedax N.V. v. Venez., 37 I.L.M.1378 (1998) (listing the five recognized characteristics of investments: duration, regularity of profit and return, assumption of risk, substantial commitment and a significance to the host state's development); Salini Costruttori Spa and Italstrade Spa v. Morocco, 42 I.L.M. 606, 607 (2003) (noting that, unlike the other characteristics, the last element, significance of an investment to the host state's development, evolved through case law).

60. *See* DOLZER & STEVENS, *supra* note 58, at 58 (acknowledging differences in emphasis and drafting style of BITs); *see also* Jian Zhou, *National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective*, 10 TOURO INT'L L. REV. 39, 47 (2000) (defining two categories of treatment standards recognized in foreign investment law); Lew, *supra* note 41 (explaining that, although the terms and conditions of treaty rights will vary depending on the countries involved, BITs provide the foundation on which parties can settle their disputes).

61. *See* Testimony from John B. Taylor, Under Sec'y of Treas. for Int'l Affairs, before the Subcomm. on Domestic and International Monetary Policy, Trade, and Technology, Comm. on Financial Services (Apr. 1, 2003) (on file with the Department of the Treasury) (outlining United States BIT rights given to investors entering emerging market countries as a way of facilitating investments in those countries); *see also* Lee Chang-Jae, *A Hub in the Making*, KOREA TRADE & INV., July 20, 2003, *available at* 2003 WL 66644033 (remarking on how the Japan-Korea BIT will be vital in generating new economic growth in Korea by removing barriers to capital flows). *But see* Chan-Hyun Sohn, *Korea-Japan FTA Crucial to Co-prosperity*, KOREA TIMES, June 6, 2003, *available at* 2003 WL 57490934 (recognizing that the Korea-Japan BIT has not improved bilateral investment flow between both countries).

treaty rights that are well established and defined in international law.[62] These have in practice formed the basis of treaty claims by investors against host states.[63] The core of treaty rights is the following:

> (a) **The Right to National Treatment**: Most BITs impose on the host state the obligation to accord the foreign investor the same treatment as enjoyed by its own nationals.[64] This right protects foreign investors from special requirements that would result in a competitive disadvantage in comparison with national investors.[65]
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> (b) **The Right to Most-Favored-Nation Treatment**: This right guarantees investors of the home state treatment no less favorable than that which the host state accords to nationals of any other country.[66] Again, this right pro-

62. *See* Garcia, *supra* note 22, at 311–12 (listing the five basic treaty rights associated with BITs). *But see* Jarreau, *supra* note 7, at 448–49 (indicating how the different ways in which treaty rights are set forth in BITs reflects a lack of international consensus concerning such rights). *See generally* Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1036 (2000) (referring to the bulk of existing BITs as influential instruments in establishing and defining investor protection standards).

63. *See* von Mehren, *supra* note 8, at 72 (illustrating one specific type of claim an investor may have against a host state, that of its failure to guarantee "fair and equitable treatment"); *see also* Spelliscy, *supra* note 54, at 117 (asserting that investors can seek damages from host states who violate certain treaty rights); Emmanuel Gaillard, *'Vivendi' and Bilateral Investment Treaty Arbitration*, N.Y.L.J., Feb. 6, 2003, at col. 1 (stating that, where a BIT coexists with a contractual agreement, a foreign investor may find separate causes of action against a host state, one in the BIT, and one in the contract).

64. *See* North American Free Trade Agreement, *supra* note 58, art. 1102; *see also* Aaronson, *supra* note 34, at 56 (defining national treatment to ensure that foreign investment receives the same treatment as domestic investment); Tony Marshall, *Projects: Risky Business*, LEGAL WEEK, Aug. 5, 2004, available at 2004 WL 72195886 (elaborating on how international investments typically include the right of national treatment to foreign investors, regardless of whether a contract exists between investor and host state).

65. *See* Matias F. Travieso-Diaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, 35 GEO. WASH. INT'L L. REV. 903, 940 (2003) (asserting that, in order to promote foreign investment, there cannot be any restrictions on the commercial activities of foreign investors). *But see* Saamir Elshihabi, *The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty*, 35 INT'L LAW. 137, 141 (2001) (noting that there may be national treatment exceptions in the area of energy-sector investments, where foreign investors will be placed at a disadvantage); Jarreau, *supra* note 7, at 456 (citing a circumstance in which the parties to a BIT adopted exclusions to guarantee national treatment in certain industries).

66. *See* North American Free Trade Agreement, *supra* note 58, art. 1139 (espousing the most-favored-nation treatment doctrine). *See generally* von Mehren, *supra* note 8, at 72 (illustrating the breadth of a most-favored-nation treatment clause); Michael Moser, *Treaties Give New Protection: State Consents To Arbitration By International Body In Disputes With Foreign Investors*, FIN. TIMES, Feb. 25, 2004, at 8, *available at* 2004 WL 70207073 (commenting that most-favored-nation treatment extends only to investors from countries which have entered into a BIT with China).

tects an investor from special requirements and competitive disadvantage, this time vis-à-vis foreign investors from other countries.[67]

(c) **The Right to Non-Discriminatory Treatment**: BITs often contain a prohibition on measures which discriminate against the foreign investor.[68]

(d) **The Right to Fair and Equitable Treatment**: The content of the right to fair and equitable treatment is a controversial question in investor-state arbitration at present.[69] One view, recently supported by the NAFTA Free Trade Commission, is that fair and equitable treatment equates with the minimum standard of protection for aliens in customary international law.[70] The alternative view is that fair and equitable treatment is an independent and self-contained standard.[71]

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67. *See* John Wickham, *Toward a Green Multilateral Investment Framework: NAFTA and the Search for Models*, 12 GEO. INT'L ENVTL. L. REV. 617, 630 (2000) (emphasizing that governments will apply varying degrees of protection depending on public policy considerations with regard to the particular type of investment at issue). *But see* Brower, *supra* note 8, at 251 (distinguishing NAFTA from most other existing BITs, which provide fewer substantive protections and even omit most-favored-nation treatment). *See generally* Garcia, *supra* note 22, at 311–12 (addressing general BIT protections between state parties, which include most-favored-nation treatment vis-à-vis non-party investors).

68. *See* Jarreau, *supra* note 7, at 459 (explaining that the United States-Honduras BIT contains a clause prohibiting either country from engaging in discriminatory measures that would impair various investment activities); *see also* Sullivan & Connor, *supra* note 14, at 123 (describing how Canada violated Articles 1102 and 1105 of NAFTA because it could not demonstrate a legitimate environmental or health concern to justify its banning of PCB exports to the United States for waste disposal). *See generally* von Mehren, *supra* note 8, at 72 (elaborating on what the non-discriminatory treatment standard entails).

69. *See* Garcia, *supra* note 22, at 348 (noting the divergent spectrum of judicial considerations of the fair and equitable treatment standard); *see also* David MacArthur, Note, *NAFTA Chapter 11: On An Environmental Collision Course With The World Bank?*, 2003 UTAH L. REV. 913, 924–25 (2003) (discussing the controversy in terms of judicial interpretation of this apparently vague standard, and providing a reason for how some of this controversy has subsided). *But see* Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 424 (2000) (explaining that the fair and equitable treatment standard sets a fairly low bar for government compliance).

70. *See* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 93 n.321 (2003) (citing that the United States, Canada, and Mexico interpreted fair and equitable treatment to not require treatment beyond that of the customary international law minimum standard of treatment of aliens); *see also* Dana Krueger, *The Combat Zone:* Mondev International, Ltd. v. United States *and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT'L L.J. 399, 411 (2003) (stating that interpretation of the fair and equitable treatment standard by the NAFTA nations mandates compliance with the more limited standards prescribed by customary international law in future disputes); Newman & Zaslowsky, *supra* note 58, at 3 (arguing that the fair and equitable treatment standard may be higher than that of national treatment, because it must take into account internationally accepted standards).

71. *See* Charles H. Brower, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L.43, 54–55 (2001) (asserting that the content of the right to fair and equitable treatment is detached from the concepts of international law); *see also* William S. Dodge, *International Decision:* Metalclad Corporation v. Mexico, 95 AM. J. INT'L L. 910, 919 n.54 (2001) (presenting the debate surrounding efforts to equate the right to fair and equitable treatment in bilateral investment treaties with a minimum standard defined by the principles of international law); *see also* Jarreau, *supra* note 7, at 451 (stating that fair and equitable treatment is considered an independent standard).

(e) **The Right to Compensation for Expropriation**: BITs invariably include the right to compensation if the host state expropriates the investment.[72] The meaning of "expropriation," and scope of this right to compensation, particularly in the context of the adverse effects on foreign investments of environmental or public health regulation, is another contentious issue in investor-state arbitrations today.[73]

C. Treaty Rights vs. Contract Rights

The issue of whether the investor needs to choose between treaty rights and contract rights, or whether the investor may pursue both types of rights simultaneously, either in the same forum or in separate forums, is of strategic importance and much debate.[74] The answer requires consideration of the nature of treaty claims in contrast with contract claims.

The fundamental criterion that always distinguishes a treaty claim from a contract claim is the source of the right.[75] The basis of a treaty claim is a right defined and established in an investment treaty, while the basis of a contract claim is a right defined and created in a con-

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72. *See* Marshall, *supra* note 64 (positing that bilateral investment treaties generally prohibit and protect against expropriation of property by providing for adequate compensation in such circumstances), 2004 WL 72195886; *see also* Aaronson, *supra* note 34, at 56 (stating that many bilateral investment treaties limit the extent that the host state may expropriate by guaranteeing fair compensation in the event of expropriation); von Mehren, *supra* note 8, at 70 (declaring that most bilateral investment treaties hold host states responsible for forms of expropriation by ensuring investors of the home state the right to compensation).

73. *See* Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 19-1 MEALEY'S INT'L ARB. REP. 17 (Jan. 2004) (positing that the law of expropriation is subject to interpretation due to the ambiguity regarding the standards which determine whether compensation is required for a governmental taking); *see also* DOLZER & STEVENS, *supra* note 58, at 25–31 (elaborating upon the broad scope of the term "investment" in various bilateral investment treaties and how the application of this term has often been the source of disagreement during investor-state negotiations); *see, e.g.*, Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1161, 1170–71 (2003) (discussing how assigning a broad definition to expropriation may negatively impact environmental and human safety regulations).

74. *See* Emmanuel Gaillard, *Introductory Note to International Centre for Settlement of Investment Disputes (ICSID):* Azurix Co. v. Arg., 44 I.L.M. 259, 260 (2004) (presenting the ambiguities surrounding jurisdictional issues of forum selection in claims involving both treaty and contract rights); *see also* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 363 (1994) (expressing the variability of dispute resolution provisions in bilateral investment treaties as well as their significance in guaranteeing investors access to forums); James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 838–39 (2000) (maintaining that the choice of forum can provide a tactical advantage to a party to a dispute because of the power the legal arena can have in establishing the agenda of international politics).

75. *See Societe Generale*, 42 I.L.M. at 1301 (suggesting that pursuant to the Vivendi Annulment decision, the test used to distinguish a contract claim from a treaty claim is based on the "essential" or "fundamental" basis of the claim). *See generally* Michael R. Reading, Note, *The Bilateral Investment Treaty in Asean: A Comparative Analysis*, 42 DUKE L.J. 679, 688 (1992) (referring to contracts as sources of rights and obligations in a foreign investment treaty); PETER WOLFGANG, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS § 1216 (Wolfgang, Peter et al. eds., Martinus Nijhoff 1986) (explaining that there are many sources for investment protection of which a contract between a foreign investor and a host country, which includes unique rights and provisions, is merely one).

tract.[76] There is thus never an overlap between a treaty claim and a contract claim, as a treaty right can never arise from a contract.[77]

The content of a treaty right is another distinguishing feature. The most familiar treaty rights established by BITs are of a generic nature and defined by international law (i.e., the rights to national treatment, most-favored-nation treatment, non-discriminatory treatment, fair and equal treatment, and compensation in the event of expropriation, as discussed above.)[78] Contract rights, in contrast, are generally specific to the investment and defined by the domestic law of the host state.[79]

In theory, treaty claims and contract claims may be pursued simultaneously, each in accordance with its applicable dispute resolution provisions, given that a BIT and a concession contract are two independent sources of rights and an investor may utilize them both.[80] However, in practice it becomes clear that the investor is always faced with the need to make a choice between these two claims, as the overlap between a treaty claim and a contract claim is signifi-

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76. *See* UNITED NATIONS, BILATERAL INVESTMENT TREATIES 88–89 (Graham Trotman 1988) (stating that a treaty claim can only arise from the provisions or terms agreed upon in the bilateral investment treaty); *see also* COMEAUX & KINSELLA, *supra* note 5, at 99 (explaining that if a state violates an investor's right which is set forth in the treaty between their respective nations, the investor's home state may bring an action under international law); *see, e.g., Societe Generale*, 42 I.L.M. at 1285 (finding that treaty claims are derived from disputes regarding investments set forth in the bilateral investment treaty between the Swiss Confederation and Pakistan and are distinct from purely contractual claims which arise from violations of specific contract provisions).

77. *See* Gaillard, *supra* note 74, at 261 (clarifying that the rights evolving under a contract and those asserted under a treaty differ in nature and, therefore, cannot arise from one another); *see also* COMEAUX & KINSELLA, *supra* note 5, at 31 (emphasizing that a breach of contractual obligations does not violate international law and, thus, does not amount to a treaty claim).

78. *See* RONALD CHARLES WOLF, TRADE, AID, AND ARBITRATE 29 (Ashgate 2004) (indicating that the modern bilateral investment treaty has broad, uniform provisions which grants its signatories standard treatment rights); *see also* UNITED NATIONS, BILATERAL INVESTMENT TREATIES, *supra* note 76, at 9 (claiming that the rights established and protected by bilateral investment treaties are inspired by the principles of international law); Salzman, *supra* note 74, at 809 (acknowledging that the majority of bilateral investment treaties guarantee their signatories the protections of most-favored-nation treatment, national treatment, and compensation rights in the event of expropriation).

79. *See* COMEAUX & KINSELLA, *supra* note 5, at 28 (declaring that foreign investment contracts between investors and states are subject exclusively to the laws of the host state in the relationship); *cf.* M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 26–27 (Kluwer Law International 2000) (arguing that a foreign investor's relocation to a host state deems all of his subsequent transactions domestic and, thus, the law of the host state should govern and control).

80. *See* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 476–78 (2d ed., West 1990) (alleging that a concession agreement between a state and a foreign nation is a contract, not a treaty, which contains its own set of dispute resolution procedures). *See generally* M. Sornarajah, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 44 (Kluwer Law International 2000) (describing a concession agreement as a contract which typically transfers specific rights of exploration to a foreign investor). *But see* Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience*, 8 NAFTA L. & BUS. REV. 501, 530 (2002) (identifying that when a treaty claim fails after being submitted to arbitration, an investor may submit any contract claims to a domestic court because both types of claims could not be pursued simultaneously within the same forum).

cant.[81] Whether a treaty clause forces an investor to elect between treaty and contract claims depends on the exact wording of the treaty, and these provisions are often ambiguous.[82] The prudent course for the investor is thus not to jeopardize his or her treaty claims by pursuing proceedings in a forum other than that indicated in the treaty, except where those proceedings are required by the BIT itself.[83]

Despite the potential overlap between treaty and contract rights, the distinct features of contracts and treaties may be reconciled.[84] For example, the state parties to a BIT may specifically agree to observe any contractual obligations that they may have with nationals of the other state party.[85] The wording of such clauses (known as umbrella clauses) will determine its effect, which could be to establish the treaty obligation to replicate every contractual obligation in a

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81. *See* A.F.M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT'L L.J. 1, 3–4 (2001) (illustrating the theory which asserts that under traditional international law, a contract right has the same legal effect as a treaty right because only the violation of a treaty right is an unlawful act, thus eliminating distinctions between treaty and contract claims); s*ee also* UNITED NATIONS, DISPUTE SETTLEMENT: INVESTOR-STATE 49 (2003) (evidencing the significant overlap between treaty claims and contract claims by highlighting the approach taken by various foreign investment agreements, such as the MAI and American bilateral investment treaties, of granting jurisdiction to disputes arising under both the treaty and any other specified agreements). *But see* Emmanuel Gaillard, *International Arbitration Law: The First Association of Southeast Asian Nations Agreement Award*, N.Y.L.J., Aug. 7, 2003 (citing the *Vivendi* annulment decision to show that there is always a clear distinction between treaty and contract claims which stems from the differing fundamental sources of the individual claims).

82. *See* UNITED NATIONS, KEY TERMS AND CONCEPTS IN IIAS: A GLOSSARY 136 (2004) (explaining that some bilateral investment treaties contain clauses which offer its signatories the specific protections afforded them under state contracts). *See generally* Luigi Migliorino, *Gli Accordi Internazionali sugli investimenti*, 85 AM. J. INT'L L. 240, 241 (1991) (book review) (finding that bilateral investment treaties define "investor" and "investment" differently, which makes these treaties' clauses susceptible to broad interpretation and, therefore, varies the scope of protections afforded to their signatories); *see* Salini Costruttori, 42 I.L.M.at 620 (illustrating an example of a bilateral investment treaty which contains a clause that explicitly incorporates various contract claims under the treaty).

83. *See* Kishoiyian, *supra* note 74, at 349 (opining that the protection of treaty shareholders requires them to resolve their disputes pursuant to the stipulations set forth in the treaty, specifically those concerning procedure and jurisdiction); *see also* Garcia, *supra* note 22, at 330 (suggesting that an international claimant risks forfeiting a remedy or relief if an international lawsuit is filed in a local or domestic forum because of procedural and substantive reasons). *See generally* UNITED NATIONS, DISPUTE SETTLEMENT: STATE-STATE 30, 41 (2003) (stating that the majority of bilateral investment treaties contain mechanisms for dispute settlement, some of which also provide for and require dispute resolution in specialized judicial institutions).

84. *See* Migliorino, *supra* note 82, at 241 (acknowledging that most bilateral investment treaties respect contractual obligations); s*ee also* Reading, *supra* note 75, at 695 (elaborating on the United States model bilateral investment treaty and the protection it affords "every kind of investment," which includes contractual rights); s*ee e.g.,* Robert Stumberg, *Direct Investment: Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491, 598 n.105 (1998) (showing that a multilateral agreement on investment also defines the term "investment" broadly to include rights such as property rights and contract rights under its protection).

85. *See* Bergman, *supra* note 1, at 10 (stating that bilateral investment treaties provide investors with security in that the obligations of both parties are set in advance); *see also* Marian N. Leich, *Bilateral Investment Treaties*, 84 AM. J. INT'L L. 895, 898 (1990) (demonstrating that parties are required to observe their contractual obligations regarding both investments and commercial activities); Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 21–22 (1998) (illustrating that when contractual obligations are not performed, this overrides the requirements of the contract).

concession contract between an investor and the host state.[86] (The contractual obligation and the treaty obligation thus become identical, although they stem from two distinct sources.[87])

IV. Advantages and Disadvantages of the BIT

A. Benefits

The State Department's Web site provides the following information with regard to the benefits of BITs for U.S. companies:

U.S. Bilateral Investment Treaties provide U.S. investors with six basic benefits:

First, BITs ensure that U.S. companies are entitled to be treated as favorably as their competitors.

Second, BITs establish clear limits on the expropriation of investments and entitle U.S. investors to be fairly compensated.

Third, BITs provide U.S. investors the right to transfer funds into and out of the host country without delay, using a market rate of exchange. This covers all transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made. Ensuring the right to transfer funds creates a predictable environment guided by market forces.

Fourth, BITs limit the ability of host governments to require U.S. investors to adopt inefficient and trade-distorting practices. For example, performance requirements, such as local content or export quotas, are prohibited.

Fifth, BITs give U.S. investors the right to submit an investment dispute with the treaty partner's government to international arbitration. There is no requirement to use that country's domestic courts.

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86. *See* Cremades, *supra* note 5, at 83 (demonstrating that an umbrella clause may state that either contracting party will guarantee to observe the commitments it has entered into with regard to the investments of the other party in the contract, and explaining that the word "commitments" does not mean that contract breaches are automatically breaches of international treaty law); *see also* Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 FORDHAM INT'L L.J. 881, 887 (1990–1991) (indicating that the Code on the treatment of transnational corporations by their host countries includes an umbrella clause which refers generally to international law for the appraisal of treatment of transnational corporations); Vinuesa, *supra* note 80, at 517–18 (showing that concession contracts apply to any disputes arising under contracts).

87. *See* Cremades & Cairns, *supra* note 12, at 173–209. *See generally* Draft Convention on the Protection of Foreign Property, March 1963, 2 I.L.M. 241, 247 (no date in original) (indicating that an agreement can take the form of a contract or a concession and that there is no way to distinguish one from the other legally); Stanimir A. Alexandrov, *Introductory Note to International Centre for the Settlement of Investment Disputes (ICSID)*: SGS Societe Generale de Surveillance S.A. v. Pak., 42 I.L.M. 1285, 1287 (2003) (demonstrating that under a bilateral investment treaty, any contract right held by a foreign investor from a host state is also considered a right in international law or treaty law).

Sixth, BITs give U.S. investors the right to engage the top managerial personnel of their choice, regardless of nationality.[88]

B. Criticisms

Since its implementation, the BIT program has come under criticism for the fact that in practice the scale of benefits are often tipped in the favor of the developed nation over the host nation.[89] While a movement is now underway to reform the existing model BIT, the modern BIT is still largely drafted to benefit the developed countries' investors in the developing nation.[90] This often creates a situation where the developed country is reaping the largest bene-

88. *See* Lang, *supra* note 40, at 458 (noting that bilateral investment treaties give American investors the right to employ top managerial personnel of any nationality); *see also* Catherine Sune, Note, *The E-2 Treaty Investor Visa: The Current Law and The Proposed Regulations*, 11 AM. U. J. INT'L L. & POL'Y 511, 517 n.28 (1996) (detailing that some bilateral investment treaties permit investors to employ personnel of any nationality, while other treaties only allow top managerial personnel to be of any nationality); Vandevelde, *supra* note 10, at 638 (affirming that bilateral investment treaties grant investors the right to employ managerial and technical personnel, regardless of their nationality).

89. *See* Inaamul Haque, *DOHA Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 AM. U. INT'L L. REV. 1097, 1111 n.60 (2002) (demonstrating that developing nations are concerned that the multilateral system favors the developed nations); *see also* Duncan E. Williams, Note, *Policy Perspectives on the Use of Capital Controls in Emerging Nations: Lessons From the Asian Financial Crisis and a Look at the International Legal Regime*, 70 FORDHAM L. REV. 561, 614 n.446 (2001) (indicating that bilateral investment treaty negotiations result in favoritism to those nations exporting the capital, namely the developed nations). *But see* Greg Warnagieris, Note, *A Treaty in Conflict with Title VII*: Macnamara v. Korean Air Lines *from an International Human Rights Perspective*, 13 LOY. L.A. INT'L & COMP. L.J. 331, 334 (1990) (detailing how despite the apparent one-sidedness of investment agreements where one party has all the capital, the party who is not providing the capital is still providing benefits through other means).

90. *See* Horacio A. Grigera Naon, *Sovereignty and Regionalism*, 27 LAW & POL'Y INT'L BUS. 1073, 1077–78 (1996) (expressing that since countries involved in treaties are not economically equal, the benefit from international investment treaties may go to the developed nations as opposed to the developing ones); *see also* Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. J. INT'L L. & POL'Y 1275, 1281 (1995) (demonstrating how transnational corporations have been seen as disseminating an uneven distribution of benefits such that the less-developed countries lose). *See generally* Robin, *supra* note 1, at 934 (discussing the American bilateral investment treaty model and its failure to encourage foreign investment as it does not present an equal balance between American and host country interests).

fit from the agreement.[91] From the perspective of many critics there are numerous drawbacks to the BIT program.[92]

One criticism of the BIT program is that under the rules of arbitration the average BIT makes it possible for individual investors to force the government of a country into arbitration if that country enacts regulations that in some way interfere with an investment or a company that is protected under the BIT.[93] If an investment or a company fails abroad the BIT could open the door for the unhappy investors to sue the governments of these countries for breach of treaty rights.[94] These suits, often claiming interference in the investment by the government

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91. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 459 (2001) (commenting that bilateral investment treaties are strongly preferential to foreign investments); *see also* Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW 69, 79 (2003) (discussing how bilateral investment treaties strongly favor foreign investors and allow them to go straight to international arbitration without getting consent from the host nation). *See generally* Guzman, *supra* note 7, at 666 (addressing how developing countries have agreed to bilateral investment treaties, despite having to give up the independence and control these countries sought for so long).

92. *See* Scott N. Carlson, *Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment*, 29 INT'L LAW. 577, 581 n.18 (1995) (noting that bilateral investment treaties have a limited application and are thus not geared to advancing foreign direct investment generally and are not to be used in place of general foreign investment law); *see also* Linda W. Tai, Comment, *Music Piracy in the Pacific Rim: Applying a Regional Approach Toward the Enforcement Problem of International Conventions*, 16 LOY. L.A. ENT. L.J. 159, 186–88 (1995) (indicating that one of the major drawbacks of bilateral treaties is breaking up the trading structure into competing individual countries, vying for beneficial agreements with the United States). *But see* Senator Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT'L L.J. 1, 7–8 (1989) (asserting that bilateral treaties have several advantages: first, negotiations proceed more quickly because there are fewer parties involved; second, economic issues can be accommodatingly addressed; and third, success is likely).

93. *See* Jacob S. Lee, Note, *No "Double-Dipping" Allowed: An Analysis of* Waste Management, Inc. v. United Mexican States *and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, 69 FORDHAM L. REV. 2655, 2662 n.35 (2001) (stressing that all United States bilateral investment treaties have binding arbitration provisions); *see also* Todd S. Shenkin, Comment, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 586 (1994) (remarking that bilateral investment treaties allow foreign investors access to arbitration to immediately confront sovereign governments). *See generally* Leich, *supra* note 85, at 897 (discussing how an investor can go straight to binding arbitration with another party under a bilateral investment treaty).

94. *See* Marc J. Goldstein & Andrea K. Bjorklund, *International Commercial Dispute Resolution*, 36 INT'L LAW. 401, 413 (2002) (noting that some of the most interesting recent cases involve private investors suing governments under the terms of bilateral investment treaties); *see also* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 732–33 (2003) (stressing that by participating in a bilateral investment treaty, a state increases its chance to be named as a party to an arbitration by a foreign investor); Andrea K. Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 707–08 (1999) (discussing how more cases are going to be brought by private actors against states now that they have standing to do so).

through improper regulation or unfair treatment of foreign investors, can be quite expensive and detrimental for a developing country's government and economic soundness.[95]

A perfect illustration of the type of damaging arbitration that can occur under a BIT agreement can be seen in a case that developed between the government of the Republic of Guyana, a small impoverished country in South America, and Big Food Group (BFG), a U.K. supermarket chain.[96] Guyana, which signed a BIT agreement with England, was being forced into arbitration by BFG, for a debt of £12 million allegedly owed to BFG.[97] This arbitration was pursued despite the fact that numerous U.K. media outlets and world development organizations castigated BFG for its attempt to collect on this debt given the financial state of Guyana's economy.[98] According to a March 17, 2003 article published by *Guardian Unlimited* and written by Geoff Gibbs, the company pursued the arbitration despite the fact that BFG makes

95. *See* Alvarez & Park, *supra* note 73, at 366 (discussing how under NAFTA, which is almost identical to a bilateral investment treaty, investors are allowed to demand arbitration when problems arise with the foreign investments, including unfair treatment and discrimination); *see also* R. Doak Bishop et al., *Strategic Options Available when Catastrophe Strikes the Major International Energy Project*, 36 TEX. INT'L L.J. 635, 639–40 (2001) (citing American Manufacturing & Trading, Inc. v. Republic of Zaire as an example of a large arbitration award of US$9 million against the host nation for breach of obligations); Mark Friedman & Gaetan Verhoosel, *Arbitrating Under BIT Claims: Under Bilateral Investment Treaties, More Investors are Taking Direct Action Against Foreign States*, 26 NAT'L L.J. 15, col. 2 (2003) (indicating that bilateral investment treaties contain various standard of protection, including the prohibition of unfair treatment).

96. *See* Magnus Saxegaard, *Creditor Participation in the HIPC Debt Relief Initiatives: The Case of Guyana*, 32 GA. J. INT'L & COMP. L. 725, 729–31 (2004) (discussing the implications of the 1989 bilateral investment treaty between Guyana and the United Kingdom); *see also David Jones, Food Giant Demands £13M From Impoverished Nation,* DAILY POST (Liverpool), Feb. 5, 2003, at 1 (indicating that Big Food Group is seeking to recover money from the government in Guyana from promissory notes issued in 1976), *available at* LEXIS, News Library, DAILY POST (Liverpool) File; Greg Lewis, *£12M Store Legal Battle in Hands of Arbitrator*, WALES ON SUNDAY, Mar. 2, 2003, at 23 (outlining how arbitration has begun wherein Big Food Group is seeking compensation for money lent to Guyana in 1976), *available at* LEXIS, News Library, Wales on Sunday File.

97. *See* Geoff Gibbs, *Big Food Group Attacked for Pounds 12M Claim Against Guyana*, THE GUARDIAN (London), Mar. 17, 2003, at 26 (informing that Big Food Group was seeking £12M in compensation from Guyana for the nationalization of its sugar industry in 1976 and indicating that Big Food Group and Guyana had agreed together to take the matter to arbitration), *available at* 2003 WL 16582525; *see also* Nick Mathiason, *Business & Media: After 26 Years, UK Food Group Squeezes Poverty-Stricken Guyana for Pounds 12 Million,* THE OBSERVER (London), Mar. 16, 2003, at 1 (arguing that Big Food Group is forcing Guyana into binding arbitration in an attempt to recover its 12-million-pound debt), *available at* 2003 WL 7094235; Nick Mathiason, *Big Food Does Big U-Turn: Victory for One Small Poor Country, But It's Not the End of the Story: Guyana Will Not be Hauled into Court for Debt but Other Nations are Still Vulnerable*, THE OBSERVER (London), Mar. 23, 2003, at 3 (stating that Big Food Group was using its bilateral treaty to compel Guyana to go to arbitration regarding the 12-million-pound, 26-year-old debt owed), *available at* 2003 WL 7094700.

98. *See Disappearing Profits Will Turn Out for the Good: Where Ford Leads Others Will Follow*, THE GUARDIAN (London), Mar. 18, 2003, at 22 (critiquing Big Food's continued 27-year hunt for Guyana's 12-million-pound debt, despite the fact that Guyana is one of the poorest nations in the world), *available at* LEXIS, News Library, The Guardian File. *But see* Simon Bowers, *BFG Drops Guyana Claim*, THE GUARDIAN (London), Mar. 18, 2003, at 22 (revealing that Big Food Group has let drop its claim for £12 million against Guyana after organizations threatened to protest outside BFG stores), *available at* 2003 WL 16583001; Darren Devine, *Debt-Fight Hails Iceland Lead*, WESTERN MAIL (Wales), Mar. 19, 2003, at 2 (declaring that Big Food Group suddenly ended its 12-million-pound claim against Guyana), *available at* LEXIS, News Library, The Western Mail File.

a yearly profit that is more than double the gross national product of Guyana.[99] The article states:

> Big Food Group, owners of the Iceland stores chain, is demanding £12 million from the government of the tiny, poverty-stricken South American country of Guyana. The money is compensation for a sugar business that Guyana nationalised in 1975. The cash-strapped country, which is so poor that the international financial community has written off 90 per cent of its debts, has already paid back £6m of what was a £13m debt. But it defaulted on repayments in 1989 following the Latin American currency crisis. Now interest has swelled the debt to £12m.
>
> Repaying it would cripple the country, a spokesman for the President's office said, "It would have serious implications in our budget capacity. It would compromise our social services and economic obligations."
>
> The group's [BFG's] turnover, at £5.2 billion, dwarfs Guyana's GDP, which stands at £2.15bn. Its government's entire annual income is just £120m—and Big Food Group is demanding a tenth of that.
>
> The group is refusing to back down and has forced Guyana to a binding World Bank arbitration tribunal hearing which will take place at the end of this month in London.[100]

BFG eventually dropped the case against Guyana in light of continued public opposition.[101] The BFG case is not unique, however, and this case is just one example of the type of situations that can arise when a developing country is under a BIT agreement. There are 21 other known cases of litigation by commercial creditors against the world's poorest countries.[102] As in the case of *BFG/Guyana Arbitration,* the host nation often does not have much recourse to avoid arbitration if the investor decides that the host nation has somehow breached

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99. *See* Mathiason, *supra* note 97, at 1 (reporting that the annual income of the government of Guyana, £120 million, pales in comparison to Big Food Group's turnout of £5.2 billon); *see also* Gibbs, *supra* note 97, at 26 (stating that the average income in Guyana is £1.50 a day); Big Food Group PLC, 2002–2004 ICC Financial Analysis Reports (2004) (stating that on Mar. 31, 2004, Big Food Group PLC reported total sales of £5,151,600,000, operating profit of £76,400,000, and profit after tax of £27,600,000).

100. *See* Mathiason, *supra* note 97, at 1.

101. *See* Press Release, World Development Movement, The Big Food Group drops £12m debt case against Guyana (Mar. 17, 2003) (on file with the NEW YORK INTERNATIONAL LAW REVIEW) (noting that the World Development Movement planned a series of protests against Big Food Group's stores); *see also* Duncan Begg, *Campaigners Celebrate Supermarket's U-Turn on Guyana Debt,* PRESS ASS'N, Mar. 18, 2004 (indicating that the Jubilee Debt Campaign also joined in the protests); Hugo Duncan, *Penguins' Joy as Food Firm Cancels Third World Debt; Praise from Campaigners after £12M Claim Is Dropped*, DAILY POST (Liverpool), Mar. 19, 2003, at 13 (stating that protesters celebrated their victory by dancing in penguin costumes outside of Big Food Group's North Wales headquarters).

102. *See* Mathiason, *supra* note 97, at 3 (listing Uganda, Sierra Leone, Nicaragua, Ethiopia, Niger, Honduras, Bolivia, Cameroon, and Congo D.R. as countries facing litigation); Devine, *supra* note 98, at 2 (naming J&S Franklin and Executive Outcomes as two companies suing Sierra Leone and Red Mountain as one suing Congo D.R.); *see, e.g.*, Ashok Sinha & Romilly Greenhill, Letter, *Have a Break from Nestle*, GUARDIAN (London), Dec. 20, 2002, at 19 (identifying Nestle's attempt to collect debt from Ethiopia).

a duty owed to them.[103] This is a rather one-sided benefit of an agreement that is supposed to benefit both sides.

Another common criticism is in response to the fact that BIT dispute resolution clauses often require the outcome of the arbitration to remain private and public access to the decision is restricted.[104] From the public point of view, this lack of access could be detrimental.[105] Many argue that the public has a right to know about the outcomes of cases, especially when some of the parties involved could be national governments.[106]

Further criticism of the BIT comes with the reality that the BIT agreement is a finite measure of regulating trade. A BIT and the policies that it mandates will only last as long as the

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103. *See* Bowers, *supra* note 98, at 22 (pointing out that the BFG's claim originated when Guyana nationalized its sugar industry and defaulted before it could pay back the company all of the money that it owed). *See generally* Ratner, *supra* note 91, at 459 (maintaining that bilateral investment treaties are skewed in that they allow investors to bypass domestic courts entirely to proceed directly to international arbitration); Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaty*, 36 COLUM. J. TRANSNAT'L L. 501, 508 (1998) (stating that BITs almost always contain arbitration provisions that allow investors to take host countries to arbitration to settle investment disputes).

104. *See* Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 547 (2001) (calling for safeguards because international arbitration lacks publicly accessible information regarding information, records, and proceedings and the unavailability of judicial review); *see also* Garcia, *supra* note 22, at 354 (pointing out that the proceedings are held in secret and unless the parties agree otherwise, the fact that a case exists may be withheld from the public). *See generally* Scott R. Jablonski, Comment, *¡Si, PO! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Contemporary Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 U. MIAMI INTER-AM. L. REV. 627, 654 (2004) (criticizing NAFTA's dispute resolution as secretive and elusive to public scrutiny).

105. *See* Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad Corporation v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209, 278 (2001) (holding that arbitration addresses complex issues in secrecy without examining environmental and public health perspectives); *see also* Jan McDonald, Symposium, *The Multilateral Agreement on Investment: Heyday or Mai-Day for Ecologically Sustainable Development?*, 22 MELB. U. L. REV. 617, 637 (1998) (expressing the fear that international arbitration cases have caused government to be reluctant to enforce or enact new environmental and safety laws against investors); Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at C1 (pointing out that international arbitration panels that meet in secret have caused national laws to be revoked, environmental rules to be questioned, and systems of justice to be challenged).

106. *See* Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L. L. 923, 953 (2003) (highlighting the need for transparency in the NAFTA arbitration procedures as they deal with host states and corporations); *see also* Symposium, *Two Regional Issues: The Mexican Trucking Case and NAFTA: Introduction, Commentary, and Afterword & The Future of International Economic Dispute Resolution in the Western Hemisphere (Dispute Settlement in the FTAA) The Mexican Truck Case and NAFTA: Introduction, Commentary, and Afterword*: *Some Comments on NAFTA's Chapter 11*, 42 S. TEX. L. REV. 1285, 1300 (2001) (illustrating how NAFTA allows issues of high public importance to be decided by international arbitration panels and not judges or legislators); Charles N. Brower & Jeremy K. Sharpe, Note, *International Arbitration and the Islamic World: The Third Phase,* 97 AM. J. INT'L L. 643, 652 n.79 (2003) (suggesting that public hearings and publicly available pleadings should be made available in arbitration matters that affect states' regulatory programs and public policies).

agreement lasts.[107] This could make for a somewhat unstable investment situation when a BIT is due to terminate and it has not been extended.[108] As BITs last for a fixed amount of time, the problem of having to renegotiate an agreement with a country every five or so years arises.[109] The expense of this problem is somewhat lightened by the fact that the BIT is based on a model draft; however, the fact that BITs last for such a limited amount of time make them more expensive and time-consuming to maintain than other forms of trade agreements.[110]

When a BIT exists between two countries, individual companies are then free to negotiate additional agreements with the host country in order to procure investment opportunities.[111] The problem arises when the developing country is forced to give up too many concessions to

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107. *See, e.g.,* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, Mar. 14, 1994, art. 15, *reprinted in* 34 I.L.M 935, 945 (1995) (stating that the bilateral investment treaty between the two countries is in force for ten years); Treaty Between the United States and the Republic of Poland Concerning Business and Economic Relations, Mar. 21, 1990, art. XIV, *reprinted in* 29 I.L.M. 1194 (1990) (expressing that the bilateral investment treaty between these two countries is in force for ten years); *see also* Robin, *supra* note 1, at 936 n.34 (pointing out that bilateral investment treaties typically have fixed terms of ten to twenty years).

108. *But see, e.g.,* Agreement Between Japan and The Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Protection of Investment, Mar. 1, 1982, art. 16(4), *reprinted in* 21 I.L.M. 963, 970 (1982) (describing how in the event of termination, the treaty still applies for an additional fifteen years to investments made prior to the date of termination); Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, art. XIII(4), *reprinted in* 21 I.L.M. 927 (1982) (citing a similar provision, but the treaty applies to investments for a period of ten years after the date of termination). *But see* Jarreau, *supra* note 7, at 444 (highlighting that the bilateral investment treaty contains a provision that adds stability in that some obligations survive termination).

109. *But see, e.g.,* Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Swiss Confederation for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, art. 12(2), *reprinted in* 21 I.L.M. 399, 407 (1982) (exemplifying how a treaty can avoid the problem of renegotiating by including a provision that after the initial ten-year period, the treaty remains in effect continuously until a year after one party provides written notice of termination). *But see* Jarreau, *supra* note 7, at 444 (maintaining that the bilateral investment treaty between the United States and Honduras does not need to be renegotiated as it could conceivably remain in effect permanently). *See generally* SORNARAJAH, *supra* note 52, at 62–63 (stating that international investors face an additional risk in that incoming governments may refuse to honor the contract made with the previous regimes).

110. *But see* Perez-Lopez & Travieso-Diaz, *supra* note 26, at 545–46 (illustrating Cuba's solution of having its treaties contain automatic renewal provisions for up to two, five, and ten years, and some that are extended indefinitely). *See generally* COMEAUX & KINSELLA, *supra* note 5, at 109 (noting that investors can negotiate directly with host countries for protection that last longer than the duration stated in the treaty); Cheryl W. Gray & William W. Jarosz*, Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 12–13 (1995) (verifying that high transaction costs incurred in the process of getting government approval for an investment reduces foreign direct investment into a host country).

111. *See* Ratner, *supra* note 91, at 462 (citing Texaco's control over the rainforests in Columbia as an example of a host country adjusting domestic laws and handing over tracts of land to de facto controlled corporations to attract investment from foreign companies). *See generally* Guzman, *supra* note 7, at 643 (pointing out how host countries provide concessions in order to attract investors); Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 529 (2001) (stating that even when a bilateral investment treaty is in place, international human rights law does not apply to multinational corporations as private entities).

these companies in an effort to attract them to invest there.[112] While the theory is that the foreign investment facilitated by the BIT is intended to help a country, often the "bidding" that takes place when a company seeks to invest in a host country works to undermine the general purpose of the BIT.[113] If the general purpose of the BIT is to infuse a developing economy with money through investment, then that purpose is impaired by coercing a country to give up resources or concessions in order for an investment agreement to be signed.[114]

A host country could therefore be in a very disadvantaged position when negotiating an agreement with a more developed and wealthier nation's investors. The pressure to gain the financial investment of the more developed nation will often lead a host country to give up concessions that in the long run may not be in the best interests of the country's environment, resources, or population.[115] In addition, offering individual companies further concessions under the BIT program may completely negate the actual benefits that are sought to be gained

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112. *See, e.g.,* Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective,* 27 VAND. J. TRANSNAT'L L. 259, 278, 297 (1994) (detailing that Mexico entered investment treaties for much-needed capital, but failed to receive any social or economic help from the multination corporations); *see also* Guzman, *supra* note 7, at 639, 643, 647 (stating that in competing with one another to win the favor of investors, host countries make concessions that ultimately cancel out most of the benefits of signing investment treaties). *See generally* Eric M. Burt, Comment, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT'L L. & POL'Y 1015, 1016–17 (1997) (explaining that India resisted efforts to regulate foreign direct investment as it feared abuse from multinational corporations).

113. *See* Burt, *supra* note 112, at 1022–23 (indicating that final agreements between host states and investors often include terms which interfere with social and economic reforms, depletion of resources, environmental hazards and destruction, and restrictive business practices); *see also* Robin, *supra* note 1, at 944 n.96 (1984) (finding direct foreign investment to be a cause of faulty employment structure, misapplication of resources, and undersupplied basic needs in host states). *See generally* Vandevelde, *supra* note 10, at 626–27 (noting that after final agreement, BITs often yield negative consequences for host states including underdevelopment, transfer of resources to developed states, internal unequal distributions of wealth, and loss of control over domestic markets).

114. *See*, *e.g.*, Inaamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. INT'L & COMP. L. REV. 219, 252–53 (2004) (illustrating common concessions that host states feel compelled to make such as assurances of neutral dispute settlement or no domestic legislation adverse to foreign investors); *see also* Vandevelde, *supra* note 10, at 634 (finding that because BITs generally fail to create rights of establishment for investors, host states can screen those investments that would be most beneficial for maintaining valuable resources from the host economy). *See generally* Guzman, *supra* note 7, at 642 (emphasizing the extensive protections provided to foreign investors at great costs to host states).

115. *See* Vandevelde, *supra* note 3, at 675 (demonstrating many BITs, including those with the United States, undermine host state domestic policies of hiring and other employment practices); *see also* Bryan Schwartz, *Lawyers and the Emerging World Constitution*, 1 ASPER REV. INT'L BUS. & TRADE L. 1, 8 (2001) (finding public concern that MAIs will usurp regulatory control from host states and negatively affect the local population). *But see* Vandevelde, *supra* note 3, at 675 (admitting the Tunisia BIT included a provision to subordinate some foreign investor decisions to local laws). *See generally* Judge Robert B. Zoellick, REPORT OF THE INDUSTRY ADVISORY COMMITTEE FOR CHEMICALS AND ALLIED PRODUCTS, Mar. 17, 2003 at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Reports/asset_upload_file937_4941.pdf> (noting significant environmental concerns with respect to the formulation of bilateral investment treaties); Wiltse, *supra* note 73, at 1180 (opining that without separate agreements to specifically protect the environment, investment agreements may jeopardize the host state's environment).

by the investment.[116] While the theoretical purpose of a BIT is to even the playing field between a foreign investor and the more local investors, the use of BITs can result in the opposite effect by giving the foreign investor a much greater business advantage through concessions such as tax breaks or eased environmental regulations.[117]

V. Additional Investment Protection Mechanisms

A. Multilateral Agreements on Investment

The various disadvantages of the use of BITs have led many critics to call for governments to abandon the practice of creating BITs in favor of establishing more multilateral agreements among countries.[118] NAFTA is an example of this type of agreement.[119] With the signing of new MAIs the critics see the possibility of instituting checks on the types of problems that often make BITs unbalanced.[120] A well-written MAI can even the playing field between the developing countries and the more developed nations since, in contrast to the two-party process that

116. *See* Vandevelde, *supra* note 3, at 652 (finding BITs ultimately undo reforms and other benefits made at the Uruguay Round of the GATT); *see also* Guzman, *supra* note 7, at 678–79 (opining that concessions such as binding contracts with investors may make the agreement more harmful). *See generally EU/WTO: GATT Birthday Show Set to Showcase Global Trade*, EUR. REP., May 16, 1998, *available at* 1998 WL 8801947, (unveiling prevalent beliefs among citizens that agreements made for foreign investment do not benefit the people, but only big businesses).

117. *See* Edward M. Graham, *Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations*, 31 CORNELL INT'L L.J. 599, 612 (1998) (noting investor protection advantages in international agreements including prohibition of expropriations, guaranteed international arbitration of compensation disputes, and other protections against discrimination); *see also* Michael C. McClintock, *Sunrise Mexico; Sunset NAFTA-Centric FTAA—What Next and Why?*, 7 SW. J. OF L. & TRADE AM. 1, 64–65 (2000) (pointing out great advantages for foreign investors including protections of investments and against expropriation). *See generally* Gray & Jarosz, *supra* note 110, at 17–18 (illustrating levels of concessions that must be made to attract foreign investors).

118. *See*, *e.g.*, Madeline Stone, Note, *NAFTA Article 1110: Environmental Friend or Foe?*, 15 GEO. INT'L ENVTL. L. REV. 763, 789 (2003) (finding MAIs such as NAFTA are preferable to BITs because they may be less detrimental to the international environment); *see also EU/OECD: European Parliament Weighs into Stalled Investment Pact*, EUR. REP., Mar. 14, 1998, *available at* LEXIS, EC News, Section 2299 (indicating European Parliament's concerns over what will make a new MAI succeed where such past agreements have failed). *See generally* David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 700–01 (2004) (noting trends toward MAIs rather than BITs due to broader investment protections and other such advantages).

119. *See* Foreign Trade Regulation, 2004 U.S. FED. L. DIGEST (noting multilateral investment stipulations in NAFTA); *see also* Anup Shah, *Free Trade Area of the Americas (FTAA)*, *at* <http://www.globalissues.org/Trade Related/FreeTrade/Regional.asp?p=1> (last updated Nov. 3, 2004) (likening and comparing NAFTA to multilateral agreements on investment). *See generally* North American Free Trade Agreement (NAFTA), *supra* note 58.

120. *See*, *e.g.*, Mark Vallianatos, *Exceptions and Conditions: De-Fanging the MAI,* 31 CORNELL INT'L L.J. 713, 717 (1998) (noting that MAIs succeed where BITs fail by allowing for equal footing for host state investors and foreign investors at earlier stages than BITs); *see also* Thomas J. Schoenbaum, *The Concept of Market Contestability and the New Agenda of the Multilateral Trading System*, AM. SOC'Y INT'L L. (1996) (identifying aspects of MAIs that could yield success where BITs have failed). *See generally* Kelley, *supra* note 111, at 492–93 (indicating MAIs can set superior, more coherent and unambiguous rules to liberalize economies and protect investors).

creates the BIT, the MAI is negotiated and signed by several countries at once.[121] The involvement of several nations makes it more difficult for one country to procure all of the advantages of the treaty.[122] On the other hand, the involvement of numerous parties in the negotiations makes it much more difficult to come to an agreement that is acceptable to all nations.[123] The recent failure of the American states to sign an MAI in Miami for establishing a Free Trade Area of the Americas demonstrates that the more nations that are involved, the more rigorous the negotiations.[124]

The rise of the MAI need not exclude the continued use and development of the BIT, however. On the contrary, the MAIs that have been created in recent years provide a series of investor rights which are similar to those found in BITs.[125] By looking at the modern-day BIT and MAI agreements, drafters of any new Investment Protection Treaty have a model of what

121. *See* Chris Baumgartner, *Trade and the Environment: The Demise of the Multilateral Agreement on Investment*, 1998 COLO. J. INT'L ENVTL. L. Y.B. 40, 41 (1998) (illustrating an example of integrating MAI elements to create a "level playing field" among nations); *see also* Salzman, *supra* note 74, at 812 (noting that MAI design would create a smoother and fairer flow of investment than BITs). *See generally* Sol Picciotto, *Linkages in International Investment Regulation: The Antimonies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 749 (identifying general arguments for and against the premise that MAIs create a "level playing field" among participating states).

122. *See* Saadia Toor, *Child Labor in Pakistan: Coming of Age in the New World Order*, 575 THE ANNALS AM. ACAD. POL. & SOC. SCI. 194, 199, (2001) (proclaiming international competition, globalization, and free trade agreements as tools to create a level playing field among nations); *see also Pascal Lamy Member of the European Commission Responsible for Trade Strengthening the Multilateral Trade System: How can the EU and India Cooperate? Confederation of Indian Industries New Delhi*, RAPID COMMISSION OF THE EUR. COMMUNITIES, Mar. 6, 2000, *available at* LEXIS, EC News (noting that MAIs can create a more balanced international community for both developed and developing countries). *See generally EU/WTO: Trade Ministers Ponder WTO Ministerial Strategy*, EUR. REP., May 8, 1999, *available at* LEXIS, EC News, Section 2406 (finding that both developed and developing countries seek binding multilateral investment agreements to create more economies).

123. *See* Larson, *supra* note 44 (identifying the notion that the inclusion of numerous states in MAIs can lead to disagreements that halt final ratification); *see also* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179, 273 (2002) (noting difficulties with negotiations among several EU states). *See generally* Kelley, *supra* note 111, at 493–97 (portraying the difficulties of coordinating and accommodating several nations during MAI bargaining stages).

124. *See EU/Latin America: Guadalajara Summit Fails to Progress on Trade and Political Links*, EUR. REP., June 2, 2004, *available at* LEXIS, EC News, Section 2873 (reporting the inability of the several involved nations to sign MAI for the Free Trade Area of the Americas); *see also EU/Mercosur: EU Offers Farm Trade Concessions*, EUR. REP., Apr. 17, 2004, *available at* LEXIS, EC News, Section 2861 (indicating the failure to sign MAI was due in large part to differing opinions on agriculture among nations). *See generally* Craig L. Jackson, *The Free Trade of the Americas and Legal Harmonization*, AM SOC'Y INT'L L. (1996) (opining that the differences in laws among the participating states could prove defeating unless harmonization could take place).

125. *See Protecting Investment Overseas: Bilateral Investment Treaties, Foreign Investment Laws and ICSID Arbitration*, pp. 5–6, *at* http://www.lovells.com/control/PublicationControl/pubId/872, (2004) (enumerating rights common to BITs and MAIs); *see also* Burt, *supra* note 112, at 1044–46 (indicating MAIs and BITs commonly contain similar provisions regarding treatment of investments, such as the "fair and equitable treatment" and "constant protection and security" standards). *See generally* Patrick Julliard, *Direct Investment: MAI: A European View*, 31 CORNELL INT'L L. J. 477, 484 (1998) (stating that both BITs and MAIs define rights and duties created for both host states and foreign investors).

things work and what things do not in creating a fair trading environment.[126] Any new treaties should include provisions for public access and disclosure of disputes that arise, at least insofar as one of the parties is a government entity. According to Luke Peterson:

> While it is reasonable for investors to expect a transparent decision-making process in host countries, it is also reasonable for the public to expect that disputes which arise out of this process will be resolved in an equally open and transparent fashion. Dispute resolution procedures should permit the public and affected parties to have access to the process.[127]

Four recent multilateral trade and investment treaties provide advance consent to submit investment disputes to ICSID arbitration: the 1992 North American Free Trade Agreement (among Mexico, Canada and the U.S.A.),[128] the 1991 Colonia Investment Protocol of the Common Market of the Southern Cone (MERCOSUR) (among Argentina, Brazil, Paraguay and Uruguay),[129] the 1994 Cartagena Free Trade Agreement (among Colombia, Mexico and

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126. *See* Jan MacDonald, *The Multilateral Agreement on Investment: Heyday or Mai-Day for Ecologically Sustainable Development*, 22 MELB. U. L. REV. 617, 654–56 (1998) (providing detailed conclusions as to what has failed in prior MAIs and the reasons for failure, and solutions as to how current and future MAIs will avoid such pitfalls); *see also* Wesley Scholz, *Direct Investment: International Regulation of Foreign Direct Investment*, 31 CORNELL INT'L L. J. 485, 488 (1998) (outlining successful provisions from NAFTA that will be examined and patterned after in future agreements). *See generally* Stephen J. Canner, *Exceptions and Conditions: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L. J. 657, 679–80 (1998) (identifying solutions and problems in current MAIs for consideration in future such agreements).

127. *See* Luke Eric Peterson, *Challenges Under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules,World Trade Agenda, at* http://www.iisd.org/trade/ilsdworkshop/ resources_es.htm (last visited Sept. 15, 2004).

128. *See* North American Free Trade Agreement, *supra* note 58 (stating that a disputing investor may submit the claim to arbitration under the ICSID Convention); *see also* William S. Dodge, *Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven: National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 358 (2000) (explaining that under Chapter 11 of NAFTA, an investor can submit claims against a host state for arbitration conducted by the ICSID); Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 188 (2000) (highlighting provisions of NAFTA that allow binding investor-state arbitration through ICSID).

129. *See* Cobb, *supra* note 50, at 12 (commenting that consent to ICSID arbitration is included in the Colonia Investment Protocol of MERCOSUR); *see also* Mary L. Moreland, "*Foreign Control" and "Agreement" under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organized Subsidiaries Against Host States*, 9 CURRENTS INT'L TRADE L.J. 18, 18 (2000) (remarking that ICSID is one of the main mechanisms for the resolution of disputes in multilateral trade and investment treaties such as the Colonia Investment Protocal of MERCOSUR); S. Benton Cantey, Comment, *International Arbitration of Resolve Disputes Under Chapter 11: Investment*, 9 TULSA J. COMP. & INT'L L. 285, 299 (2001) (indicating that the Colonia Investment Protocol of MERCOSUR allows settlement of disputes by ICSID).

Venezuela)[130] and the 1994 Energy Charter Treaty (the current signatories include the states of Western, Central and Eastern Europe, the former Soviet Union, the EU, Japan and Australia).[131]

Because BITs tend to be binding only for a limited duration—five, ten, or sometimes twenty years—it seems logical to attempt to remedy their failings and weaknesses through subsequent agreements.[132] A new multilateral treaty could redress some of the imbalances and flaws of current investment treaties. This multilateral investment regime could be useful for balancing the needs of investors for security and protection, against the needs and concerns of host states. On the other hand, an investment treaty requires a common theme and common interests, and while these are often found in bilateral treaties they may be more difficult to establish in multilateral regimes.[133]

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130. *See* Cobb, *supra* note 50, at 12 (noting that the 1994 Cartagena Free Trade Agreement allows for arbitration of disputes by ICSID*); see also* Moreland*, supra* note 129, at 18 (advancing the importance of ICSID as an important mechanism for the resolution of disputes in multilateral trade and investment treaties, including the 1994 Cartagena Free Trade Agreement); Cantey, *supra* note 129, at 299 (establishing that the 1994 Cartagena Free Trade Agreement allows settlement of disputes by ICSID).

131. *See* Commission of the Eur. Communities, Council and a Commission Decision on the Signing of the European Energy Charter Treaty and its Provisional Application by the European Coal and Steel Community and the European Atomic Energy Community, 1994 OFFICIAL J. 344 (1994) (detailing in art. 26(4)(a)(i) that disputes between investors and contracting parties, if not settled amicably, shall be submitted to the ICSID); *see also* McDonald, *supra* note 105, at 640 (declaring that the Energy Charter Treaty gives private investors the right to settle investment disputes under ICSID arbitration); Michael Polkinghorne, *Investor-State Dispute Resolution Under the Energy Charter Treaty*, 19-4 MEALEY'S INT'L ARB. REP. 12 (2004) (suggesting that disputes under the Energy Charter Agreement that are not amicably settled can be submitted to the ICSID).

132. *See also* U.N. CENTRE FOR TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 37-38 (1988) (explaining that a majority of existing bilateral investment treaties are concluded for a period of 10 years). S*ee generally* Jarreau, *supra* note 7, at 443 (acknowledging that the BIT between the United States and Honduras, commenced in 2001, would initially last for 10 years and would only be terminated thereafter upon one year's written notice from either party).

133. S*ee* COMEAUX & KINSELLA, *supra* note 5, at 101–02 (expressing that under a BIT, an agreeing state provides protections and reciprocal treatment to foreign investors in an effort to encourage the flow of investment to that state); *see also* Asif H. Qureshi, INTERNATIONAL ECONOMIC LAW, 380 (1999) (postulating that multilateral, rather than bilateral investment agreements are preferential because they require less reciprocity between member states, encourage binding commitments on the admission of investments, and "facilitate policy coherence in the international investment sphere."). S*ee generally* Kelley, *supra* note 111, at 495–96 (chronicling the failure of the Organization for Economic Cooperation and Development (OECD), a group of 30 developed nations, to establish an MAI, citing concerns such as the agreement's effect on domestic cultural industry, and fears that the MAI would encroach upon state sovereignty).

B. Institutional Agencies for Investment Protection

A number of the weaknesses initially found in BITs have been addressed through the creation of governmental bodies for the promotion and protection of investments abroad.[134] The Overseas Private Investment Corporation (OPIC) was established in 1971 by the U.S. government in order to mobilize and facilitate foreign direct investment and ensure its congruency with the developmental objectives of the host state.[135] OPIC thus ensures "the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from non-market to market economies."[136]

The aims and purposes of such investment and development protection institutions are adequately expressed in OPIC's mission statement:

> OPIC's mission is to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from non-market to market economies. In accomplishing its mission, OPIC will promote positive U.S. effects and host country developmental effects. OPIC will assure that the projects it supports are consistent with sound environmental and worker rights standards. In conducting its programs, OPIC will also take into account guidance from the Administration and Congress on a country's observance of, and respect for, human rights. In accomplishing its mission, OPIC will operate on a self-sustaining basis.[137]

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134. *See, e.g.,* Konrad von Moltke, *An International Investment Regime? Issues of Sustainability*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, 16 (2000) (noting that most BITs rely on organizations such as the ICSID, which is part of the World Bank, to settle disputes among investors); *see* Kishoiyian, *supra* note 74, at 338 (showing that the World Court has played a role in settling disputes between parties to BITs). *See generally* James W. Weller, Note, *International Parties, Breach of Contract, and the Recovery of Profits*, 15 HOFSTRA L. REV. 323, 334 (1987) (acknowledging that in settling disputes over expropriations of investments by host states, the United Nations often applied provisions of international law).

135. *See* The Overseas Private Investment Corporation Act, 22 U.S.C.S. § 2191 (2004) (establishing OPIC); *see also* Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA. J. INT'L L. 615, 670–71 (1994) (maintaining that the purpose of the OPIC is to promote social and economic growth in developing states without harming United States interests); Michael W. Gordon, *The Overseas Private Investment Corporation: Risk Management Principles*, 48 TUL. L. REV. 480, 487 (1974) (reiterating that the purpose of OPIC is to mobilize and facilitate the use of United States private capital and skills in the economic and social growth of less developed countries and areas).

136. *See* Overseas Private Investment Corp., *OPIC's Development Mission, at* http://www.opic.gov/Mission/DM/Intro_asp (last modified Aug. 20, 2004); *see also* Foreign Assistance Act of 1969, Pub. L. No. 91–175, 83 Stat. 805 (1969) (specifying in Title IV, Sec. 231 that OPIC shall mobilize and facilitate United States private capital and skills in the development of less developed countries but should only support investment projects that are sensitive to the special needs and requirements of their economies and contribute to their social and economic development); *see also* Robin, *supra* note 1, at 937 (mentioning that the purpose of OPIC is to increase participation by American enterprises in the economic development of less-developed countries).

137. *See* Overseas Private Investment Corp., *supra* note 136.

Each proposed investment is thus examined critically in terms of its developmental impact.[138] Since its emergence in 1971, OPIC has accomplished its developmental mission by supporting more than 3,100 projects throughout the developing world.[139] The agency has supported nearly $145 billion worth of investments that have helped developing countries generate over $11 billion in host-government revenues and create over 680,000 host-country jobs.[140]

Agencies such as OPIC exist worldwide.[141] In France, COFACE (Compagnie Française d'Assurance pour le Commerce Exterieur) was founded in June 1946 in order to facilitate for-

138. *See* A. Martin Erim et. al., *Financing Sources for Trade & Investment in Latin America*, 13 AM. U. INT'L L. REV 815, 831–32 (1998) (examining the factors OPIC considers before undertaking an investment project such as business and financial plans of the investment, detailed descriptions of the project and its owner, assessment of supply and distribution markets, statements detailing potential benefits the project will provide for the economic and social development of the host area); *see also* Daniel Lubetzky, *Incentives for Peace and Profits: Federal Legislation to Encourage U.S. Enterprises to Invest in Arab-Israeli Joint Ventures*, 15 MICH. J. INT'L L. 405, 428 (1994) (discussing the factors that OPIC considers when deciding to invest in potential projects including economics, technology, financial soundness of the investment, adequateness of cash flow, commercial viability, and marketing procedures); David Nelson & William Prince, *Developing an Environmental Model: Piecing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 247, 285 (1996) (illustrating the critical examination procedures that OPIC employs before undertaking an investment project, such as rejecting projects that do not satisfy minimal environmental standards set by the World Bank).

139. *See OPIC Proposes to Support Projects of Foreign-Associated U.S. Firms; OPIC President Describes Problem with Current Eligibility Rules*, FED. INFORMATION AND NEWS DISPATCH INC., State Department, June 10, 2003 (conveying the testimony of Peter Watson, President of OPIC, before the House of Representatives Committee on International Relations, in which he stated that OPIC had invested in 3,100 projects over the last 32 years); *see also* Overseas Private Investment Corp., *supra* note 136 (noting that in 32 years, OPIC has created 680,000 host-country jobs, supported $145 billion worth of investments, and generated over $11 billion in host-government revenues); Statement of the Honorable Peter Watson, President and Chief Executive Officer, Overseas Private Investment Corporation, Before the House of Representatives Committee on International Relations, *at* http://wwwc.house.gov/ international_relations/108/wat0610.htm (last visited Sept. 15, 2004) (testifying that OPIC has supported 3,100 projects, created over 668,000 host-country jobs, and produced $11 billion in host-country investments).

140. *See* Overseas Private Investment Corp., *supra* note 136; *see also* H.R. REP. NO. 108-339 (2003) (stating that OPIC is responsible for supporting $145 billion of investment overseas and creating close to 670,000 jobs in host countries); *OPIC Supports Lease Financing in Georgia; Provides Alternative to Bank Loans for Smaller Companies,* FED. INFORMATION AND NEWS DISPATCH INC., State Department, Aug. 9, 2004 (remarking that in its 32 years of existence, OPIC has supported over $150 billion of investments and helped to generate over 690,000 jobs in host countries).

141. *See* Been & Beauvais, *supra* note 11, at 111–12 (stating that most developed countries have agencies similar to OPIC); *see also* Overseas Private Inv. Corp., *Frequently Asked Questions*, *at* http://www.opic.gov/GeneralOPIC/faqs.htm (last visited Sept. 14, 2004) (stating that most developed countries have national agencies comparable to OPIC). *See generally* E. Waide Warner, Jr. et al., *Credit Agreements and Collateral Arrangements in International Infrastructure Projects*, 803 PRAC. L. INST. 359, 374–75 (2000) (discussing multilateral investment agreements and related governmental agencies).

eign investment and trade throughout the world.[142] Spain's parallel agency is ICEX (Instituto Español de Comercio Exterior), whose investment and business cooperation programs include financial support for foreign investment projects and aid with the development of projects in the host state through the granting of information and advice and the establishment of cooperation agreements with local partners.[143]

In addressing the challenges and risks faced by both parties entering into a BIT, these and other similar development agencies worldwide (such as U.K. Trade & Investment, Netherlands Foreign Investment Agency and Germany's KfW Bankengruppe) provide political risk insurance to help foreign investors manage risk, facilitate financing through direct loans and loan guaranties, and leverage private capital through agency-supported funds.[144] The alleged imbalance created by BITs in favoring the rights of foreign investors at the expense of the development of the host countries is also remedied through these institutions, as these development agencies work together with host country governments to help create economic climates that attract investment while ensuring that the host country's development goals are being met.[145]

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142. COFACE, *Coface: Credit Insurance, Credit Information, Debt Recovery, Credit Risks, Receivables Management*, *at* http://www.coface.com/ (last visited Sept. 14, 2004) (providing general and background information about COFACE); *see* Sidney Posel, *Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons*, 57 TUL. L. REV. 292, 326 n.124 (1982) (noting that COFACE offers credit insurance against "political risks" for foreign investors); *see also* COFAS, *Credit Insurance Products and Services for Companies*, *at* http://www.eastwest.be/east_west/coface.htm (last visited Sept. 14, 2004) (supplying historical information about COFACE).

143. ICEX, *Portal de la Administración Comercial Española*, *at* http://portal.icex.es/ (last visited Sept. 14, 2004) (providing general information about ICEX); *see Foreign Agricultural Service, Spain, at* http://www.fas.usda.gov/cmp/com-study/1996/spain.html (last visited Sept. 14, 2004) (discussing the relationship between ICEX and foreign investment with respect to agriculture); *see also* International Trade Data System, *Trade and Economic Profile for Spain*, at http://www.itds.treas.gov/SPAIN.html (last visited Sept. 14, 2004) (noting that ICEX assists Spanish businesses in the international market).

144. *See*, *e.g.*, KfW Bankengruppe, *Home page*, *at* http://www.kfw.de/EN/ (last visited Sept. 14, 2004) (providing general information about KfW Bankengruppe). *See generally* Chifor, *supra* note 123, at 228 (noting the existence of export development agencies and their capital-providing services). *See generally* Netherlands Foreign Investment Agency, *Netherlands Foreign Investment Agency (NIFA-Home)*, *at* http://www.nfia.com/ (last visited Sept. 14, 2004) (offering general information about NIFA).

145. *See* Guzman, *supra* note 7, at 672 (describing the effect of the imbalance between host and investor nations); *see also* Patrick Juillard, *MAI: A European View*, 31 CORNELL INT'L L.J. 477, 484 (1998) (indicating the imbalance between host nations and investor nations created by many bilateral investment treaties); Salacuse, *supra* note 18, at 655 (contemplating the existence of agencies which create foreign investment regulations supplemental to bilateral investment treaties).

VI. BITs and the WTO

Attempts to negotiate a multilateral trade agreement on investment at the WTO have so far failed to establish a binding agreement.[146] Many governments, especially poorer ones, have opposed a global agreement which would bind them to open up their economies by removing all regulations on foreign investment and have been wary of claims made about multilateral investment liberalization.[147] This opposition has been a major force that has led to the numerous bilateral investment agreements that exist throughout the world today.[148]

Yet expanding the liberalization agenda through bilateral agreements does not preclude the possibility of the creation of a WTO foreign investment mechanism in the future, and may even foster it.[149] Once countries are enmeshed in webs of bilateral investment agreements, the groundwork could be set for launching a more comprehensive multilateral agreement, as inter-

146. *See* Richard B. Bilder & Thomas J. Schoenbaum, *Legal Aspects of Foreign Direct Investment*, 96 AM. J. INT'L L. 764, 764 (2002) (book review) (suggesting that there is no multilateral investment agreement in existence at the WTO); *see also* Kennedy, *supra* note 33, at 77 (inferring the nonexistence of a multilateral investment agreement at the WTO). *See generally* Anyuan Yuan, *China's Entry into the WTO: Impact on China's Regulating Regime of Foreign Direct Investment*, 35 INT'L LAW. 195, 201 (2001) (pondering the likelihood of a multilateral investment agreement emerging at the WTO).

147. *See* Alice Slayton Clark et al., *International Trade*, 37 INT'L LAW. 399, 404 (2003) (showing the dichotomy of thought between established and developing nations with respect to multilateral investment agreements); *see also* S. K. Date-Bah, *Facilitating and Regulating Private Investment in a Developing Economy*, 22 PA. ST. INT'L L. REV. 3, 10–11 (2003) (elaborating on the differences of opinion between developed and emerging nations with respect to multilateral investment agreements); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 41 n.186 (2004) (explaining developing nations' opposition to multilateral investment agreements at the WTO).

148. *See* TIEASIA, *FACTSHEET THREE: Bilateral Investment Agreements*, *at* http://www.tieasia.org/ factsheetthree.htm (last visited Sept. 14, 2004) (illustrating reasons why resistance to multilateral investment agreements has led to proliferation of bilateral investment treaties among "poorer" nations); *see also* Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 788 (2002) (maintaining that resistance to multilateral investment agreements has in part motivated the proliferation of bilateral investment agreements). *See generally* Jonathan Carlson, *Answering Antiglobalist Angst*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 13, 19–20 (2002) (discussing general opposition to multilateral investment agreements).

149. *See* Dattu, *supra* note 24, at 315 (envisaging a WTO multilateral investment agreement emanating from the expanding modern network of bilateral investment treaties). *See generally* Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51, 75 (1998) (contemplating the harmonious coexistence of a WTO multilateral investment agreement and bilateral investment treaties); Symposium, *Capitalism in Transition: The Role of International Law*, 89 AM. SOC'Y INT'L L. PROC. 103, 117 (1995) (observing the possibility of consonance between a WTO multilateral investment agreement and a web of bilateral investment treaties).

ests between nations will increasingly conglomerate and an MAI-type of agreement at the WTO would be harder to resist.[150]

> Just as modern business markets rely on the integration of networks, we need a web of mutually reinforcing regional and bilateral trade agreements to meet diverse commercial, economic, developmental and political challenges . . . They also promote the broader U.S. trade agenda by serving as models, breaking new negotiating ground, and setting high standards . . .[151]

A. The Relationship Between Trade and Investment

Since 1997, WTO members have been engaged in analysis and debate about the relationship between international trade and investment, and its implications for economic growth and development.[152] Because the mandate came from the 1996 Singapore Ministerial Conference, investment is sometimes described as one of four "Singapore Issues."[153] "In today's economy, trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization."[154]

Thus, despite the failure to date to establish a comprehensive multilateral investment treaty at the WTO, it is important to note that a number of important aspects of investment

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150. Aziz Choudry, *Bilateral Investment And Trade Deals No Fairytale*, ZNet Commentary *at* http://www.zmag.org/sustainers/content/2003-06/21choudry.cfm, (last visited June 21, 2003) (suggesting that multilateral investment treaties are a natural consequence of the expanding modern network of bilateral investment treaties); *see also* Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148 n.33 (2002) (speculating that the current network of bilateral investment treaties will spawn a multilateral investment treaty at the WTO); J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 472 (1999) (explaining that the present web of bilateral investment agreements might result in multilateral investment initiatives at the OECD and WTO).

151. *See* Robert B. Zoellick, U.S. Trade Representative, *Overview and the 2003 Agenda*, March 2003, *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Trade_ Policy_Agenda/Section_Index.html.

152. *See* Date-Bah, *supra* note 147, at 10–11 (explaining how the 1996 Singapore Ministerial Conference led to the creation of the "Working Group" to study the relationship between international trade and investment, and its significance for economic growth). *See generally* Edward T. Hand, *Department of Justice Experience in Reconciling Antitrust and Trade*, 47 N.Y.L. SCH. L. REV. 131, 139–40 (2003) (discussing the "Working Group" and its directive to study and discuss international trade policies); Howard Mann, *International Investment Agreements: Building the New Colonialism?*, 97 AM. SOC'Y INT'L L. PROC. 247, 249 (2003) (pointing out the emergence of debate involving multinational investment agreements).

153. *See* World Trade Org., *Trade and Investment: From Bilaterals to a Multilateral Agreement?*, Cancun WTO Ministerial Conference 2003: Briefing Notes, *available at* http://www.wto.org/ english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm (last visited Sept. 14, 2004); *see also* Timothy C. Brightbill, *U.S.-EU Trade Relations: Sources of Friction and Prospects for Resolution*, 10 ILSA J. INT'L & COMP. L. 467, 472 (2004) (stating the four "Singapore" issues); Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 313 (detailing the four "Singapore" issues).

154. Speaking to an audience of government officials, businessmen and academics, Mr. Ruggiero emphasized how foreign direct investment facilitates an international division of labor to take advantage of international trade opportunities by increasing the mobility of factors of production. Press Release, World Trade Org., Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO Director-General (Feb. 13, 1996), *available at* http://www.wto.org/ english/news_e/pres96_e/pr042_e.htm.

policy are already the subject of WTO rules governing the treatment of foreign companies operating within a country's territory.[155] These include rules covering trade in services, the protection of intellectual property rights, and the agreement dealing with trade-related investment measures which includes a commitment by the WTO member governments to consider within the next four years the need for complementary provisions on investment policy.[156]

B. Investors' Access to WTO Law Through BITs

While the world trading system still restricts access to its dispute settlement body to cases brought by member nations, investor-state arbitration allows for investors to present their own claims, irrespective of the wishes of their home state.[157] The steady increase in the number of investment disputes arising under BITs is in large part a result of this newfound flexibility in dispute resolution.[158]

The relationship between WTO measures and BITs is significant, and the development of a global network of bilateral investment treaties may increasingly offer foreign investors an

155. *See* Victor Mosoti, Comment, *The WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge*, 15 PACE INT'L L. REV. 181, 188–188 (2003) (codifying investment regulations from the WTO into the Trade Related Investment Measures "TRIMs"); *see also* World Trade Org., Doha Ministerial Decision, WT/MIN(01)/ 17, para. 22 (Nov. 14, 2001) *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeinvestment (declaring a number of investment policies of the WTO that regulate foreign investment). *See generally* Scott S. Quillin, Note, *The World Trade Organization and its Protection of Foreign Direct Investment: The Efficacy* of the Agreement on Trade-Related Investment Measures, 28 OKLA. CITY U. L. REV. 875, 886 (2003) (discussing the creation of the TRIMs Agreement by WTO members to facilitate investment).

156. *See* Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT L. REV. 545, 564 (1996) (asserting that a provision of the WTO Agreement is to consider whether the Trade-Related Investment Measures should be complemented with provisions on investment policy in the future); *see also* Brewer, *supra* note 29, at 643 (stating whether the TRIMs agreement of the WTO should be complemented with provisions on investment policy).

157. *See* Been & Beauvais, *supra* note 11, at 44–45 (showing that a claim initiated by an investor under the investor-state dispute resolution mechanism does not require acquiescence by the investor's home state); *see also* Wiltse, *supra* note 73, at 1152–1153 (asserting that BITs provide direct investor-state arbitration for investors regardless of the requests of their home state). *See generally* Steve Charnovitz, *Economic and Social Actors in the World Trade Organization*, 7 ILSA J. INT'L & COMP. L. 259, 260–61 (2001) (recognizing that investors do not have any direct rights within the WTO).

158. Luke Eric Peterson, *Emerging Bilateral Investment Treaty Arbitration and Sustainable Development*, International Institute for Sustainable Development (IISD) (August 2003); *see also* Mengsteab Negash, *Investment Laws in Eritrea*, 24 N.C. J. INT'L L. & COM. REG. 313, 374 n.491 (1999) (asserting that clauses for dispute resolution are becoming commonplace in BITs). *See generally* María Beatriz Burghetto, *Notes on Arbitration in Argentina*, L. & BUS. REV. AM. 471, 491–92 (2003) (showing that parties are including provisions for arbitration in BITs because of the increasing number of international disputes).

opportunity to directly challenge breaches of WTO law.[159] In certain circumstances, measures affecting intra-firm trade, the investments of foreign service suppliers, or the rights of intellectual property rights holders may constitute breaches of a host state's obligations under both WTO law and the applicable BIT.[160] The investor may thus utilize the BIT to seek relief in the form of cessation of the WTO-inconsistent measure and when the measure can be shown to have caused the investor injury, damages.[161] When a foreign investor initiates investor-state arbitration under the applicable BIT to seek withdrawal of and/or damages for such measures, WTO law may arguably come into play in two distinct manners. First, WTO law may be applicable to the investment dispute.[162] Second, WTO law may in any event provide important interpretative context for the regulatory treatment obligations of the BIT.[163] Thus, despite the precept that private entities cannot directly invoke WTO law in the state courts of WTO members and claim monetary damages for breaches of WTO law, they may do so in BIT arbitrations.[164]

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159. *See* Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 84–85 (2000) (noting that BITs provide investors with direct access to investment dispute resolution practices to challenge international measures that are restricted to government claims under the WTO); *see also* Price, *supra* note 69, at 427 (showing that BITs provided investor-state dispute resolution for investors to directly challenge WTO law). *See generally* James McIlroy, *Private Investment Against State and Provinces—The Impact of NAFTA Chapter 11 on Sub-Federal Government Agencies*, 27 CAN.-U.S. L.J. 323, 324–325 (2001) (demonstrating that in the past, foreign investors did not have an opportunity to directly challenge breaches of international law).

160. *See* Avramovich, *supra* note 9, at 1238 (showing that international law is independent of BITs and both may be applicable in the event of a violation); *see also* Haque & Burdescu, *supra* note 114, at 251–52 (asserting that a violation of a guarantee under a treaty is a breach of the treaty in addition to a breach of international law). *See generally* Stefan Matiation, *Arbitration With Two Twists:* Loewen v. United States *and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT'L ECON. L. 451, 474 (2003) (stressing that agreements such as the WTO and BITs must both be taken into account).

161. *See generally* Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 322 (2002) (providing remedies under BITs when states cause damages); *see generally* Haque & Burdescu, *supra* note 114, at 250 (showing the applicable measures that the WTO and BITs encompass for an investor to seek relief).

162. *See* Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 493 (2003) (stating that WTO law may be applicable to the investment dispute); *see also* Junji Nakagawa & Thomas J. Schoenbaum, *Introduction, The Course of Japanese-American Economic Relations*, 16 ARIZ. J. INT'L & COMP. L. 1, 6 (1999) (asserting when WTO law may apply in dispute settlement mechanisms). *See generally* FOLSOM, *supra* note 43, § 27.3 (showing that the WTO provides a rough set of international rules).

163. *See* Verhoosel, *supra* note 162, at 493 (asserting that WTO provides an interpretive context for obligations under BITs); *see also* Surya Deva, *Human Rights Violations By Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT'L L. 1, 28 (2003) (showing that the WTO's dispute settlement system clarifies rules of public international law). *See generally* George Kleinfeld & Deborah Wengel, *Foreign Investment*, 31 INT'L LAW. 403, 410–11 (1996) (demonstrating that WTO uses good faith in interpreting agreements).

164. *See* Verhoosel, *supra* note 162, at 493; *see also* MARANS ET AL., *supra* note 2, at § 1.14 (showing that the WTO dispute resolution does not provide for a private right of action). *See generally* Elizabeth C. Seastrum, *Chevron Deference and the Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?*, 13 FED. CIRCUIT B.J. 229, 233 (2003) (stating private parties cannot directly participate in WTO litigation).

While members argue over the viability of the WTO investment negotiations, investors are becoming aware of the attractive status quo under the global investment regime: the attractiveness of bilateral investment treaties is that they offer investors access to an investor-state dispute settlement mechanism and allow them to take their disputes directly to international arbitration.[165] Investors may launch disputes on their own, without needing to ensure the approval of their home states, as would be required under WTO rules.[166] Investors are thus waking up to the existence and utility of these long-overlooked treaties.[167]

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165. *See* Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 430 (2004) (stating private actors have been given a right to bring disputes against a state through direct arbitration); *see also* Wiltse, *supra* note 73, at 1148 (establishing BITs provide for direct investor-state arbitration for investment disputes). *See generally* Gerhard Erasmus, *Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments*, 32 INT'L J. LEGAL INFO. 243, 256 (2004) (discussing the protection mechanisms given to foreign investors).

166. *See* Luke Eric Peterson, *International Investment Rules: Is the GATS Campaign Becoming a Red Herring?*, BRIDGES (Int'l Ctr. for Trade and Sustainable Dev., Geneva, Switz.), March/April 2002, at 17–18 (asserting that investors may launch disputes of their own, without the approval of their home states); *see also* Wiltse, *supra* note 73, at 1152–53 (revealing that BITs provide for direct investor-state arbitration without the approval of the investor's home state). *See generally* Maurits Lugard, *Implementation, Compliance and Effectiveness Toward an Effective International Investment Regime*, 91 AM. SOC'Y INT'L L. PROC. 485, 493 (1997) (indicating that there is not a WTO rule where an investor can assert the dispute resolute mechanism itself).

167. *See* Peterson, *supra* note 166, at 17–18 (admitting that investors are recognizing the utility of these long-overlooked treaties). *See generally* Reading, *supra* note 75, at 682–83 (expressing the flexibility that bilateral agreements provide for both parties in international disputes). The first attempt to establish a multilateral agreement on foreign investment was made immediately following World War II. In 1948, the draft Charter to establish an International Trade Organization (ITO) was presented at a meeting in Havana. The proposal was given up due to the refusal of the U.S. Congress to ratify it, despite the fact that the U.S. government had been one of the driving forces behind the Havana Charter. Consequently, the General Agreement on Tariffs and Trade (GATT) was launched as a temporary measure. Since its inception, the GATT maintained a dividing line between trade and investment issues, and it was only at the Uruguay Round of GATT negotiations from 1986 to 1994 that the investment issue was brought within its framework. The failure to establish the ITO was one of the major factors that led to a shift from multilateral to bilateral investment agreements, making BITs the dominant investment instruments in the 1950s and 60s. In the '60s and '70s, the U.S. also remained committed to establishing a comprehensive agreement on investment at the GATT. The developed countries were finally successful in bringing investment issues under the ambit of the GATT and in the Final Act of the Uruguay Round, TRIMs and a General Agreement on Trade in Services (GATS) were incorporated.

In the 1990s, the developed countries, led by the U.S., launched negotiations for a treaty known as the Multilateral Agreement on Investment (MIA) at the Organization for Economic Co-operation and Development (OECD), which included investment liberalization, protection of investors and a dispute resolution mechanism. Differences among the OECD member states on certain issues, along with opposition by NGOs and trade unions, led to the failure of this initiative. As a result of the collapse of these negotiations, the Working Group on Trade and Investment at the WTO remains the only multilateral forum where investment issues are under discussion at present.

C. Prospects for a Comprehensive Investment Treaty at the WTO

Given that the mandate of the WTO is confined to trade in goods and services, it is debatable whether the WTO is an appropriate venue for negotiating a multilateral investment agreement (MIA).[168] This is perhaps one of the reasons why the creation of a comprehensive MIA carries little support among WTO member-countries.[169] Out of 146 WTO member nations, more than 60 belonging to the developing world have articulated their opposition to launch negotiations at Cancun, while not even a dozen member states have supported the notion of a comprehensive MIA.[170]

On September 10–14, 2003, the ministers from all 146 members of the WTO came together in Cancun, Mexico.[171] "The WTO 5th Ministerial Conference in Cancun ended without conclusion on September 14, when Conference Chairman and Mexican Foreign Minister Luis Ernesto Derbez determined that it would not be possible to reach consensus across the agenda and closed the meeting . . . The timing of the next Ministerial Conference was not confirmed."[172]

The disagreement that prevailed at Cancun stemmed in large part from significant gaps in the dedication of the different members toward establishing a Multilateral Investment Agree-

168. *See* Date-Bah, *supra* note 147, at 10 (asserting that the WTO could be used as a forum for negotiating a multilateral investment agreement but many countries have voiced their disapproval); *see also* Daniil E. Fedorchuk, *Acceding to the WTO: Advantages for Foreign Investors in the Ukrainian Market*, 15 N.Y. INT'L L. REV. 1, 39 (2002) (demonstrating that the WTO received strong opposition in relation to multilateral investment agreements). *See generally* Burt, *supra* note 112, at 1055–56 (commenting on the arguments for and against using the WTO as a forum to negotiate multilateral investment agreements).

169. *See* Burt, *supra* note 112, at 1016–17 (stating that developing nations in the WTO have resisted efforts to create a Multilateral Investment Agreement); *see also* Brian T. Larson, Comment, *Meaningful Technical Assistance in the WTO*, 2003 WIS. L. REV. 1163, 1169 (2003) (indicating that more than half of the member countries refused to back a proposed Multilateral Investment Agreement at the Cancun conference); *Cancun's Bitter Harvest*, L.A. TIMES, Sept. 18, 2003 at B14 (noting that most member countries did not want to discuss a Multilateral Investment Agreement at the Ministerial Meeting in Cancun).

170. Kavaljit Singh, *Investment Agreement in the WTO: Opening Pandora's Box?*, *available at* http://www.globalpolicy.org/globaliz/econ/2003/0728wtomia.htm (July 25, 2003); *see also* Porterfield, *supra* note 147, at 41 n.186 (indicating that developing countries opposed including a Multilateral Investment Agreement in the WTO); James Reynolds, *Developing the Solutions to Real Problems for Poorer Countries*, THE SCOTSMAN, Sept. 8, 2003 at 4 (reporting that 66 developing country members oppose negotiations on investment).

171. *See, e.g.*, Bonnie D. Jenkins et al., *International Institutions*, 37 INT'L LAW. 609, 619 (2003) (noting the agreed upon dates of the conference); Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, 27 B.C. INT'L & COMP. L. REV. 371, 376 (2004) (indicating the starting date for the conference). *See generally* Frances Williams, *Draft Guidelines for Doha Trade Talks Issued*, FIN. TIMES (LONDON), Aug. 25, 2003, at 5 (discussing the preparations needed to start the conference by the appointed dates).

172. World Trade Org., *Fifth WTO Ministerial Conference Cancun, Mexico (September 10–14, 2003)*, DEP'T OF FOREIGN AFF. AND INT'L TRADE, CANADA (2004), *available at* http://www.dfait-maeci.gc.ca/tna-nac/WTO-MCD-en.asp; *see also* Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 324 (2004) (indicating that the meeting broke up due in large part to a lack off consensus on various issues); Clifford A. Jones, *The Growth of Private Rights Action Outside the U.S.: Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 417 (2004) (stating that the meeting concluded without agreement and that the future of negotiations is not clear).

ment.[173] Differences over the development of new rules on the "Singapore Issues" (investment, competition, trade facilitation, transparency in government procurement) could not be overcome, and the Conference did not lend itself to consensus-building.[174]

Many developing countries argue that the existing bilateral investment treaties already provide adequate legal protection to investors.[175] They question whether a WTO agreement would indeed increase investment flows, and they express concern that a multilateral agreement would add obligations to developing countries while limiting their ability to align investment inflows with national development objectives.

A surprising factor is that unlike in the past, the U.S. is no longer strongly pushing for further investment negotiations at the WTO.[176] Perhaps the U.S. administration has taken note of the inherent difficulties to be encountered in successfully establishing a comprehensive investment liberalization agreement in a multilateral forum. The problems encountered in negotiations at the WTO have prompted the U.S. to rethink its strategy on establishing a multilateral investment agreement. In addition, there are concerns regarding the possibility that a new multilateral investment agreement could entail a new set of rules and responsibilities for corporations that may present additional barriers to investment. These factors have geared the focus of the U.S. toward bilateral and regional agreements which are much easier to negotiate.

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173. *See* Fiona MacMillan, *If Not This WTO, Then What?*, INT'L TRADE L. & REG., 10(3), 41–49, 42 (2004) (commenting on the differences between the stances of developing and developed countries toward establishing a multilateral investment agreement); *see also* Elizabeth Becker, *Poorer Countries Pull Out of Talks Over World Trade*, N.Y. TIMES, Sept. 15, 2003, at A1 (distinguishing the opposing viewpoints of rich and poor nations on the proposed new trade rules on investment); Guy De Jonquieres & Frances Williams, *WTO Begins Final Drive in Framework for Trade Talks*, IRISH TIMES, Aug. 26, 2003, at 18 (describing the controversy among WTO member countries regarding the proposed rules on investment).

174. World Trade Org., *supra* note 172; *see also* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 124 (2003) (asserting that rejection of the "Singapore issues" by the developing countries was the main cause for the collapse of the Ministerial Meeting at Cancun in September 2003); Supachi Panitchpakdi, *The Real Losers Are the Poor; After Cancun*, INT'L HERALD TRIB., Sept. 18, 2003, at 6 (declaring that the ministers could not reach consensus on whether to launch negotiations on the "Singapore issues").

175. World Trade Org., *Trade and Investment: Negotiate or Continue to Study*, DOHA WTO MINISTERIAL 2001: BRIEFING NOTES, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief12_e.htm; *see also* Salzman, *supra* note 74, at 809–10 (suggesting that developing countries prefer to use bilateral investment treaties because they offer the same protections without many of the drawbacks of a multilateral agreement). *See generally* David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 TULSA J. COMP. & INT'L L. 195, 212 (1999) (explaining that a multilateral agreement on investment will have similar protection provisions to current bilateral investment treaties).

176. Kavaljit Singh, *When Elephants Dance: MIA Negotiations in the WTO*, HEINRICH BOLL FOUNDATION NORTH AMERICA (2003) *available at* http://www.boell.org/docs/Cancun_Singh.pdf; *see also* Kurtz, *supra* note 148, at 774 (acknowledging that, diverging from its prior behavior, the United States was less demanding about the commencement of investment negotiations in the WTO). *Compare* David A. Gantz, *Failed Efforts to Initiate the "Millenium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. LAW 349, 365 (2000) (noting the current United States opposition to a Multilateral Investment Agreement), *with* Canner, *supra* note 126, at 663 (suggesting that in earlier WTO discussions, the United States sought to establish broad, comprehensive rules for investment).

An element supporting the claim for the WTO being the appropriate forum for concluding a multilateral investment agreement is the diverse and broad WTO membership that includes developed, developing, and emerging economies.[177] On the other hand, there are a number of factors that question the establishment of such an instrument at the WTO.[178] First, it is clear that foreign direct investment flow is steadily increasing, even in the absence of a global MIA.[179] Given the continued success of the existing mechanisms for foreign direct investment, significantly altering the current system could present a series of risks.[180] Second, a WTO agreement on investment presents a genuine threat to the national sovereignty of developing countries; the development concerns of developing countries and their capacity (or incapacity) to absorb yet another WTO agreement are serious issues.[181] Third, reaching consensus for any WTO agreement on investment would undoubtedly require that serious exceptions or

177. *See* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Restraints,* 98 AM. J. INT'L L. 247, 274 (2004) (noting that developing countries outnumber the more powerful trading nations); *see also* Symposium, *Foreign Direct Investment and Competition Policy at the World Trade Organization,* 33 GEO. WASH. INT'L L. REV. 585, 611 (2001) (stating that the broad and diverse WTO membership makes it a proper forum for multilateral framework agreements). *See generally Half a Crisis Afflicts World Trade: The WTO is in a Mess, but the World Still Goes on Trading,* FIN. TIMES (London), Jan. 2, 2004, at 14 (citing the growing number of poor nation members and their conflicting interests as a reason for the downfall of the WTO).

178. *See* Symposium, *The Boundaries of the WTO: Triangulating the World Trade Organization,* 96 AM. J. INT'L L. 28, 28–29 (2002) (mentioning 2001 worldwide coalition letter opposing introduction of investment issues into the WTO due to potential for negative social, environmental and human rights effects); *see also* Vandevelde, *supra* note 10, at 640 (noting the need to balance the WTO's interest in neutrality and security against accommodating compromises); Kevin Sullivan, *Poor-Rich Rift Triggers Collapse of Trade Talks,* WASH. POST, Sept. 15, 2003, at A1 (citing major disagreements between rich and poor nations as a reason for the failure to establish a global trade agreement in Cancun).

179. *See* Rebecca Trent, Comment, *Implications for Foreign Direct Investment in Sub-Saharan Africa Under the African Growth Opportunity Act*, 23 NW. J. INT'L L. & BUS. 213, 220 (2002) (relating to the United Nations Conference on Trade and Development's finding of rapid growth in Foreign Direct Investment (FDI) over the past decade); *see also* Jung Ho-bin, *Development or Conservation?,* KOREA HERALD, Mar. 6, 2002 (noting that Korea's actual realized investments have not increased at the same rate as has FDI overall); *see also* Frances Williams, *World Trade: Flow of funds lifted by Merger & Acquisition,* FIN. TIMES (London), Feb. 9, 2000, at 12 (finding a twenty-five percent increase in worldwide FDI flows in 2000 and additional increases in 1999 and 1998 over previous years).

180. *See* Kennedy, *supra* note 33, at 85 (questioning the usefulness of a global multilateral agreement in the face of the vast network of bilateral/regional agreements that already exist). *But see* Edward M. Graham, *National Treatment of Foreign Investment: Exceptions and Conditions,* 31 CORNELL INT'L L.J. 599, 602 (1998) (opposing the concerns of non-governmental organizations and suggesting that their fears could be addressed through negotiations); Haque & Burdescu, *supra* note 114, at 255 (arguing that the current BIT system is inadequate to meet the needs of developing countries because of its preference for investor security).

181. *See* Elizabeth Becker & Ginger Thompson, *Proposal at W.T.O. Meeting Rejects Changes in Subsidies,* N.Y. TIMES, Sept. 14, 2003, § 1, at 14 (noting opposition by developing countries to the inclusion of investment issues at the WTO for fear of undermining their labor, human rights and environmental laws). *See generally* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 785 (noting the WTO's exemplification of the growing tension between internationalism and national sovereignty). *See generally* Burt, *supra* note 112, at 1056 (stating that developing countries may not be equipped for the Multilateral Agreement on Investment's (MAI) restrictions on sovereignty).

reservations be made, hollowing out its effectiveness considerably.[182] And last, it is far from clear that the current network of bilateral and regional investment agreements provides an unstable and unpredictable legal environment for foreign direct investment, as bilateral investment agreements offer a level of flexibility that is unattainable under a multilateral framework.[183] These are merely some of the potential obstacles to the establishment of a multilateral investment treaty at the WTO.

The creation of a comprehensive MIA and the continued existence of the numerous BITs already in place are not mutually exclusive.[184] Despite the establishment of a multilateral trade regime under the WTO, the U.S. and the EU have signed several bilateral and regional trade agreements in recent years.[185] Apart from NAFTA, the U.S. has participated in the Asia Pacific Economic Cooperation (APEC) Forum, a free trade initiative encompassing 21 economies including the U.S., Japan, and China, and has trade initiatives in the Caribbean Basin and in Israel.[186] The European Union has fully liberalized internal agricultural trade and adopted a

182. *Compare* Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions,* 19 BERKELEY J. INT'L L. 44, 77 (2001) (finding that the unchecked use of exceptions in WTO agreements would lead to an upset in the balancing of interests between nations), *with* David Weissbrodt & Muria Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* 97 AM. J. INT'L L. 901, 918–19 (2003) (citing numerous examples of how exceptions in WTO agreements have worked to allow states to restrict trade in protecting human rights and environmental interests), *and* Kenneth W. Abbott, *Halfhearted; Attempt to Balance Competing Needs Fails,* CHI. TRIB., Sept. 28, 2003, at C1 (noting that exceptions in WTO agreements generally are for benefits to developing countries and allow for trade restrictions subject to their laws).

183. *But see* Kelley, *supra* note 111, at 490 (questioning the effectiveness of BITs in creating a safe and useful global investment market due to their lack of uniformity or consensus). *See generally* Shenkin, *supra* note 93, at 549, 569 (arguing for an MAI because while BITs provide exceptional protection and predictability for investors, they are not widespread enough to protect all foreign investment).

184. *But see The Sinking of the MAI,* THE ECONOMIST, Mar. 14, 1998, at 81 (reporting that the goal of the MAI was to replace the patchwork of BITs currently in existence). *See generally* Stumberg, *supra* note 84, at 507 (arguing that BITs and the MAI are not equivalent, because the draft MAI contains much stronger investment protections); Stephen J. Wood & Brett G. Scharffs, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV Applicability of Human Rights Standards to Private Corporations: An American Perspective,* 50 AM. J. COMP. L. 531, 554 (2002) (stating that the United States itself is party to a multitude of investment treaties, both bilateral and multilateral).

185. *See* Gantz, *supra* note 118, at 691 (stating that the U.S. completed a new draft of the Model BIT in February 2004 for use in future BITs); *see also* Daniel Griswold, *Bilateral Deals are No Threat to Global Trade,* FIN. TIMES (London), Jul. 28, 2003 (commenting on the basis of the United States' continued support for an MAI despite recent agreements with Israel, Canada and Mexico). *See generally* Jarreau, *supra* note 7, at 430 (discussing the presently in-effect 2000 BIT between the United States and Honduras as a model for U.S. BITs).

186. *See* Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War,* 19 AM. U. INT'L L. REV. 587, 623 (2004) (stating that the current U.S. approach toward the Middle East is to make trade agreements with peaceful nations, then consolidate them into free trade regions); Narendra Aggarwal, *APEC Business Card Provides Fuss-Free Travel; Singapore Joins 15 Other Places in Scheme Giving Businessmen Special Immigration and Visa Clearance to Ease Movement*, THE STRAITS TIMES (Singapore), June 17, 2004 (noting that APEC consists of 21 members including the U.S., Canada, Mexico and Russia). *See generally* Colin Espiner Bangkok, *No Olive Branch on Ships English Wants to Invite U.S. Warship Apec Leaders to Clash over Security,* THE PRESS (Christchurch, New Zealand), Oct. 21, 2003, at 1 (stating Asian nations' concerns that the U.S. may attempt to force counter-terrorism as a central theme at APEC summits).

Common Agricultural Policy (CAP).[187] Talks of a trade agreement between the EU and MERCOSUR are underway.[188] The compatibility between these different types of trade agreements demonstrates that bilateral and multilateral investment treaties could be equally compatible.[189] The prospect of developing an investment agreement at the WTO leaves open the question of how this agreement would coexist with the over 2000 bilateral and regional investment treaties that are already in place. The Working Group on Trade and Investment at the WTO has yet to contemplate this important aspect.[190]

VII. BITs and International Arbitration

A key innovation in many BITs has been the inclusion of provisions for investor-state dispute settlement.[191] In recent years, the number of investor-state disputes has risen sharply, as

187. *See* Alexander J. Black, *Winnowing the Chaff: Canadian Grain Trade and International Law*, 13 AM. U. INT'L L. REV. 1, 53–54 (1997) (noting that the EU seeks to consolidate member countries' agricultural markets with the CAP since two-thirds of the EU's budget consists of agriculture); *see also* Ernesto M. Hizon, *Virtual Reality and Reality: The East Asian NICs and the Global Trading System,* 5 ANN. SURV. INT'L & COMP. L. 81, 117 (1999) (stating that the EU has responded to unfair trade practices with policies such as the CAP). *But cf.* George E.C. York, Note, *Global Foods, Local Tastes and Biotechnology: The New Legal Architecture of International Agriculture Trade,* 7 COLUM. J. EUR. L. 423, 446 (2001) (commenting that the CAP has been a problem in transatlantic trade).

188. *See* Raymond Colitt, *Deadline at Risk as Mercosur and EU Trade Talks Stall*, FIN. TIMES (London), Aug. 13, 2004, at 10 (discussing the dangers to free trade between Europe and South America as the recent round of trade talks broke off); *see also Europe, Mercosur Resume Trade Talks*, J. COM. ONLINE, Sept. 13, 2004, at WP (reporting the decision between the EU and Mercosur to resume talks on September 12 in hopes of trading agricultural goods and investment banking access). *See generally* Rafael A. Porrata-Doria, Jr., *Mercosur: The Common Market of the Twenty-First Century?*, 32 GA. J. INT'L & COMP. L. 1, 52 (2004) (noting that the goals of the talks between the EU and Mercosur are the complete destruction of trade barriers between the regions and the strengthening of political discussions among them).

189. *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle,* 17 ARIZ. J. INT'L & COMP. LAW 257, 265 (2000) (stating that the current system of bilateral and regional trade agreements should be compatible with each other and with the possible WTO agreement to come); *see also* Cherifa Chaour, *Reconstructing Regional Relationships, or the New Bases for Rebuilding Spheres of Influence,* DIOGENES, Jun. 22, 2002, at 47 (stating the WTO's policy that bilateral or regional agreements should be compatible with, and not adverse to, the multilateral scheme for liberalisation); William Dullforce, *GATT Sees Chile as Third World Superstar,* FIN. TIMES (London), July 9, 1991, at 4 (reporting on Chile's intention at the time to strengthen its bilateral treaties while seeking to take part in multilateral agreements since it views the two as compatible).

190. *See* Singh, *supra* note 170; Salzman, *supra* note 74, at 811 (stating that the breakdown in WTO MAI negotiations in 1996 led to the formation of new working groups on trade and investment to study the necessary compromises in forming an MAI). *See generally* Symposium, *Third Annual Latin American Competition and Trade Round Table: After Seattle: Is There a Future for Trade and Competition Policy Rule-Making?,* 26 BROOKLYN J. INT'L L. 307, 314–15 (2000) (listing the issues discussed by the Working Group on Trade and Investment at the WTO since its inception; the possible effect of a comprehensive MAI is not among them).

191. *See* Ginger Lew & Jean Heilman Grier, *A Role for Governments in the Resolution of International Private Commercial Disputes*, 18 FORDHAM INT'L L.J. 1720, 1720 (1995) (noting that investor-state dispute settlement mechanisms ensure that investors can bring claims against other governments); *see also* Daniel Price, *NAFTA Chapter 11—Investor-State Dispute Settlement: Frankenstein or Safety?*, 26 CAN.-U.S. L.J. 107, 107 (2001) (commenting that over 1,500 bilateral treaties include investor-state dispute settlement nearly identical to the one found in NAFTA Chapter 11); Wiltse, *supra* note 73, at 1159 (discussing the conditions needed to make a claim based on NAFTA Chapter 11).

investors are recognizing that a wide variety of host state measures may be subjected to arbitral scrutiny.[192] Investors are also increasingly using BITs to challenge host state treatment of investments throughout the developing world.[193] Emerging cases include disputes over the regulation of water and sewage concessions,[194] tax treatment of investors in the natural resources sector,[195] and challenges to environmental regulation.[196] Investor-state arbitration differs fundamentally from traditional international commercial arbitration in that its basis lies in treaties between states (either multilateral or bilateral), rather than in private agreements.[197]

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192. For a discussion of whether this type of dispute settlement mechanism has shown itself to balance sufficiently the interests of investors with those of host states, see Margrete Stevens, *Arbitration and Investment Disputes—Are We Heading in the Right Direction?* ICSID NEWS, Spring 2002, at 4, *available at* http://www.worldbank.org/icsid/news/n-19-1-4.htm (discussing whether dispute settlement mechanisms have balanced sufficiently the interests of investors with those of host states); *see also* Brower & Sharpe, *supra* note 106, at 647 (indicating that Islamic nations have recognized the value of international arbitration and have included it in roughly 2,000 bilateral investment treaties); *Businesses Look to Arbitrate to Resolve Differences*, FIN. TIMES, Jun. 23, 2004, at 8 (proclaiming that cases involving bilateral investment treaties ration clauses have doubled in the past three years).

193. *See* Newman & Zaslowsky, *supra* note 58, at 3 (informing that a BIT gives an investor the right to arbitrate even if it has not specifically been agreed to by the parties); *see also* Moser, *supra* note 66, at 8 (expressing that recourse against the Chinese government can be sought through its multitude of bilateral investment treaties); *Telekom Files Summons Against Ghana Unit*, BUS. TIMES (Malaysia), Dec. 29, 2003, at 5 (announcing that Telekom had filed an arbitration proceeding based on a bilateral investment treaty).

194. *See* Mary Friel, *Political Risk Insurance—Another Test*, MONDAQ BUS. BRIEFING, Dec. 1, 2003, *available at* 2003 WL 57496465 (discussing Argentina's attempt to breach its obligations under its bilateral investment agreements regarding its water supply); *see also Opinion Debate Over Investor Rights Is Too Late*, TORONTO STAR, Apr. 22, 2001, at 1 (reporting that waste management is expected to be a hot arbitration topic in the upcoming year). *See generally Minority Shareholders Consider Leaving Aguas Argentinas*, SPANISH NEWS DIG., Feb. 23, 2004, *available at* 2004 WL 60760531 (showing the fall-out of companies faced with binding international arbitration).

195. *See* Alvarez & Park, *supra* note 73, at 391 (asserting that a lack of fiscal symmetry creates an economic double taxation that distorts cross-border capital flows); *see also* Aldo Forgione, *Weaving the Continental Web: Exploring Free Trade, Taxation, and the Internet*, 9 SMU L. & BUS. REV. AM. 513, 516 (2003) (outlining that a "lack of congruous income tax treatment of multinational business transactions challenges the efficacy of a continental free trade pact"). *See generally* Michiel Muizelaar, Comment, *Adding Smoke to the Fire:* Ministry of Finance Tax Office V. Philip Morris GMBH *and the Expanding Concept of Permanent Establishment*, 18 EMORY INT'L L. REV. 211, 259 (2004) (detailing that "a nation's capacity, culture, economics, politics, and history" are essential to a country's tax treatment of income).

196. *See* Luke Eric Peterson, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development Publications Center, *available at* http://www.iisd.org/publications/publication.asp?pno=577 (examining the relevancy of human rights issues upon investment treaty arbitration); *see also* David A. Gantz, *Global Trade Issues in the New Millennium: Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 659 (2001) (presenting four examples of suits based directly on a conflict between environmental regulation and foreign investment); Capdevila, *supra* note 8 (expressing examples of bilateral investment treaties being enforced against Mexico based on environmental disputes).

197. *See* B. M. Cremades & D.J.A. Cairns, *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes*, (forthcoming 2004) (comparing the underlying differences between investor-state arbitration and other more traditional forms of arbitration); *see also* Garcia, *supra* note 22, at 312 (declaring that the usual local methods of judicial review are non-existent in investor-state arbitration); Saunders, *supra* note 41, at 1 (asserting that international laws and principles are more difficult to define than private laws).

There is significant scope for foreign investors to challenge measures imposed by host states.[198] However, the arbitration process will often permit host states which face such disputes to resort to their other international legal obligations, notably international human rights treaties, in an effort to defend against investor claims.[199] Investment treaty arbitrators will often maintain the legal ability to take these human rights obligations of host states into account as they interpret the host state's obligations to foreign investors.[200] For example, in the water services sector, host states may have the ability to justify certain non-discriminatory treatment of foreign investors by pointing to the host state's obligations to ensure that its citizens enjoy an internationally recognized right to water.[201]

As BITs increase in number, so too do the number and variety of disputes arising under them.[202] A Spanish corporation, Technicas Medioambientales Tecmed S.A., filed for arbitration under a BIT in an effort to sue the Mexican government over its environmental regula-

198. *See* Been & Beauvais, *supra* note 11, at 30 (speculating that the *Metalclad* case has made it unclear to the extent that investors can now challenge and potentially stifle environmental and land use regulation); *see also* Alvarez & Park, *supra* note 73, at 391 (recognizing that investors can now expand the range of suits that they can bring in the host country); *The World Bank: Alleviating Poverty and Promoting Economic Growth with Social Equity*, METRO. CORP. COUNS., Apr. 2004, at 1 (discussing the increased use of arbitration as investors have challenged host nations).

199. *See* Sol Picciotto, *Rights, Responsibilities, and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 136 (2003) (expressing that bilateral investment treaties provide basic guarantees but still allow host states to control certain aspects of the agreements); *see also* Jenik Radon, *Balance of Power: Redefining Sovereignty in Contemporary International Law*, 40 STAN. J. INT'L L. 195, 208 (2004) (noting that the sovereignty of states can become compromised by international dealings in regard to human rights). *See generally* Chantell Taylor, Comment, *NAFTA, GATT and the Current Free Trade System: A Dangerous Double Standard for Worker's Rights*, 28 DENV. J. INT'L & POL'Y 401, 401 (2000) (informing about the dire consequences of unregulated power given to investors in areas such as the environment, human rights, and workers' rights).

200. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 691 (2003) (clarifying that bilateral international trade agreements do contain language that protects the host country from the tyranny of the investor); *see also* Brower, *supra* note 8, at 1559 (revealing that courts have been willing to accept amicus curiae briefs from groups seeking to protect the public's interests); Weiler, *supra* note 165, at 429 (claiming that transnational investors should have a responsibility to safeguard international human rights).

201. *See* Sun Belt. Inc. v. Canada, Notice of a Claim for Arbitration (Oct. 12, 1999) *available at* http://www.international-economic-law.org/Sunbelt/sun_02.pdf (presenting an arbitration request based on a claim to ensure the public has potable water); *see also* Gonzalo Biggs, *Breakthrough for International Commercial Arbitration in Chile*, 59 APR DISP. RESOL. J. 65, 65 (2004) (acknowledging that water rights are subject to mandatory arbitration). *See generally The Right to Water*, U.N. Committee on Economic and Cultural Rights, 29th Sess., General Comment 15, U.N. Doc. E/C.12/2002/11 (2002) (presenting the legal stance for the right to water).

202. *See* Peterson, *supra* note 127, (discussing the need for multilateral rules in relation to bilateral investment treaties); *see also* Cremades, *supra* note 5, at 78 (warning that the significant amount of lawsuits may lead governments to withdraw from previously recognized autonomous arbitration processes). *See generally* Gilbert M. Bankobeza, *International Legal Developments in Review: 2000 Public International Law*, 35 INT'L LAW 659, 659 (2001) (warning of the scope of international environmental law issues that must be monitored throughout the developing world).

tions.[203] The arbitration was brought under the ICSID Rules and is being heard by a panel of three arbitrators.[204] A subsidiary of the French Vivendi Corporation has been involved in a long-running bilateral investment treaty dispute with the Argentine government over a controversial water privatization scheme.[205] The Hungarian government has been sued at arbitration by an American multinational firm, under the terms of the Energy Charter Treaty´s investment provisions.[206] The dispute centers upon recent privatizations in the Hungarian energy sector.[207]

There is a strong likelihood that investor disputes challenging government regulation of investments will continue to emerge elsewhere.[208] BITs have "proved an open invitation to unhappy investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host

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203. *See* Técnicas v. Mexican States, (ICSID arbitration), *available at* http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf (presenting this case's decision via an English translation); s*ee also* Friel, *supra* note 194 (noting that the *Tecmed* decision clarified that a government's breach of a bilateral investment treaty is subject to ICSID arbitration); ICSID (Award): Tecnicas Medioambientales TECMED S.A. v. Mexico, *International Law in Brief*, The American Society for International Law, *available at* http://www.asil.org/ilib/ilib0614.htm#j2 (discussing Mexico's recent arbitration defeat to Tecnicas Medioambienbientales TECMED).

204. *See* Mark Friedman & Gaetan Verhoosel, *Under Bilateral Investment Treaties, More Investors are Taking Direct Action Against Foreign States*, 26 NAT'L L.J. 15, 15 (2003) (explaining that the denial to renew an operating license constituted unfair treatment and led to Mexico's defeat to Tecmed); *see also* Victor Fuentes, *Pierde Mexico $17 Millones por Violar Articulo del TLC*, EL NORTE, Feb. 14, 2003, *available at* 2003 WL 5190542 (detailing the Mexican arbitration loss to Tecmed); *Govt. Fined US$7mn Over Environmental Litigation*, BUS. NEWS AMERICAS, Jun. 23, 2003, *available at* 2003 WL 62065920 (detailing the Mexican government's arbitration loss to the Spanish environmental firm Tecmed).

205. *See* Vivendi v. Argentina, 41 INT'L LEGAL MATERIALS 1135, 1135 (2002) (announcing the ICSID's decision in this matter); *see also* Gaillard, *supra* note 63, at 3 (highlighting the guidance given to investors in regard to matters similar to the *Vivendi* case); *see also* Michael D. Goldhaber, *Big Arbitrations*, THE AMERICAN LAWYER, June 2003, at 1 (proclaiming that the privatization of water has led to the major discontent that led to the *Vivendi* incident).

206. *See Power Generator AES Looks to Close Legal Disputes With Hungary by Summer 2002, Feels Discrimination*, HUNGARY BUSINESS REPORT, July 30, 2001 (noting AES's suit against the Hungarian government under the provisions of the Energy Charter Treaty); *see also* Tomos Packer, *Court Rules in Favour of Hungarian State Privatisation Agency*, WORLD MARKET RESEARCH DAILY ANALYSIS, June 3, 2003 (reporting that international arbitration court ruled against AES and in favor of Hungarian privatization agency). *See generally* Herbert Smith and Robert Volterra, *Energy Treaty—The Energy Charter Treaty and Protection of Energy Investments*, POWER ECONOMICS, Nov. 30, 2002, at 18 (reviewing dispute resolution provisions for investors under the Energy Charter Treaty).

207. *See* Peterson, *supra* note 127, at 12–13 (observing that Hungarian arbitration with an American firm centers on privatizations in the Hungarian energy sector); *see also AES May Have to Mothball Two Blocks or 430 MW at Tisza*, HUNGARY BUSINESS REPORT, Nov. 20, 2001 (describing that dispute revolves around violations of privatization agreements between AES and MVM); *Hungarian Arbitrage Court Dismisses 12.3 Mln Euro Case of U.S*, HUNGARIAN NEWS DIGEST, May 13, 2003 (recounting arbiter's rejection of AES' privatization claim against Hungary agency).

208. *See* Peterson, *supra* note 127, at 12–13 (noting concern that investor disputes challenging government regulation of investments will continue to emerge); *cf.* Ray C. Jones, Note, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 545 (reviewing criticism against NAFTA that arbitration under the treaty will allow foreign investors to influence government policy-making through threat of litigation). *See generally* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized", or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 38 (2003) (reporting the growing popularity of arbitration and increase in number of cases decided).

government and delighted by the opportunity to threaten the national government with a tedious, expensive arbitration."[209]

A. The Role of the Arbitrator

Where an investor invokes the dispute resolution provisions of a BIT, this permits the creation of an Arbitral Tribunal whose jurisdiction is set out in the relevant treaty, and is generally restricted to "investment disputes" or to alleged violations of the substantive rights in the investment treaty.[210] Each party will ordinarily select an arbitrator for their dispute, and the two parties will agree upon a third arbitrator or delegate this authority to some other appointing authority.[211]

The Tribunals will interpret the provisions of the treaty in accordance with the applicable law agreed to by the parties, or in default, as specified in the arbitration rules.[212] Where the

209. *See* Peterson, *supra* note 127, at 12–13 (quoting William D. Rogers' statement that unhappy investors will use the threat of arbitration to respond negatively to government policy); *see also* Justin Byrne, Comment, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415, 434 (2000) (recognizing threat of meritless litigation brought by private parties against governments whose legitimate policy interests are counter to those of the investors'); Stuart G. Gross, Note, *Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 894–95 (2003) (analyzing situation in Indonesia where foreign-owned mining companies and their investors threatened arbitration, resulting in the Indonesian government repealing a mining ban).

210. *See*, *e.g.*, Marian Leigh, *U.S. Practice*, 84 AM. J. INT'L L. 885, 899–900 (1990) (illustrating dispute settlement provisions in U.S.-Poland treaty allowing for creation of arbitral tribunal to settle investment disputes); s*ee* Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 193 (1996) (relating that under a BIT a national or company may submit to arbitration a dispute arising out of an investment agreement or an alleged breach of any right); *see also* U.S. Model Bilateral Investment Treaty, Section B, Article 24, *available at* http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm (describing procedures of what investment disputes may be submitted to arbitration and what arbitration methods are typically available, subject to their relevant treaties).

211. *See* Luke Eric Peterson, Int'l Institute for Sustainable Development, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, at 11 (2003) (describing arbitration selection procedure for each of the arbitrators); Convention on the Settlement of Investment Disputes, *supra* note 51, at 524 (detailing provision related to the creation of an arbitral tribunal and its constitution of three members, by default); *see also* Lowenfeld, *supra* note 174, at 1 (mentioning the World Bank and ICSID's method of arbitrator selection).

212. *See* Kishoiyian, *supra* note 74, at 369–70 (discussing applicable law to arbitration proceedings, including a specific agreement on the matter or in default the law of the host state and applicable international law, as specified in the ICSID convention); Cobb, *supra* note 50, at 12 (asserting that in an arbitral proceeding under an ICSID arbitration, the tribunal will decide the dispute in accordance with the legal rules agreed to by the parties, or in the absence of such agreement the tribunal will apply the laws of the host state and applicable international laws); *cf.* Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 AM. REV. INT'L ARB. 45, 59–60 (2001) (analyzing conflict of law and choice-of-law rules, in the context of awarding compound interest in international arbitration cases).

investment treaty is silent on the applicable law, arbitrators will ordinarily look to ascertain if the parties have reached consensus as to the applicable law.[213]

Investment treaty awards rendered by arbitrators are generally binding only upon the two parties to the arbitration.[214] However, it is widely acknowledged that arbitral tribunals will often take account of earlier awards, such that awards may be said to have some persuasive authority as precedents.[215]

The parties to a treaty claim are always an investor of the home state and the host state.[216] The state party is the state itself, not a federal or regional unit or any state agency or entity.[217]

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213. *See* Peterson, *supra* note 127, at 11 (commenting that arbiters will look to party consensus in absence of treaty provision regarding applicable law); *see also* Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1190–91 (2003) (noting party agreement provides the most significant rules for regulating arbitrations and conducting arbitration proceedings). *See generally* Rachel Engle, Comment, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L. LAW. 323, 323 (2002) (explaining that the substantive law applicable to the merits of the dispute is the most important "layer of law" in arbitration).

214. *See*, *e.g.*, Marshall J. Breger & Shelby R. Quast, *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority*, 32 CASE W. RES. J. INT'L L. 185, 213 (2000) (expressing that under Israeli law, an arbitration award is binding upon the parties and their successors under the theory of res judicata); *see* Alexia Herwig & Peggy Rodgers Kalas, *Dispute Resolution Under the Kyoto Protocol*, 27 ECOLOGY L.Q. 53, 65 (2000) (stating that arbitration only binds the parties to a dispute in the context of a discussion of the Kyoto Protocols, which utilizes traditional arbitrational and resolution measures); *see also* Cobb, *supra* note 50, at 12 (noting that arbitration award is binding on both parties to a dispute).

215. *See* Peterson, *supra* note 127, at 11–12 (acknowledging that arbitral tribunals take account of earlier awards to the extent they have persuasive authority as precedent); *see also* Gantz, *supra* note 118, at 708 (noting that while an award made by a tribunal shall have no binding force except between the parties to the case, it has relevance as persuasive authority); *see also* Garcia, *supra* note 22, at 309 (stating that while no formal stare decisis exists in regard to arbitration decisions, they are referred to like case law or precedent in other arbitrations).

216. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 906 (1987) (identifying arbitration of a private party against a state for an injury caused by a violation of international obligation); Convention on the Settlement of Investment Disputes, *supra* note 51, at 524 (establishing jurisdiction for international investment arbitration to be between a contracting state and a national of another contracting state); s*ee also* Freyer, Barry H. Garfinkel & Hamid G. Gharavi, *Arbitration Under Bilateral Investment Treaties: An Often Overlooked Tool*, 13-5 MEALEY'S INT'L ARB. REP. 16 (1998) (defining investment dispute as between one state party to a BIT and a national or a company of the other party to the BIT).

217. *See*, *e.g.*, Hans Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 441 (1995) (defining the state and statehood and its requisite powers under international law using the traditional definition). *But see* Freyer, et al., *supra* note 216, at 16 (describing that it is unclear whether "party" includes a political subdivision or a state agency or instrumentality, as some BITs expressly provide that they shall apply to political subdivisions, but in other cases, such as the United States, the individual states are not subject to the rights or duties of a treaty). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (asserting that to be considered a state for treaty purposes the party has to have the capacity to conduct international relations).

The applicable law under a BIT generally includes the provisions of the BIT itself, the domestic law of the host state and the general principles of international law.[218] The typical treaty rights have been the subject of considerable doctrine and jurisprudence in public international law and these will be considered by an arbitral tribunal in determining the dispute.[219] A successful treaty claim results in state responsibility in international law.[220]

B. The BIT Dispute Resolution Procedure

Generally, a dispute resolution clause in an investment treaty involves four distinct steps between the recognition that a dispute has arisen and the constitution of an arbitral tribunal:

1. A period of consultation and negotiation;
2. A waiting period;
3. An election of forum;
4. An election of arbitral institution or rules.[221]

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218. *See* Garcia, *supra* note 22, at 311 (noting applicable substantive law provisions under the investment treaty and the law to be applied at arbitration); Kishoiyian, *supra* note 74, at 362–63 (suggesting that there is little uniformity on the exact applicable law under a treaty but that domestic law and international law as typified by the bilateral investment treaties are often applicable); *see also* U.S. Model Bilateral Investment Treaty, *supra* note 210 (stating the law the arbitral tribunal shall apply, including treaty provisions, domestic law of the respondent, and applicable international law).

219. *See*, *e.g.*, Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1, 4–6 (1994) (identifying customary international law, treaty law and general principles as the primary sources of international law which are all utilized by arbitral tribunals); *see* Spelliscy, *supra* note 54, at 108 (arguing that there are not generic provisions for bilateral investment treaties because the treaties vary depending on the relative strengths of the bargaining parties). *See generally* Lang, *supra* note 40, at 457–58 (describing the basic aims of bilateral investment treaties and the basic guarantees found in U.S. BITs).

220. *See* Cremades, *supra* note 5, at 82. *See* Brower, *supra* note 8, at 1547 (explaining that more than 2,000 Bilateral Investment Treaties rely on the customary international law of state responsibility for economic injury to aliens); *see also* Bernard Kishoiyian, *supra* note 74, at 327–29 (arguing that BITs enlarge the force of traditional conceptions of state responsibility for foreign investment because parties realize that the rule of international law governs the treaties).

221. *See* Cremades, *supra* note 5, at 82; *see also* Belgium-Luxembourg-Union of Soviet Socialist Republics: Agreement Concerning the Promotion and the Reciprocal Protection of Investments, Feb. 9, 1990, art. 9, 29 I.L.M. 299 (introducing a treaty which explains the steps investors and host states follow to settle a dispute in an investment treaty); R. Doak Bishop, Arbitration as a Weapon, TEX. LAW., Mar. 8, 1999, at 27 (explaining the steps the parties should follow before submitting to arbitration in a dispute that has arisen in a bi-lateral investment treaty).

1) Consultation and Negotiation:

In the event of a dispute, BITs almost always aim for the investor and the host state to attempt to reach an amicable settlement.[222] This obligation generally requires that the investor at least notify the host state of the grounds of the dispute in writing and maintain a willingness to discuss and settle the dispute, prior to proceeding to arbitration or litigation.[223]

2) The Waiting Period:

The obligation to seek a settlement is generally supported by a mandatory waiting period for the purpose of settlement negotiation prior to commencing arbitration or litigation.[224] A common waiting period prior to the commencement of legal proceedings is three to six months.[225]

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222. *See* Trinidad and Tobago-United States: Message of the President of the United States Transmitting the Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Sept. 1994, art. 9, S. TREATY DOC. NO. 104-14 (1995) (noting that the parties to the treaty should attempt to resolve disputes amicably); *see also* Message from the President of the United States Transmitting the Treaty between the United States of American and The Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, with Protocol, Dec. 3, 1985, art. 6, S. TREATY DOC. 99-19, 1985 U.S.T. LEXIS 221, 27–28 (explaining that the parties should seek to solve a dispute through negotiations and good-faith consultations). *See generally* Settlement of Investment Disputes, Aug. 27, 1965, ch. III, sect. 1, art. 28, TIAS 6090, 17 U.S.T. 1270 (describing the conciliation process required in investment disputes between signatories to an investment treaty).

223. *See* Settlement of Investment Disputes, *supra* note 222 (explaining that a request to seek arbitration should be made in writing by the investor); Kishoiyian, *supra* note 74, at 365 (indicating that in BITs there are a host of dispute resolution mechanisms available to investors and states so that they may reach a fair and equitable agreement before resorting to international arbitration); *see also* David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising From the* Metalclad *Case*, IBA ARB. & ADR NEWSL. (BUS. LAW. INT'L), May 2003, at 1 (suggesting that an investor has to notify the International Center for the Settlement of International Disputes in writing that a dispute between the investor and the host country cannot be solved amicably).

224. *See* Trinidad and Tobago, *supra* note 222, art. IX, para. 3(a) (introducing that the treaty allows an investor to submit an investment to a dispute three months after the dispute has arisen); *see also* Dana H. Freyer, et al., *supra* note 48, at 16 (explaining that a specified period of time must elapse before a dispute can be brought before an arbitrator). *See generally* Stewart R. Shackleton, *The Importance of Investment Protection in Argentina,* INS. DAY, Sept. 23, 2002, at 1 (describing Argentina's requirement that under the Bilateral Investment Treaties to which it is a signatory, an investor must wait three months before submitting a dispute to arbitration).

225. *See* Camponovo, *supra* note 215, at 193 (explaining the general rule that an investor must wait at least three months before submitting an investment dispute to arbitration); Saunders, *supra* note 41, at 6 (noting the "cooling down" period of three to six months found in many Bilateral Investment Treaties). *See generally* Trinidad and Tobago, *supra* note 227, art. IX, para. 3(a) (discussing the waiting period in the dispute resolution process before the dispute goes to arbitration).

3) The Choice of Forum:

If settlement negotiations fail and the waiting period expires, the next step for the investor is the choice of forum.[226] Typically, the choice of forum clause provides for three possible forms of dispute resolution:

1. The courts or administrative tribunals of the state party;
2. International commercial arbitration;
3. Any applicable, previously agreed dispute-settlement procedures.[227]

The investor normally has the right to select the forum, and almost invariably chooses international arbitration.[228] In some BITs, however, there may be a requirement of prior recourse to the host country's dispute resolution mechanisms.[229] There is also the issue of whether the selection of the forum by the investor is binding upon the host state, and this factor also depends on the BIT, particularly on the provisions relating to state party consent to arbitrate.[230]

4) The Choice of Arbitral Institution or Rules:

Once the investor has chosen arbitration as the forum to resolve an investment dispute, the choice of the administrating institution arises. BITs most commonly designate institutional arbitration with ICSID, not surprisingly given that the ICSID was established specifically to administer the arbitration of investment disputes between states and the nationals of another

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226. *See* Camponovo, *supra* note 210, at 193 (indicating that the investor company may choose the forum under which it wants to resolve a dispute); *see also* Saunders, *supra* note 41, at 6 (explaining that parties often agree to dispute resolution as part of a treaty). *See generally* Kishoiyian, *supra* note 74, at 363 (indicating that in some treaties parties agree to conciliation or arbitration in advance).

227. *See* Trinidad and Tobago, *supra* note 222, art. 9 (explaining the choice of forum decisions available to an investor); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 (1987) (permitting an injured party to pursue a remedy through the courts, international arbitration, or any other agreed-upon dispute-settlement procedure). *But see* Alexandrov, *supra* note 87, at 455 (stating that BIT agreements supersede earlier agreements on dispute resolution).

228. S*ee Are the Roots of the Modern 'Lex Mercatoria' Really Medieval?,* S. ECON J., Jan. 1999 at 427 (explaining that over 90% of bilateral investment treaties have arbitration clauses); *see also* Jarreau, *supra* note 7, at 435 (noting that the most important element of the dispute resolution mechanisms employed is international arbitration); Guzman, *supra* note 7, at 657–58 (attributing the popularity of arbitration clauses to their enforceability under international law).

229. *See* Kishoiyian, *supra* note 74, at 365 (noting that the in some BITs, reliance on the host country's dispute resolution system may be required); *Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment*, Nov. 1969, 8 I.L.M. 1341 (discussing how in many instances investors are required to resort to local administrative mechanisms to resolve a dispute); *Symposium on Energy and International Law: Development, Litigation, and Regulation*, 36 TEX. INT'L L.J. 1, 5 (2001) (indicating that in some international agreements an investor might be subject to the jurisdiction of local courts).

230. SORNARAJAH, supra note 52, at 211–17. *See* Kishoiyian, *supra* note 74, at 368 (indicating that investors should not take for granted that arbitration is binding on the host country); *see Model Clauses*, *supra* note 229, at 1342 (explaining the trend toward the acceptance of arbitration clauses).

state.[231] Another common option after ICSID arbitration is *ad hoc* arbitration under the UNCITRAL Arbitration Rules.[232] The Court of Arbitration of the International Chamber of Commerce is also a nominated institution in many BITs.[233]

While in some BITs the investor has the power to choose the applicable rules or institution, others establish that the choice be made by agreement of the parties, with a specified alternative in the event that the parties fail to agree.[234] In some BITs that allow for the possibility that a state party commence arbitration of an investment dispute, the choice of institution or rules is made by the party that commences the arbitration.[235]

C. The Choice of Forum

The foreign investor maintains a series of choices with regard to the ultimate forum for the resolution of an investment dispute. First, the investor must choose whether or not to pur-

231. *See* James A.R. Nafziger, *Transnational Dispute Resolution: Bringing it all Together—An Introduction,* 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 3–4 (2000) (describing how BITs usually refer disputes to the International Center for the Settlement of Investment Disputes (ICSID)); *see also* Bishop, *supra* note 226, at 27 (indicating that over 100 nations have adopted ICSID's supporting convention).

232. *See* Garcia, *supra* note 22, at 313 (presenting that BITs and many multilateral treaties use UNCITRAL Arbitration rules*). See generally* Symposium on Energy and International Law, *supra* note 229, at 6 (describing the function of the ICSID and UNCITRAL dispute resolution mechanisms).

233. *See* Nafziger, *supra* note 231, at 4 (indicating that BITs often stipulate the arbitration rules of the International Chamber of Commerce); *see also* Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Arbitration,* 11 AM. REV. INT'L ARB. 307, 337–338 (2000) (describing some of the difficulties the widespread use of the International Chamber of Commerce (ICC) dispute resolution mechanisms has created). *See generally* Brower & Sharpe, *supra* note 106, at 655 (discussing the value of the International Chamber of Commerce arbitration process to the Islamic world).

234. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, December 16, 1994, U.S.-Uzbekistan, art. IX 1996 BDIEL AD LEXIS 16 (noting that an investor can invoke previously agreed-upon dispute settlement procedures for arbitration); *see also* United States Model Bilateral Investment Treaty, *supra* note 210 (providing that the investor can submit the dispute to binding arbitration under the ICSD, the additional facility of the ICSD, in accordance with UNCITRAL rules, or to any other institution that is agreed upon by both of the parties). *See generally* Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 785 (1983) (stating that ICSID disputes are to be referred to an international court, unless the individual parties agree to another forum).

235. *See* DOLZER & STEVENS, *supra* note 58, at 147–56 (noting that the party that commences arbitration often may choose the forum). *But see* Spelliscy, *supra* note 54, at 106–07 (asserting that the choice of institution rests solely with the investor because a state consents to arbitral jurisdiction simply by signing the bilateral investment treaty). *See generally* Emmanuel Gillard & Yas Banifatemi, *Introductory Note to ICSID: Salini Construttori Spa and Italstrade Spa v. Kingdom of Morocco*, 42 INT'L LEGAL MATERIALS 606, 607 (2003) (purporting that BITs often offer the choice between the courts of the host state and an international forum).

sue legal redress.[236] In some investment disputes, this path may not be immediately desirable and the investor may choose to seek resolution of the dispute through political or diplomatic approaches and direct negotiation.[237] Once the investor has decided to seek enforcement of its legal rights and there is a BIT between the investor's home state and the host state, the investor maintains the ability to pursue such treaty rights.[238]

However, as foreign investment usually involves contracts between the investor and entities within the host state (these contracts may take the form of a concession contract with the state itself, or a territorial unit of the state, or might involve contracts with various state agencies) the investor may find there are additional rights provided by the contract (contract rights) available in addition to those provided by the BIT (treaty rights).[239] There may also be other

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236. *See* Garcia, *supra* note 22, at 306 (noting that BIT litigation has been positive for investors, because host nation control has been weakened); *see also* Youlian Simidjiyski, *A Comparative Study of the Bulgarian Law on Foreign Investment and the Foreign Investment Laws of Hungary, Poland, and the Czech Republic Through the Prism of World Bank Guidelines for Treatment of Foreign Investment*, 9 FLA. J. INT'L L. 277, 308 (1994) (expressing that although most bilateral investment treaties provide a negotiation requirement prior to arbitration, parties are encouraged to submit their disputes to a previously chosen jurisdiction if negotiations fail). *See generally* MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 28 (Martinus Nijhoff Publishers 1993) (asserting that any party to a dispute may begin a legal proceeding of arbitration in the ICSID by addressing a written request to the Secretary General of the ICSID).

237. *See, e.g.,* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Apr. 19, 1994, U.S.-Estonia, art. VI, 1995 BDIEL AD LEXIS 24 (declaring that initial dispute resolution should consist of consultation and negotiation, with arbitration being instituted only when these procedures fail); *see also* James D. Nolan, *A Comparative Analysis of the Laotian Law on Foreign Investment, the World Bank Guidelines on the Treatment of Direct Foreign Investment, and Normative Rules of International Law on Foreign Direct Investment*, 15 ARIZ. J. INT'L & COMP. L. 659, 675 (1998) (explaining that the ICSID contains a provision where the contracting state may require exhaustion of local remedies before they will consent to arbitration); *see* Camponovo, *supra* note 210, at 188 (stating that an investor is disadvantaged by the exhaustion of local remedies requirement, as local litigation is expensive and biased).

238. *See, e.g.,* The MAI Negotiating Text, Apr. 24, 1998, 1998 BDIEL AD LEXIS 33 (detailing means of settlement under a standard bilateral investment treaty); *see also* Guzman, *supra* note 7, at 642 (expressing that when a BIT is in force, a breach of the agreement is a breach of international law, thus giving the investor access to binding arbitration); Edith Brown Weiss, *The ILC's State Responsibility Articles: Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 813 (2002) (noting that once a bilateral investment treaty is signed, investors may take advantage of a standard provision which allows them to take advantage of international arbitration procedures).

239. *See Europe—Getting in a State,* THE LAWYER, Feb. 24, 2003, at 33 (stating that investors have overlapping rights throughout various legal regimes, including among treaty and contract law); *see also* Coudert Freres, *When Disaster Strikes: Options and Remedies in International Energy Disputes*, ALL REGIONS, Sept. 5, 2003 (explaining that because state entities have international responsibilities in relation to bilateral investment treaties, investors have opportunities for redress outside of the individual contract). *See generally* Newman & Zaslowsky, *supra* note 58, at 3 (asserting that "national treatment" obligations in investment fall under both treaty and contract based rights).

rights created by domestic legislation that are applicable to the investor's particular case.[240] As a result, the investor finds him or herself before a "choice of rights."[241] The decision made will be crucial, particularly since in complex disputes maintaining the distinction between the different sources of rights may become problematic, as discussed in the above section on Treaty Rights vs. Contract Rights.[242]

D. ICSID

One of the major arbitration venues mentioned in BITs is the International Centre for Settlement of Investment Disputes (ICSID), which is a facility of the World Bank Group dedicated to the resolution of investment disputes.[243] ICSID provides that any disputes registered with the Centre will be publicly notified, while other arbitral venues do not keep such a register.[244] For instance, the arbitration rules of the International Chamber of Commerce, the Stockholm Chamber of Commerce and the United Nations Commission on International

240. *See Lanco International*, 40 I.L.M. at 469 (noting that a state may require exhaustion of domestic remedies before resorting to bilateral investment treaties). *But see* Thomas W. Waelde & George Ndi, *Stabilizing Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 216, 236 (1996) (concluding that the legal weakness behind domestic remedies for contract rights explains why investors look more frequently for different solutions); *see* Vandevelde, *supra* note 3, at 626 (highlighting the major difficulties behind the use of domestic law in international investment disputes).

241. *See* DOLZER & STEVENS, *supra* note 58, at 147–56 (noting that the party that commences arbitration can have a choice in forum); Jablonski, *supra* note 104, at 634 (observing that many of Chile's bilateral investment treaties provide both substantive rules for dispute resolution as well as the option of international arbitration)*; see also* Gaillard, *supra* note 63, at 3 (noting that when confronted by prejudicial measures by the host state, an investor has a cause of action under both treaty and contract rights).

242. *See* Dodge, *supra* note 128, at 365 (stating that the 1994 U.S. Model Bilateral Investment Treaty precludes a party from bringing suit in both domestic court and international arbitration); *see also* Jarreau, *supra* note 7, at 492 (asserting that under the U.S.-Honduras Bilateral Investment Treaty, investors may only compel arbitration if they have not previously brought suit in the host state's domestic legal system); *see also* Modern Bilateral Investment Treaty (BIT) and Sample Provisions from Negotiated BITS, Feb. 24, 1984, 1 BDIEL 655 (declaring that suits can only be brought to arbitration when the national or company concerned has not brought the matter before courts or tribunals of competent jurisdiction).

243. *See* International Center for Settlement of Investment Disputes, *About ICSID*, *at* http://www.worldbank.org/icsid/about/main.htm (last visited Sept. 16, 2004) (stating that the ICSID is an organization closely tied with the World Bank that provides facilities for arbitration of disputes between member countries and investors who are nationals of other member countries); s*ee also* WOLFGANG, *supra* note 75, at 303 (asserting that the "ICSID was created under the auspices of the World Bank in order to encourage private investment in developing countries); Cantey, *supra* note 129, at 297 (stating that the ICSID was established through the World Bank to conduct arbitration procedures, as well as many other international investment functions).

244. *See* Nathalie Bernasconi Osterwalder, *Corporate Responsibility: Governance Principles for Foreign Direct Investment in Hazardous Activities, available at* http://www.ciel.org/Publications/Presentation_Kiev_Final%2021May03.pdf (last visited Sept. 16, 2004) (asserting that while ICSID rules allow public registration of disputes, other arbitration mechanisms do not publicize their cases). *But see* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration,* 16 AM. U. INT'L L. REV. 969, 969 (2001) (providing that the proceedings of the ICSD are kept in secret and that members of the tribunal must sign a confidentiality agreement). *See generally* Luke Peterson, *Changing Investment Litigation Bit by BIT, Bridges Between Trade and Sustainable Development* (May 2001), *available at* www.iisd.org/pdf/2001/trade_inv_litigation.pdf (noting that the lack of reporting by arbitral tribunals is dangerous to the world community).

Trade Law (UNCITRAL), all of which are incorporated in a number of BITs, do not provide such a requirement that arbitrations be made a matter of public record.[245]

Data from ICSID, the only BIT arbitral body to offer public records, offers some useful insight to those resorting to arbitration under a BIT. In the past five years, ICSID has seen well over half of its 120 registered disputes.[246] The figures reveal that BITs are at the center of an increasing number of commercial arbitrations. This surge in BITs disputes is such a recent phenomenon that many of these cases have yet to be resolved by arbitration tribunals.[247]

While ICSID has been in existence for three-and-a-half decades, more than half of its caseload has been launched during the last five years.[248] ICSID has become the central forum for BIT arbitration, yet it is not the only institution which handles such investment disputes; most treaties offer investors recourse to the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL).[249] Such disputes can be heard anywhere in the world

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245. *See* International Center for Settlement of Investment Disputes, *supra* note 243 (noting that the ICSID publishes a listing of international bilateral trade agreements); *see also* Hans Smit, *Report: Confidentiality: Articles 73 to 76,* 9 AM. REV. INT'L ARB. 233, 233 (1998) (reporting that confidentiality had only been previously codified in the International Chamber of Commerce Rules); William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration*, 11 AM. REV. INT'L ARB. 531, n.23 (2000) (explaining the confidentiality provisions in the rules of both UNCITRAL and ICSID).

246. *See* Andres Rigo Sureda, *Two Views on ICSID Arbitration*, 13 WORLD ARB. & MEDIATION REP. 166, 168 (2002) (noting that the speed of submission of mediation requests to the ICSID has increased from one per year to one per month in recent years); *see also Protecting Investments Overseas: Bilateral Investment Treaties, Foreign Investment Laws and ICSID Arbitration,* LOVELL'S CLIENT NOTE 6, *available at* http://www.lovells.com/germany/ Controlservlet/ depublication/publd/872/ (last visited Sept. 16, 2004) (noting that more than two-thirds of ICSID cases have been brought since 1996); Sophie Evans, *Dispute Revolution,* LEGAL WEEK, Apr. 8, 2004 (showing that there were 129 ICSID cases ongoing in 2003).

247. *See* David A. Gantz, *Investor State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules, available at* www.usvtc.org/.../Vietnam%20IV%20-&20Investor%20-%20State%20Arbitration%20outline%20rev2.pdf (last visited Sept. 16, 2004) (stating that as of September 2003, 124 ICSID cases had been registered since 1965, of which 63 were pending); *see also* International Center for Investment Disputes, *supra* note 243 (declaring that there are currently 79 cases pending).

248. *See* SHIHATA, *supra* note 3, at 1045 (emphasizing the great expansion of the ICSID's caseload along with the increase of BITs being signed); Symposium, *Symposium on Energy and International Law: Development, Litigation, and Regulation*, 36 TEX. INT'L L.J. 1, 8–9 (2001) (focusing on the major increase in the ICSID's caseload within the past decade, primarily due to the influx of parties wanting to arbitrate under BITs); Eloise Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, 18 NEWS FROM ICSID, Jan. 25, 2002 (showing the increased amount of activity the ICSID has dealt with in the past decade), *available at* http://www.worldbank.org/icsid/news/news.htm (last visited Sept. 16, 2004).

249. *See* Kishoiyian, *supra* note 74, at 367 (expressing the different options investors have to arbitrate, one of them being through the UNCITRAL Rules); Lowenfeld, *supra* note 174, at 129 (referring to the UNCITRAL Rules as another method of arbitration other then the ICSID); Thuy Le Tran, Comment, *Vietnam: Can An Effective Arbitration System Exist?*, 20 LOY. L.A. INT'L & COMP. L. REV. 361, 383–84 (1998) (examining different countries that use the arbitration rules of UNCITRAL in place of or along with the ICSID Convention).

without any public disclosure of the details or parties involved.[250] This veil of secrecy renders these disputes a veritable nightmare for policy analysts to monitor and assess.[251]

Today, over 130 states have ratified the ICSID Convention, making ICSID´s unique benefits available to them, their corporations and individual investors.[252] ICSID administers neutral international arbitration to resolve investor-state disputes.[253] It also creates a powerful regime for the enforcement of ICSID arbitral awards.[254] Over 900 BITs contain the host state's advance consent to ICSID arbitration in the event of investment disputes arising.[255] About 20 foreign investment laws contain generic consent provisions offering to submit disputes with investors to arbitration under the ICSID Convention.[256] ICSID thus furthers the purpose of

250. *See* Brown, *supra* note 244, at 995–96 (presenting the strict confidentiality kept in arbitration agreements allowing for the cases to stay private). *See generally* Lowenfeld, *supra* note 55, at 465 (reviewing KAJ HOBER, EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION (2001)) (remarking on the ability of foreign investors to bring their conflicts privately through vehicles such as the ICSID); Gruner, *supra* note 106, at 924 (explaining the increasing popularity of arbitration due to the private dispute resolution method it provides for international investors).

251. *See* Wiltse, *supra* note 73, at 1171 (examining why the lack of public disclosure may make it more difficult to provide public safeguards within the foreign investment community); Peterson, *supra* note 127 (proclaiming that the secrecy in arbitration disputes makes monitoring the process a "nightmare"). *See generally* Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics*, 32 DENV. J. INT'L L. & POL'Y 475, 497 (2004) (implying that the private policies of arbitration make it difficult to predict future outcomes in similar cases and do not set any guidelines).

252. *See* Dhooge, *supra* note 104, at 489 n.67 (stating that the ICSID has been ratified by at least 131 states); Kenneth I. Juster, *Arbitral & Judicial Decision: The Santa Elena Case: Two Steps Forward, Three Steps Back*, 10 AM. REV. INT'L ARB. 371, 372 n.4 (1999) (indicating more than 130 countries have ratified the ICSID Convention); Moreland, *supra* note 129, at 18 (noting that approximately 131 countries have ratified the ICSID).

253. *See* Guzman, *supra* note 7, at 657 (recognizing the neutral environment that is provided by dispute settlements through arbitration); Spelliscy, *supra* note 54, at 106 (providing that a neutral forum through the arbitration process also provides investors with more protection); Evans, *Dispute Resolution*, *supra* note 246, at 1 (citing the importance of arbitration as a neutral venue).

254. *See* Henry P. DeVries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 60–61 (1982) (asserting the award at arbitration will be enforced, if the parties have both agreed to arbitration, even if one party wants to later withdraw); Schneider, *supra* note 94, at 715–16 (affirming the enforcement of the arbitration award and that the rights of the parties are directly effective); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 511 (2001) (stating that arbitration awards made by the ICSID are directly enforceable as if they were domestic court judgments).

255. *See* Moreland, *supra* note 129, at 18 (stating that there are over 900 bilateral investment treaties that consent to arbitration under the ICSID); Noah Rubins, *supra* note 233, at 344 (discussing the 900 BITs that frequently take advantage of the ICSID's exclusive jurisdiction to resolve investment disputes between the participating states); Jablonski, *supra* note 104, at 644 n.72 (indicating that the parties to over 900 BITs have consented to arbitration under the ICSID).

256. *See* Moreland, *supra* note 129, at 18 (citing that the ICSID includes approximately twenty investment laws); Cantey, *supra* note 129, at 299 (noting that the ICSID examines about twenty investment laws during an arbitration).

these investment treaties and laws in promoting investor and guarantor confidence by setting high standards of investor protection applicable in international law.[257]

VIII. Conclusion

The Bilateral Investment Treaty program has had a hand in creating a world that is more open to foreign investment and trade between countries than ever before. The use of the BIT has opened up markets to products and economic development on a large scale, and has brought many countries into a growing global community of trade.[258] The proliferation of the BIT, however, seems as though it has had a "double-edged sword" effect, in that, on one hand, developing countries are opening their borders and allowing development of their resources, but on the other, these same nations must often grant numerous concessions to investors, deeming the developing country's gains from the agreement minimal at best.[259] Due to the apparently unbalanced distribution of benefits provided by these agreements, many critics have argued that BITs are not the way to go when the ultimate goal is economic advancement of the developing nations of the world.[260]

Despite these criticisms, statistics show that numerous BITs are being signed despite their seeming uneven-handedness, demonstrating the continued success of this investment protec-

257. *See* Breger & Quast, *supra* note 214, at 238 (noting that combining the BIT and ICSID provides the investor with a heightened level of protection and comfort); Robin, *supra* note 1, at 955 (reasoning that the ICSID provides the investors with much-needed protection, hence raising the confidence levels to invest further); *Protecting Investment*, *supra* note 125 (addressing the confidence that high standards of protection provide through investment treaties), *at* http://www.lovells.com/germany/ControlServlet/de/publication/publd/872/ (last visited Sept. 16, 2004).

258. *See* MacArthur, *supra* note 69, at 933 (explaining that the U.S. and other developed countries use treaties, such as BITs, to open up investment to the world and have created more than 1,800 such treaties in over 160 countries). *See generally* William A. Lovett, *Reflections on the WTO Doha Ministerial: Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 972 (2002) (noting that BITs have opened up foreign investment in many countries due to the heightened confidence they provide); Elmer L. Winter, *An Inviting Prospect*, THE JERUSALEM POST, Nov. 1, 1991, at Opinion (citing that undeveloped countries seek foreign investment to help support their communities).

259. *See* Ratner, *supra* note 91, at 459 (examining how BITs can be heavily weighted in favor of the investor and may even harm the developing nation); Vandevelde, *supra* note 10, at 626 (explaining one theory that foreign investment inhibits growth rather than promotes economic growth in developing countries). *See generally* Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth,* 75 AM. J. INT'L L. 437, 461 (1981) (acknowledging the problematic nature of investment treaties on the host countries, usually developing nations).

260. *See* Gantz, *supra* note 16, at 719 (critiquing BITs because some believe they do not follow the standards of international legal principles); Luke Eric Peterson, *Globalization Fight Continues*, THE TORONTO STAR, July 22, 2003, at A22 (evaluating the effectiveness of BITs and concluding that they do not provide much new investment flow into poor developing nations); Frances Williams, *International Economy: Rise in Bilateral Treaties to Guard Investors UNCTAD Data*, FIN. TIMES (LONDON), Dec. 19, 2000, at 16 (discussing the perplexing nature of the bilateral agreements and how they may put the poorest nations at a disadvantage, while confusing investors).

tion mechanism.[261] The continued development and proliferation of the BIT indicate that the BIT need not imply an unbalanced distribution of benefits between state parties.

This is not to say that the use of multilateral agreements on investment would not be helpful in striving to achieve a more equal and level trading environment. The utilization of these types of multilateral agreements could alleviate some of the problems that often emerge from BITs. The BIT and the MAI need not be mutually exclusive, as demonstrated by the recent agreement between the U.S. and the EU regarding the preservation of previously existing BITs as the Eastern European nations enter the European Union.[262]

The difficulty becomes evident in practice, however. The recent obstacles faced by the project for a multilateral investment treaty in the Americas demonstrate the challenge of negotiating a viable MAI acceptable to all countries involved. While MAIs may lend a hand in ensuring a more balanced foreign direct investment environment worldwide, their proliferation need not imply the end of the BIT as an efficient and useful investor protection mechanism. An MAI may very well be a useful alternative, yet if all countries are unable to agree, it is certainly not necessary for an interested country to forgo an attractive investment opportunity as a BIT is always a viable option.

ICSID's Web site (www.worldbank.org/icsid) is the best reference source to use to establish whether the particular countries in which you have an interest have entered into an applicable BIT.[263] Copies of the treaties themselves can usually be obtained from the foreign or finance ministry of the contracting states.[264]

The diversity and complexity of the procedural requirements of modern investment treaties is tremendous. Before initiating any proceedings, an investor must establish a clear dispute

261. *See* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 469–70 (2000) (finding that BITs are an international phenomenon due to the rate they are being negotiated, which was one per day in the mid-1990s); Kelley, *supra* note 111, at 488 (emphasizing the "explosive" amount of BITs initiated and signed within the past decade); Reading, *supra* note 75, at 682 (commenting on how BITs have become the bilateral "agreement of choice" between states around the world).

262. *See* Dick Lugar, *Economic Treaties*, FEDERAL DOCUMENT CLEARING HOUSE CONGRESSIONAL TESTIMONY, Apr. 1, 2004, at 1 (summarizing the understanding reached between the United States and the European Union that will leave the already existing BITs intact but subject to change); Editorial, *Trade Scene: May Day for EU: Enlargement Brings Benefits, Concerns for U.S.,* J. COM. ONLINE, Apr. 28, 2004, at WP (discussing the U.S.'s hustle to sign BITs with Eastern European countries before the EU commences control over these nations); *EU/U.S./Enlargement: Transatlantic Investment Treaties to Be Amended*, EUROPEAN REPORT, Sept. 3, 2003, § 2799 (commenting on the EU's requirement that before accession, all candidate countries will have to modify any bilateral treaties, including those made by the U.S., to conform to EU regulations).

263. *See Protecting Investment Overseas*, *supra* note 125; *see also Bilateral Investment Treaties, Starting from 1959*, (listing all of the Bilateral Investment Treaties worldwide), http://www.worldbank.org/icsid/treaties/treaties.htm (last visited Sept. 16, 2004).

264. *See Protecting Investment Overseas*, *supra* note 125. *But see Bilateral Investment Treaties*, (citing 25 countries and each of their full text bilateral investment treaties), http://www.sice.oas.org/cp_bits/english99/listagrs.asp#Bilateral%20Investment%20Treaties (last visited Sept. 16, 2004). *But see* Kennedy, *supra* note 33, at 174 n.374 (2003) (acknowledging that BIT treaties are available online and providing a Web site which lists the bilateral treaties and gives sample treaties).

resolution strategy for any investor-state dispute. While investment treaties have created a new source of rights directly enforceable by the investor, thereby increasing security and encouraging flows of foreign direct investment, the benefits of these rights will only be reaped through a clear understanding of the nuances involved and the many possibilities and difficulties that may arise due to the rapidly changing nature of the BIT.

Recognition and Enforcement of United States Judgments in Italy

Alessandro Barzaghi, LL.M.*

I. Introduction

The recognition and enforcement of U.S. judgments in Italy has become particularly interesting in the last several years due to a radical reform aimed at making the Italian system more open to foreign judgments. The topic has traditionally been of interest to comparative legal scholars because of the deep-rooted differences between the United States' common law system and a typical civil law country like Italy. For example, punitive damages, grounds for jurisdiction and judgments in default are all treated quite differently in each of the legal systems and demonstrate the difficulty in recognizing decisions from foreign jurisdictions.[1] There is also a practical scope to this paper. It is designed to assist a practitioner trying to find his way through the maze of Italian laws and court decisions on this issue. The paper further aims to provide an overview of the topic, while detailing some of the requirements a foreign judgment must meet in order to be recognized in Italy. To conclude, a review of the most important recent decision on the subject is provided.

1. *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 14–16 (2002) (highlighting the scrutiny applied by Italian courts to both procedural and substantive common law principles developed by American jurisdictions); *see also* Richard H. Dreyfuss, *The Italian Law on Strict Products Liability*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 37, 65 (1997) (hereinafter "Dreyfuss, *The Italian Law*") (comparing the unavailability of punitive damages under Italian tort law to American tort reform); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7–10 (1992) (explaining that the basic differences are rooted in Italy's civil law paradigm).

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A. Recognition and Enforcement of Foreign Judgments: the System Before 1995[2]

Until 1995, the Italian system of recognition and enforcement of U.S. judgments was divided into three categories.[3]

The first category included judgments issued in countries that were parties to the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, signed on September 27, 1968, and enforced in Italy by Law 804/1971 (Law number 804 enacted in 1971).[4] The second category included all judgments rendered in countries with

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2. A brief introduction to the Italian jurisdictional system might be required for a thorough analysis of recognition and enforcement of foreign judgments in Italy. The highest ranking court in Italy is the Supreme Court (*Corte Costituzionale*). This court was conceived in 1956 and is the highest authority on Italian constitutional issues. Its role is similar to that of the U.S. Supreme Court, but rather than have the discretionary power to grant certiorari, it must hear all cases. The Court of Cassation (*Corte di Cassazione*) is the Court of Third Instance, and has powers similar to the U.S. Supreme Court and the supreme courts of the individual states. Below the Court of Cassation are the Courts of Appeal (*Corti d'Appello*), which are courts of second instance, with powers similar to the U.S. Courts of Appeals. The lower-level courts are called District Courts (*Tribunali e Giudici di Pace*): they are the courts of first instance. The Italian sources of law could be divided as follows: the Constitution, the codes (*codici*), the Italian laws and the EU laws. The highest source is the Constitution (*La Costituzione*): enacted in 1948, it contains the basic laws governing a variety of matters such as the formation, composition, term of office and powers of the supreme bodies of the state and the principles and values which inform the Italian legal system. For the purposes of this article, it will be important to note that it contains the principles of the so-called procedural public policy. There are five basic codes in the Italian system: The Civil Code (*Codice Civile*), the Code of Civil Procedure (*Codice di Procedura Civile*, frequently abbreviated as C.P.C.), the Criminal Code (*Codice Penale*), the Code of Criminal Procedure (*Codice di Procedura Penale*) and the Code of Navigation (*Codice della Navigazione*). All of these Codes undergo frequent amendments which keep them "alive" and aligned with the emerging trends of modern life. For the purposes of the present article, the Code of Civil Procedure is the most important, as it contains the vast majority of procedural rules to be followed when pleading before an Italian court. The third major source in the Italian system is constituted by the Laws (*Le leggi*): legislation governing a large number of aspects of Italian life. For the purposes of recognition and enforcement of foreign judgments, the fundamental source of law is Law 218/95. The newest source and the one with growing importance in Italy is constituted by EU laws (*Normative comunitarie*): such laws are set forth in EU Directives, Recommendations and Regulations, with which Italy must comply. Some EU Directives and Regulation are self-executing and directly enforceable in Italy, while some others require Italy to enact ad hoc laws. A copious legislation has been enacted to implement EU directives.

3. *See* Andreas F. Lowenfeld, *Recognition and Enforcement of Judgments*, *in* INT'L LITIG. & THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 109, 114–15 (1996) (discussing the narrow limits of recognition in practice).

4. *See* 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, tit. III, arts. 25–32, 1972 O.J. (L. 299) 32 (hereinafter 1968 Brussels Convention) (providing for recognition and enforcement of judgments between contracting states); *see also* Case 258/83 Calzaturificio Brennero SAS v. Wendel GmbH, 1984 E.C.R. 3971, ¶ 10 (positing that the purpose of the convention was to reduce the legal hurdles for enforcement of judgments issued by another contracting state); Alan Reed, *To Be or Not to Be: The* Forum Non Conveniens *Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 105–14 (2000) (relying on the Convention's pragmatic approach as a model for solving jurisdiction problems). The Convention has been extended to states belonging to the European Free Trade Association by the Lugano Convention, signed on September 16, 1988, and later to any new member state of the European Union.

which Italy had a bilateral treaty in force.[5] By 2000, Italy had stipulated 26 bilateral treaties.[6] The third category included all judgments rendered in countries that do not fall into either of the first two categories.[7]

B. Recognition and Enforcement of Foreign Judgments: the System After 1995

In 1995, the system of Italian International Private Law was deeply modified by a drastic reform enacted under Law 218/1995 (Law 218 of May 31, 1995), called *Riforma del Sistema Italiano di Diritto Internazionale Privato* (Reform of the Italian System of Private International Law).[8] It introduced an entirely new system of recognition and enforcement of foreign judg-

5. *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 55, 28 I.L.M. 620, 636 (superceding the convention between Italy and Austria on the recognition and enforcement of judgments in civil and commercial matters, of judicial settlements and of authentic instruments, signed at Rome on Nov. 16, 1971), *reprinted in* RICHARD H. KREINDLER, TRANSNATIONAL LITIGATION: A BASIC PRIMER, app. 3, at 451, 471–72 (1998); *see also* KREINDLER, *supra* at 233–34 (1998) (noting that scope of application differs in bilateral treaty from relevant convention for purposes of recognition and enforcement of decisions rendered in foreign states); Remarks by Arthur von Mehren (July 5, 1991), CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES 87, 87–88 (Dean C. Alexander ed., 1992) (observing that absent special treaty arrangements, many legal systems give preclusive effect to foreign judgments upon evaluation of the jurisdictional basis and procedural fairness of the court of origin).

6. *See* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, at ITL-18 to -19 (2003) (enumerating nearly twenty multilateral conventions concerning international cooperation in legal matters, including recognition and enforcement); *see also* 4 PETER H. ROHN, WORLD TREATY INDEX 317–27 (2d ed. 1983) (listing thirty-nine bilateral treaties concerning legal procedures with twenty-five countries as of 1983). *See generally* Lupoi, *Recognition and Enforcement of Foreign Judgments Outside the Scope of Application of the Brussels and Lugano Conventions: Italy, in* 3 CIVIL PROCEDURES IN EUROPE: RECOGNITION & ENFORCEMENT 347, 350–51 (Gerhard Walter & Samuel P. Baumgartner eds., 2000) (hereinafter Lupoi, *Recognition*) (providing an exhaustive list of treaties that Italy has stipulated).

7. *See* Lupoi, *Recognition, supra* note 6, at 347. The Italian legal system was particularly suspicious of such judgments, and therefore they all had to undergo a long proceeding for recognition before the Court of Appeals (regulated by C.P.C. arts. 797–99). Such proceeding was called *Delibazione* and was necessary both for recognition and enforcement of foreign judgments; *see* Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Joint Children, proposed May 26, 1999, art. 42, sec. (4)(c), 1999 O.J. 1 (verifying that the recognition and enforcement of foreign judgments on particular legal issues is governed by C.P.C. arts. 796 and following); *cf.* Richard B. Cappalli, *The Style and Substance of Civil Procedure Reform: Comparison of the United States and Italy,* 16 LOY. L.A. INT'L & COMP. L. REV. 861, 861–85 (1994) (discussing Italy's clogged legal system and evaluating the 1990 reform of C.P.C.).

8. *See* Andrea Giardina, *Italy: Reforming the Italian System of Private International Law,* 35 I.L.M. 760, 761 (1996) (describing the reform's comprehensive scope); *see also* Kurt Siehr, *National Private International Law and International Instruments*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH 335, 337–38 (James Fawcett ed., 2002) (opining that this represented an efficient integration of the conventions into Italy's body of law).

ments, profoundly different from the system in force before 1995.[9] The new law absorbed some of the latest trends in private international law and introduced a preference for recognizing foreign decisions in Italy.[10]

Yet even with this change, there remained three categories under which all judgments fall:

The first category includes judgments rendered in European Union countries falling under the Brussels Convention, whose system mirrors Law 218/95 (automatic recognition).[11]

The second category includes judgments rendered in countries with which Italy has a bilateral treaty in force, and is still governed by such treaties.[12]

The third category still comprises all judgments rendered in countries that do not fall under one of the first two categories.[13] These judgments, for example, include those rendered in the United States.[14]

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9. *See* Giardina, *supra* note 8, at 760–62 (citing the need to fill the lacunae of previous laws on recognition and enforcement and facilitate homogeneous rules by extending prior conventions' jurisdiction standards); *see also* Andrea Bonomi, *The Italian Statute on Private International Law*, 27 INT'L J. LEGAL INFO. 247, 251–52 (1999) (elucidating why the drafters introduced new rules); *cf.* Louis F. Del Duca, *Problemi di riforma del diritto internazionale private italiano*, 83 AM. J. INT'L L. 444, 445 (1989) (book review) (determining that the evolution of European Communities has been the root cause of Italy's reforms); *see also* European Court of Justice, May 21, 1980, 125/79, Denilauler, in *Rivista di diritto internazionale privato e processuale* (*International Private and Procedural Law Review*), 188 (1981).

10. *See* Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, tit. I, art. 2, 35 I.L.M. 760, 765 (stating the purpose of harmonizing the Italian system with conventions already in force and promoting their uniform application); *see also* Bonomi, *supra* note 9, at 252 (explaining that the new rule on lis pendens flows from the conventions and extends them by requiring that an Italian court must stay such proceedings only if the foreign court's decision may be recognized in Italy). *See generally* Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Judgments*, 36 AM. J. COMP. L. 1, 4 (1988) (suggesting that such reform is necessary to advance the twin procedural goals of judicial economy and repose).

11. *See* IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 133 (1982) (observing that under the so-called "direct" conventions such as the Brussels Convention, contracting states allow for virtually automatic recognition and enforcement of foreign judgments); *see also* Gian Paolo Romano & Daniele Vecchi, *Italy*, *in* INTERNATIONAL CIVIL PROCEDURE 345, 372 (Shelby R. Grubbs ed., 2003) (noting that Italy's principle of automatic recognition is still in effect such that a decision is automatically recognized unless its recognition is challenged by the other party).

12. *See* Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, tit. V, art. 72, 35 I.L.M. 760, 782 (stating that the new law does not disturb private international law provisions already in force); *see also* Bonomi, *supra* note 9, at 256 (commenting that the essential principle of bilateral arrangements, namely equality of treatment of *lex fori* and foreign law, is embodied in the new law).

13. *See* Bonomi, *supra* note 9, at 265 (postulating that the Italian court under such circumstances would not simply extend the rules of the Brussels Convention and offering a hypothetical case); *cf.* Jonas Astrup & Avesha Hassan, *Doing Business Abroad: Jurisdiction Issues Influence Decisions, ICC Survey Finds*, LEGAL TIMES, Apr. 21, 2003, at 28 (maintaining that international businesses falling under such category, including American companies, are troubled by the possible non-recognition and non-enforcement; due to this uncertainty, they delimit entering into international contracts).

14. *See generally* Remarks by Catherine Kessedjian (July 5, 1991), *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES 97, 98–99 (Dean C. Alexander ed., 1992) (expressing doubts about the U.S.'s desire to enter into bilateral covenants due to the preference of negotiating with a bloc of European countries).

The system is now governed by Articles 64 and 67 of Law 218/95, which in summary provides for automatic recognition and enforcement of decisions through the Court of Appeals when certain prerequisite conditions are met.[15]

II. Recognition and Enforcement of Foreign Judgments that Do Not Fall Under the Brussels Convention or Bilateral Treaties

The main focus of this article pertains to the recognition and enforcement of U.S. judgments in Italy, primarily the law applicable to the third category of judgments mentioned above. The United States is neither a party to a treaty facilitating the mutual recognition of judgments abroad, nor is it a party to the Brussels Convention.[16]

A. Types of Decisions that Can Be Recognized in Italy

Italian courts begin their analysis by determining if a foreign decision can be considered a *sentenza* for the purposes of Law 218/95 and is therefore suitable for recognition.[17] In order to be considered a *sentenza* or "decision" for Italian purposes, it must be issued by a court, institution or judging body entrusted with jurisdictional powers and must create, modify or terminate

15. Law No. 218, art. 64 (Italy), *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 779–80 (1996) (stipulating instances of recognizable decisions, such as foreign cases having proper jurisdiction, proper service on defendant, final judgment; judgment on the merits; and judgment consistent with Italian law and public policy); Law No. 218, art. 67 (Italy), *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 780–81 (1996) (providing that a person may seek enforcement through the Italian Court of Appeals in the district where enforcement is sought so that the court may determine the prerequisites for recognition).

16. *See* Patrick E. Thieffry, *The European Integration and Transnational Disputes*, 388 PRAC. L. INST. 153, 199 (1990) (observing that the United States is not a signatory to the Brussels Convention nor to any bilateral or multilateral treaty facilitating the enforcement of foreign judgments); *see also Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments*, Before the House Comm. on Courts & Intellectual Prop. (2000) (statement of Jeffrey D. Kovar, U.S. Dep't of State, Assistant Legal Advisor for Private Int'l Law), *at* http://www.state.gov/documents/organization/6846.doc (last visited on Oct. 3, 2004) (mentioning that the U.S. is not a party to any convention or bilateral agreement on the recognition and enforcement of foreign judgments); *Recognition and Enforcement of Foreign Money Judgments*, *at* http://www.lectlaw.com/files/bul12.htm (Sept. 1993) (stating that the U.S. is not a party to any international convention governing the recognition and enforcement of foreign judgments).

17. *See also* Lupoi, *Recognition, supra* note 6 (clarifying that the Italian legal system considers foreign any decision handed down by a non-Italian judicial authority or by an adjudicating body shared by two or more foreign states); Dreyfuss, *supra* note 1, at 7–8 (mentioning that foreign courts scrutinize American judgments to decide whether such judgments violate the jurisdiction's substantive or procedural policy). *See generally Green Paper on a European Order for Payment Procedure and On Measures*, ELLIS PUBLICATIONS (E.U.) (Jan. 6, 2003), *available at* 2003 WL 14483463 (insisting that the right to refuse enforcement of a foreign judgment indicates the diversity of national legislation and the ignorance of foreign rules).

rights, capacities or a legitimate interest protected by the foreign law.[18] Italian courts initially verify whether an Italian judge would have issued a *sentenza* in a similar matter under Italian jurisdiction. Therefore, it need not be a formal decision but rather it is evaluated based on its legal effect.

Judgments issued abroad that do not fall within the Italian definition of a judgment will not be recognized in Italy.[19] For example, decisions issued in special proceedings and urgency proceedings will not be recognized in Italy.[20] By their very nature, such judgments are limited

18. Supreme Court (*Cassazione*) n. 2727 (May 12, 1979), *available in* Foro Italiano, vol. I, 1366 (1979); MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE [INTERNATIONAL CIVIL PROCEDURE LAW] 2d ed., Padova, 305 (1954); Carella, *Sentenza civile straniera* [*Foreign civil decision*], *in* ENCICLOPEDIA DEL DIRITTO, XLI, Milan (1989); CAMPEIS, DE PAULI, LA PROCEDURA CIVILE INTERNAZIONALE [INTERNATIONAL CIVIL PROCEDURE], Padua, 416 (1991). Partly dissenting is Attardi, *La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere* [*The new discipline on Italian jurisdiction and recognition of foreign decisions*], in RIVISTA DEL DIRITTO CIVILE [CIVIL LAW REVIEW] 755 (1995) (stating that that the term *sentenza* should be interpreted literally as to include only decisions that in Italy would strictly be called so); Carpi, *Il riconoscimento e l'efficacia delle sentenze straniere* [*Recognition and effectiveness of foreign decisions*], *in* ATTI DEL XXI CONVEGNO DELL'ASSOCIAZIONE ITALIANA FRA GLI STUDIOSI DEL PROCESSO CIVILE [FILES OF THE XXI MEETING OF THE ITALIAN ASSOCIATION AMONG THE STUDENTS OF THE CIVIL PROCEEDINGS], Parma, 1998 (October 11–12, 1996); Consolo, *Evoluzioni nel riconoscimento delle sentenze* [*Evolutions in the recognition of the decisions*], *in* RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [QUARTERLY REVIEW OF LAW AND CIVIL PROCEDURE] 603 (1997); *see also* ENFORCING FOREIGN JUDGMENTS, *infra* note 23 at 138 (stipulating that the foreign court which issued the judgment must have had jurisdiction over the dispute, according to Italian rules of jurisdiction); *see also* Allan T. Marks, *Exchange Control Regulations Within the Meaning of the Bretton Woods Agreement: A Comparison of Judicial Interpretation in the United States and Europe*, 8 INT'L TAX & BUS. LAW. 104, 126–27 (1990) (citing the *Terruzzi* case in which Italian courts refused to enforce a British judgment that would have forced the litigant Terruzzi to breach Italian exchange control regulations). *But see* Kurt H. Nadelmann, Comment, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282, 1285–86 (1969) (invoking the Common Market Convention, which would require Italian courts to enforce judgments rendered at an improper forum).

19. New York Bar Association Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments* (2001), *at* http://www.cptech.org/ecom/jurisdiction/CFCl.rtf (last visited Oct. 3, 2004) (noting the disinclination of Italian law, like other civil law countries, not to recognize or enforce U.S. money judgments due to incompatible concepts of what constitutes an appropriate basis to assert jurisdiction). *See generally* Dreyfuss, *supra* note 1, at 17 (requiring that foreign judgments not infringe on the essential rights of defense and honor the right to prosecute in order to be recognized in Italy). *See generally* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 48, 79 (2002) (citing instances where New York federal courts refused to enforce a foreign arbitration award overturned by an Italian court and deeming Italian judgments as worthier of enforcement than the awards they set aside).

20. *See* E.U. Commission, *Green Paper—Maintenance Obligations*, ELLIS PUBLICATIONS (E.U.) (Apr. 15, 2004), *available at* 2004 WL 61300618 (relating that some states refuse to recognize or enforce foreign judgments and instead commence new proceedings on the merits). *See generally Green Paper on a European Order for Payment Procedure and on Measures*, ELLIS PUBLICATIONS (E.U.) (Jan. 6, 2003), *available at* 2003 WL 14483463 (observing that proceedings among European states tend to diverge widely).

to the proceeding in which they are issued.[21] By the same token, interim decisions cannot be recognized in Italy.[22]

Simply stated, only judgments addressing the merits of a case will be recognized in Italy.[23] All procedural decisions, decisions on evidence, decisions on foreign judgments (other than the ones rendered in the country of origin or in Italy) and interlocutory decisions will not be recognized by the Italian procedure described herein.[24] Foreign decisions on jurisdiction may, however, have a limited effect in Italy.[25]

Article 7 of Law 218/95 states that:

> When in a proceeding a plea of lis pendens is brought concerning an action between the same parties having the same object and the same title, the Italian court may stay the proceeding if it deems that the decision of the foreign court may have an effect in the Italian legal system. If the foreign court declines its jurisdiction or the foreign decision is not recognized under Italian law, the Italian court shall continue the proceeding upon the application of the party concerned.[26]

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21. *See also* Lupoi, *Recognition, supra* note 6, (indicating that Italian courts will not even recognize any decision on the merits albeit with a provisional, interlocutory or temporary character); S. Bariatti, *Notes on Article 64 of Law 218/95*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 1225, n.11 (1995) (noting that in the Brussels Convention, recognition is given to foreign precautionary judgments only on condition that the party has been duly served a judicial act and the decision would be executed after service).

22. *See* Lupoi, *Recognition, supra* note 6, at 350; *see also* Alberto Giampieri & Giovanni Nardulli, *Enforceability of International Documentary Letters of Credit: An Italian Perspective*, 27 INT'L LAW. 1013, 1026 (1993) (citing the European Court of Justice as holding that rules of transnational enforceability do not apply to interim measures granted *inaudita altera parte*).

23. *See* Lupoi, *Recognition, supra* note 6, at 350; *Provisional Measures: Classification and the Trans-Border Context*, *available at* http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/prov_measures_1_en.pdf (last visited on Oct. 3, 2004) (stating that in general, Italian law recognizes only those foreign decisions on the merits). *But see* ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 137 (Ronald A. Brand, ed., 1992) (hereinafter ENFORCING FOREIGN JUDGMENTS) (adding that under certain circumstances, U.S. judgments are not subject to review on the merits in Italy).

24. *See* Bariatti, *supra* note 21, at 1224 (1995). *See generally* ENFORCING FOREIGN JUDGMENTS, *supra* note 23 (addressing the finality of judgment which Italian courts demand, such that they will not accept U.S. judgments for review until the time for appeal has run); *The Sixth Annual International Review of Trademark Jurisprudence*, 89 Trademark Rep. 191, 191 (1999) (noting that Italy recently followed the Community Trade Mark Regulation in passing down an interlocutory decision).

25. *See* Bariatti, *supra* note 22, at 1225. *See generally* Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 693 (2004) (citing judicial observations of foreign courts' increasing transnational interaction with one another); Roberta Ceschini, *Divorce Proceedings in Italy: Domestic and International Procedures*, 28 FAM. L. Q. 143, 147 (1994) (mentioning that the legalized dissolution of marriages—strongly opposed by the Italian Catholic church—between different nationalities will have laws of the country where divorce is easier compared with procedures for recognizing foreign judgments in the other spouse's country).

26. Law No. 218, art. 7 (Italy), *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 766 (1996) (listing the provisions as cited above); *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 23, at 139 (indicating that the Italian legal system does not accept the concept of international lis pendens).

In other words, there are some exceptional cases where a foreign judgment may be recognized in Italy, even though it does not address the merits of a controversy.[27] This recognition, however, would not be the same recognition provided for in Article 64, but a different one, limited to lis pendens purposes only.[28] It is important to highlight that Italian law does not require reciprocity as a condition to recognition and enforcement of judgments.[29]

Complicating the matter further, Italian courts may be required to evaluate a case where a defense on the merits follows the rejection of a jurisdictional defense by the court of first instance in the country where the judgment was rendered.[30] The solution in these cases is straightforward. The Italian courts will first determine if the question on jurisdiction satisfies Italian standards.[31] If it does, the Italian court will only review the decision based on the merits.[32]

B. Article 64 of Law 218/95

Article 64 of Law 218/95 contains the provisions of the law for recognition of foreign judgments:

Foreign judgments shall be recognized in Italy with no need for any further proceeding when all the following requirements are met:

a) The foreign judge rendering the judgment had jurisdiction according to the Italian jurisdiction principles;

b) The defendant was properly served with the document starting the proceeding pursuant to the law in force in the place where the proceeding was held, and the essential rights of defense were not violated;

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27. *See generally* Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters* (Oct. 10, 2001), *available at* http://www.kentlaw.edu/depts/ipp/intl-courts/docs/treaty10_10.pdf (last visited on Oct. 3, 2004) (observing that the second court will suspend proceedings once the prior court has finally rendered judgment in lis pendens controversies).

28. *Compare* Law No. 218, art. 7 (Italy), *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 766 (1996) (stipulating that "[i]f the outcome of a proceeding in an Italian court depends upon the outcome of a proceeding pending before a foreign court, the Italian court may stay its proceeding . . .") *with* Law no. 218, art. 64 (Italy), *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 779–80 (providing that "[a] judgment rendered by a foreign authority shall be recognized in Italy *without requiring any further proceedings* if . . . (f) *no proceedings are pending* before an Italian court . . .") (emphasis added).

29. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 23, at 141 (noting that for a foreign judgment, there is no requirement of reciprocity); *see also* Lupoi, *Recognition, supra* note 6, at 351 (noting that in this respect, Italian recognition and enforcement of foreign judgment policy is quite open, especially when compared with some other countries' policy); *see also* Bonomi, *supra* note 9, at 266 (noting that unlike German or Austrian law, Italian law does not require reciprocity, whereas in France, recognition cannot be denied because the foreign court applied the law of the country where the judgment was rendered, which would not have been applied according to French choice-of-law rules).

30. *See generally* ENFORCING FOREIGN JUDGMENTS, *supra* note 23, at 140 (specifying that Italian courts must review foreign default judgments on the merits, on defendant's application).

31. *See* Anthony Sistilli, *Italy: Enforcement of Foreign Judgments,* 24 INT'L BUS. LAW. 542, 542–43 (1996) (noting that Italian law requires compliance with Italian jurisdictional standards for foreign judgments to be deemed valid).

32. *See* GIANNI NUNZIANTE, ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 156–58 (Charles Platto ed., 1988) (noting that Italian courts will review decisions on the merits in cases of foreign judgments).

c) The parties appeared before the court in accordance with the law in force in the place where the proceeding was held or, otherwise, default was declared in accordance with that law;

d) The judgment became final according to the law in force in the place where it was pronounced;

e) The judgment does not conflict with any final judgment rendered by any Italian court;

f) No proceeding is pending before any Italian court between the same parties and on the same subject matter which was initiated before the foreign proceeding;

The judgment is not contrary to public policy.[33]

In substance, Article 64 contains the whole discipline of the current Italian law of recognition of foreign judgments.[34]

Italian law is applied in cases decided abroad dealing with jurisdiction, right of defense, no prior Italian judgment, lis pendens and public policy.[35] For matters of service, appearance or default, and res judicata, Italian courts will apply the law of the country where the judgment was rendered.[36]

In essence, the new system reverts to the original system in force in Italy in 1865 when foreign judgments were automatically recognized (*ipso iure*).[37] The Code of Civil Procedure of

33. *See* Law No. 218, art. 64 (Italy), *translated in* Reform of the Italian System of Private International Law, 35 I.L.M. 760, 779–80; *see also* Andrea Russo & Robert E. Rains, *The Reform of the Italian System of Private International Law with Particular Regard to Domestic Relations Issues,* 25 N.C. J. INT'L L. & COM. REG. 271, 277–78 (2000) (listing the criteria for recognition of foreign judgments under the new law); *Cassazione Civile Sezione I* (Italian Supreme Court, First Section), May 18, 1995, n. 5451 (unpublished), *translated in* Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 16 (2002) 18 n.79.

34. *See Cassazione* (Italian Supreme Court), n. 543, January 23, 1980, *available in* GIURISPRUDENZA ITALIANA [Italian Caselaw] 1981, Vol. I, 1, 590, 596 (stating that Article 64 determines when a foreign judgment shall be recognized); Dreyfuss, *supra* note 1, at 16 (stating that Article 64 determines when a foreign judgment shall be recognized).

35. *See* Nadine Balkanyi-Nordmann, *Is an Arbitration Award Enforceable if the Same Case Is Pending Elsewhere?,* 56 DISP. RESOL. J. 20, 28 n.30 (2001–2002) (noting application of Italian law to cases decided abroad dealing with lis pendens).

36. *See, e.g.,* Gioe v. Westervelt et al., 116 F. 1017 (S.D.N.Y. 1902) (noting reciprocity of recognition of foreign judgments between the Untied States and Italy).

37. *See* Luzzatto, *Sulla riforma del sistema italiano di diritto internazionale privato e processuale*, in STUDI VITTA 151, 163 (discussing the reform of the Italian system of international private and procedural law); Peter Gottwald, *Principles and Current Problems of Uniform Procedural Law in Europe Under the Brussels Convention,* 1997 ST. LOUIS–WARSAW TRANSATLANTIC L.J. 139, 161 (1997) (noting that the 1995 law changed acceptance of foreign judgments in Italy to *ipso iure*; *see also* Cappelletti, *Il valore delle sentenze straniere in Italia* [*The value of the foreign decisions in Italy*], in RIVISTA DI DIRITTO PROCESSUALE [REVIEW OF PROCEDURAL LAW], Vol. I: 197 (1965); *see also* Ballarino, DIRITTO INTERNAZIONALE PRIVATO [PRIVATE INTERNATIONAL LAW], Padua, 148 (1982); Broggini, *Riconoscimento ed esecuzione dell sentenze civili straniere nel ius commune italiano* [*Recognition and enforcement of the foreign civil decisions in the Italian* ius commune], in RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [PRIVATE AND PROCEDURAL INTERNATIONAL LAW REVIEW] 835 (1993).

1942 changed this system, requiring foreign judgments to be recognized through the *delibazione* proceeding.[38]

III. Legal Concepts in Article 64

A. Jurisdiction (Letter "a")[39]

For a foreign judgment to be recognized in Italy, jurisdiction must be based on the Italian rules of jurisdiction.[40] Article 3 of Law 218/95 sets forth the general rule: Italian jurisdiction exists when the defendant is domiciled or resident in Italy or has an agent entitled to appear in court on his behalf.[41]

Italian jurisdiction also exists in cases set forth by sections 2, 3 and 4 of Title II of the Brussels Convention,[42] even when the defendant is not domiciled in a country which is party to the Brussels Convention (extension of the jurisdiction criterion set forth by the Brussels Convention beyond the scope of the Convention itself) in all cases implying a matter covered by the Convention.[43]

The Brussels Convention applies to civil and commercial matters excluding revenue, customs or administrative matters.[44] The Convention does not apply to matters of status or legal capacity of persons, matrimonial matters, wills and succession, bankruptcy, social security and arbitration.[45]

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38. *See* Cappalli, *supra* note 7, at 863 (noting the requirement of the *delibazione* proceeding under the 1942 Code).

39. *See* Law No. 218, art. 64(a) (Italy), *translated in* 35 I.L.M. 760, *780 (requiring the court that rendered the judgment to have had jurisdiction under Italian law for the judgment to be recognized in Italy).

40. *See* Lupoi, *Recognition, supra* note 6, at 350 (stating the unlikelihood that a foreign judgment would be denied recognition on jurisdictional grounds under the new law); *see also* Bonomi, *supra* note 9, at 265–66 (describing the reasons for requiring that foreign judgments meet the criteria for Italian jurisdiction before recognition in Italy).

41. *See* Law No. 218, art. 64 (Italy), *translated in* Reform of the Italian System of Private International Law, 35 I.L.M. 760, 765 (laying out when Italian courts have jurisdiction over a defendant).

42. *Id.* (extending the jurisdiction of the Italian courts to include parts of the Brussels Convention).

43. *Id.* at 779–80 (noting that a defendant does not have to be domiciled in a country that is party to the convention for Italy's jurisdiction to reach him).

44. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, tit. 1, Sept. 27, 1968, 1972 O.J. (L 299) 32, *translated in* 8 I.L.M. 229, 232 (hereinafter "Convention on Jurisdiction") (stating the scope of the Convention's application); *see also* Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention,* 14 MICH. J. INT'L L. 559, 575–79 (1993) (stating the scope of the applicability of the Brussels Convention and the specific exclusions).

45. *See* Convention on Jurisdiction, *supra* note 44, at 232 (listing matters excluded from the Convention's application).

Title II, section 2 of the Brussels Convention is the most important for the present study because it sets forth a "special jurisdiction" for certain cases.[46]

Of the above-mentioned cases, the most important ones are those providing for the *fori* for contracts and torts.

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46. Article 5

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Contracting State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated.

Article 6 bis

Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.

Jurisdiction over contracts falls under the courts of the country where the obligations arising out of the international contract were performed, should have been performed or shall be performed in the future.[47]

1) Forum for Torts

The proper forum for tort claims has been debated. The Brussels Convention adopts language that supports jurisdiction based upon *where the harmful event occurred*.[48] The traditional interpretation supports jurisdiction in both the court of the country where the damage occurred (i.e., where the consequences are suffered) and the court of the country where the tortious action occurred have jurisdiction.[49] Such is, for example, the interpretation of Article 5, note 3 given by the Court of Justice in the seminal case *Handerlswerkerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*[50]

This type of long-arm provision has been criticized by scholars (non-Europeans in particular).[51] One recently reviewed the provision—Article 5, note 3 of the Brussels Convention, referred to as "*the long-arm provisions of the Brussels Convention*"—concluding it would not be acceptable in the U.S. system.[52] For an analysis recognizing a U.S. judgment in which the juris-

47. *See* P. JENARD, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59), *reprinted in* ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 329, 351 (1987) (stating that contract jurisdiction lies solely in the country where the obligation was or is to be performed).

48. *See* Convention on Jurisdiction, *supra* note 44 (stating that jurisdiction in tort claims is predicated upon where the injury occurred).

49. *See* Comment, *Italy; Unfair Competition—Jurisdiction: Italian Court Has Jurisdiction Under Brussels Convention Over UK Defendant Spreading Damaging Rumors in UK About Italian Plaintiff*, EUROPEAN INTELLECTUAL PROP. REV. 16(2), D30 (1994) (showing jurisdiction in Italy, where the economic damages resulting from the alleged tort were suffered).

50. Case 21/76, Handerlswerkerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735 (1976) (holding that, where the tort and the injury resulting from the tort occur in two different countries, plaintiff can choose to file suit in either forum); *see also* Daniel Arthur Laprès, *Of Yahoos and Dillemmas*, 3 CHI. J. INT'L L. 409, 417 (2002) (pointing out that plaintiff can sue in either the country where the harmful act itself occurred, or where the effects of the harmful act occurred).

51. *See* Russell J. Weintraub, *Negotiating the Tort Long-arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1276–77 (1998) (concluding that U.S. courts will not augment their jurisdictional reach despite the existence of a long-arm provision in a convention); *see also* GIUSEPPE CAMPEIS & ARRIGO DE PAULI, LA PROCEDURA CIVILE INTERNAZIONALE 313 (2d ed. 1996) (discussing the procedural rules); *see also* Luigi Paolo Comoglio, *Preclusioni Istruttorie e Diritto alla Prova* [*Evidence Foreclosures and the Right to Evidence*], 53 RIVISTA DI DIRITTO PROCESSUALE [PROCEDURAL LAW REVIEW] 968, 979 (1998) (providing the rules regarding the right to evidence).

52. *See* Weintraub, *supra* note 51, at 1281 (concluding that the United States is opposed to recognizing treaty provisions extending the jurisdiction of foreign courts). *See generally* Asahi Metal Indust. Co. Ltd. v. Super. Ct. of Cal., 480 U.S. 102, 115 (1987) (stating that "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting))).

diction was based on this provision of the Brussels Convention, see part V.H. *infra*: Bari Court of Appeals May 11, 2000 on Jurisdiction and Service of Process.[53]

2) Agreement of the Parties

When the matter does not fall within the generic rule set forth by Article 3, Article 4 states that the parties may agree to submit all their controversies to a specific jurisdiction but they must be in writing and only cover claims concerning disposable rights.[54] The defendant also accepts jurisdiction by appearing at the first hearing without challenging jurisdiction.[55]

Issues related to jurisdiction become particularly complicated when:

a) The parties agreed to submit controversies arising out of a contractual relationship to a particular court that sits in a country other than Italy or the country where the judgment was rendered;

b) Litigation is brought in the country where the judgment was rendered;

c) The court in such country reviews the jurisdiction clause agreed by the parties and finds it invalid;

d) And the court decides the controversy.

In such a case, an Italian judge may:

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53. *See* Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L., 115 F. Supp. 2d 367, 369 (S.D.N.Y. 2000) (noting that the Court of Appeals in Bari, Italy, enforced the plaintiff's U.S. judgment, allowing him to obtain relief against defendant); *see also* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice On International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 351 n.81 (2004) (citing a case in which Italy enforced a U.S. judgment concerning a contract claim where performance was exclusively in Italy).

54. Cass., 22 Mar. 2000, n. 3365, Foro It. I, *reprinted in* MASSIMARIO DEL FORO ITALIANO [ITALIAN COLLECTION OF MAXIMS] (2000) (discussing the American notion of default judgment); *see* Convention on Jurisdiction, *supra* note 44 (stating that Italian courts have jurisdiction in cases where the parties have agreed to such jurisdiction in writing).

55. *See* Aldo Attardi, *La Nuova Disciplina in Tema di Giurisdizione Italiana e di Riconoscimento delle Sentenze Straniere* [*The New Discipline on Italian Jurisdiction and the Recognition of Foreign Decisions*], 6 RIVISTA DI DIRITTO CIVILE [CIVIL LAW REVIEW] 727, 763 (1995) (discussing the moment that Italian law applies to a judgment and the role of foreign law prior to the determination of a judgment); *see also* Broggini, *Riconoscimento ed Esecuzione dell Sentenze Civili Straniere nel ius Commune Italiano* [*Recognition and Execution of the Foreign Civil Decisions in the Italian* Ius Commune], RIVISTA 848 (1993) (noting that a judgment must be conclusive in order to be recognized); Andrea Carlevaris, *L'Accertamento Giudiziale dei Requisiti per il Riconoscimento delle Sentenze Straniere* [*The Judicial Ascertainment of the Requisites for the Recognition of Foreign Decisions*], RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [PRIVATE AND PROCEDURAL INTERNATIONAL LAW REVIEW] 82 (2002) (examining the nature of the foreign judgment); Claudio Consolo, *Il Ruolo del "Giudicato Formale" Quale Requisito per il Riconoscimento delle Sentenze Straniere* [*The Role of the Formal Final Judgment for the Recognition of the Foreign Decision*], 4 RIVISTA DI DIRITTO PROCESSUALE [PROCEDURAL LAW REVIEW] 1074, 1074 (1991) (explaining the criteria for the recognition of foreign judgments); European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5, 8 I.L.M. 229, 235 (1969) (stating that a court of the contracting state will have jurisdiction if the defendant appears before it and does not challenge jurisdiction).

a) Review the jurisdiction clause agreed by the parties;[56]

b) Decide that such clause is fully valid and that therefore the court in the country where the judgment was rendered should have dismissed the case for lack of jurisdiction;[57]

c) Deny recognition to the foreign judgment for lack of jurisdiction.[58]

Such decision pattern becomes troubling when the court in the decision country of origin decides to consider the jurisdiction clause agreed by the parties to be null because of *forum non conveniens*.[59]

For precautionary measures, Italian courts shall have jurisdiction in two cases: when the measure is to be put into execution in Italy[60] as well as when Italian courts have jurisdiction on the merits.[61]

3) Summary

In summary, Italian courts have jurisdiction when:

- In general, the defendant has its domicile or residence in Italy;[62]
- For contracts, the obligation arising from the contract must be performed in Italy;[63]

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56. *See* Law No. 218, art. 64 (Italy), *translated in* 35 I.L.M. 760, 779–80 (1996) (setting out the circumstances in which a foreign judgment will be recognized by Italian courts).

57. *Id.*

58. *Id.* (explaining the specific circumstances under which foreign judgments will be recognized by Italian courts).

59. *See* Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 622 (2003) (acknowledging that a court invoking the doctrine of *forum non conveniens* to deny jurisdiction may be inhibiting the current system in force within the European Community).

60. *See* Law No. 218, art. 10 (Italy), *translated in* 35 I.L.M. 760, 767 (1996) (citing circumstances in which Italian courts will have jurisdiction in the area of precautionary measure). *E.g.,* Stefania Bariatti, *Riforma del Sistema Italiano di Diritto Internazionale Privato,* 4 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [PRIVATE AND PROCEDURAL INTERNATIONAL LAW REVIEW] 1221, 1229 (1995) (noting that the solution adopted by the Brussels Conventions considers the effects of the decisions more than the object of the claim (*petitum*) and the reason for the claim (*causa petendi*)).

61. *See* Law No. 218, art. 3 (Italy), *translated in* 35 I.L.M. 760, 767 (1996) (stating that Italian courts have jurisdiction in cases where the merits are also within their jurisdiction).

62. Cass., 5 May 1989, n. 2102, *reprinted in* RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [PRIVATE AND PROCEDURAL INTERNATIONAL LAW REVIEW], 177 (1991) (concerning the evaluation of Italian and American law in their entirety); *see also* Law No. 218, art. 3 (Italy), *translated in* 35 I.L.M. 760, 765 (1996) (explaining that jurisdiction of Italian courts covers not only defendants domiciled or residing in Italy, but who have representatives in Italy who can appear in court on their behalf).

63. Cass., 24 Nov. 1989, n. 5074, Giur. It. 1990, I. 926 (concerning the public policy to be applied). *See generally* European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5, 8 I.L.M. 229, 232–33 (1969) (stating that a defendant may be sued in the court of the country where the contract was or is to be performed).

- In torts, the event giving rise to a tort occurred in Italy;[64]
- For immovable goods, the claim concerns an immovable good located in Italy;[65]
- For precautionary measures, the measure must be put into execution in Italy;[66]
- In case there is a written agreement, the parties agreed on Italian jurisdiction;[67]
- If there is more than one defendant, at least one defendant is domiciled in Italy.[68]

A U.S. judgment will be considered to have been rendered according to "Italian rules of jurisdiction" when:

- In general, the defendant in the case has its domicile or residence in the U.S.;[69]
- For contracts, the obligation arising from the contract must be performed in the U.S.;[70]
- In torts, the event giving rise to a tort occurred in the U.S.;[71]
- For immovable goods, the claim concerns an immovable good located in the U.S.;[72]

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64. *See generally* European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5, 8 I.L.M. 229, 232 (1969) (asserting that a defendant may be sued in the court of the country in which the injury took place).

65. *See* Law No. 218, art. 5 (Italy), *translated in* 35 I.L.M. 760, 766 (1996) (stressing that Italy has no jurisdiction over actions concerning immovable property situated outside of the country).

66. *Id.* (declaring that Italian courts have jurisdiction over provisional measures that are to be enforced in Italy).

67. *Id.* (stating that Italian courts have jurisdiction in cases where the parties have agreed to such jurisdiction in writing).

68. *See* European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 6, 8 I.L.M. 229, 233 (1969) (maintaining that, in cases involving multiple defendants, a defendant may be sued in the country where any one of the defendants is domiciled).

69. *See* Angela Maria Romito & Charles Sant 'Elia, *CISG: Italian Court and Homeward Trend*, 14 PACE INT'L L. REV. 179, 182 (2002) (citing that Italian law has established rules of jurisdiction which take into account the domicile of the defendant).

70. *See* 1968 Brussels Convention, *supra* note 4, at art. 5(1), 1972 O.J. (L 299) (stating that one who is domiciled in a contracting state may be sued in another contracting state in contractual matters in the courts where the obligation was performed). *See generally* C.G.J. Morse, International Shoe v. Brussels and Lugano*: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999, 1005–06 (1995) (discussing the main principles and features of the Brussels Convention).

71. *See* 1968 Brussels Convention, *supra* note 4, at art. 5(3), 1972 O.J. (L 299) (providing that one who is domiciled in a contracting state may be sued in another contracting state in matters involving tort claims in the courts where the wrong occurred); *see also* Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 693–95 (1999) (elaborating upon both the textual and expansive interpretations of specific jurisdiction in tort cases as set forth under Article 5(3) of the Brussels Convention).

72. *See* 1968 Brussels Convention, *supra* note 4, at art. 16(1), 1972 O.J. (L 299) (articulating that proceedings involving immovable property will take place in the forums where the property is located). *See generally* Peter Gottwald, *Principles and Current Problems of Uniform Procedural Law in Europe Under the Brussels Convention*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 139, 150–51 (1997) (assessing various interpretations of exclusive jurisdiction for tenancies of immovable property under Article 16(1) of the Brussels Convention).

- For precautionary measures, the measure must be put into execution in the U.S.;[73]
- In case there is a written agreement, the parties agreed on the U.S. jurisdiction;[74]
- If there is more than one defendant, at least one defendant is domiciled in the U.S.[75]

While Italian courts validate jurisdiction based on Italian law, they are not empowered to determine whether a foreign judge had jurisdiction according to its own law.[76]

Therefore, foreign decisions issued on the merits that survive jurisdictional challenge and become final cannot be litigated a second time in Italy (and presumably cannot be litigated a second time in the country in which it was rendered as well).[77]

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73. *See* 1968 Brussels Convention, *supra* note 4, at art. 24, 1972 O.J. (L 299) (declaring that courts of a contracting state may be applied to for protective measures); *cf.* Lawrence W. Newman & Michael Burrows, *Lessons from English "Mareva" Injunctions*, N.Y.L.J., Aug. 19, 1998, at 3 (noting that Article 24 of the Brussels and Lugano Conventions entertains requests for provisional as well as precautionary relief).

74. *See* 1968 Brussels Convention, *supra* note 4, at art. 17, 1972 O.J. (L 299) (codifying the rule which confers exclusive jurisdiction to the courts of a contracting state to settle disputes which arise between parties who have a written agreement or an oral agreement that is evidenced by writing). *See generally* Brand, *supra* note 71, at 699–700 (referring to Article 17 of the Brussels Convention in a discussion of jurisdiction in disregard of a choice of forum clause between the parties of an agreement).

75. *See* 1968 Brussels Convention, *supra* note 4, at art. 6, 1972 O.J. (L 299) (stating that in cases in which there are multiple defendants, a defendant domiciled in a contracting state may be sued in the courts where any of them is domiciled); *see also* Michael Cordera, Note and Comment, *E-Consumer Protection: A Comparative Analysis of EU and U.S. Consumer Protection on the Internet*, 27 RUTGERS COMPUTER TECH. L.J. 231, 235–37 (2001) (citing Article 17 of the Brussels Convention in a comparison between the rules of jurisdiction of the European Union and those of the United States).

76. *See* Law No. 218, art. 12 (Italy), *translated in* Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 765 (providing that Italian law governs all civil proceedings brought before Italian courts); *see also* Celia Wasserstein Fassberg, *Rule and Reason in the Common Law of Foreign Judgments*, 12 CAN. J. L. & JURIS. 193, 194–202 (1999) (revealing that courts cannot review the procedure or the substance of foreign judgments even if a different end would have been reached under its own law or under the law of the foreign forum); *cf.* Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems*, 45 KAN. L. REV. 9, 39–40 (1996) (highlighting that pursuant to the Brussels Convention, a court which is addressed for recognition and enforcement of a foreign judgment is not permitted to validate whether the original court had jurisdiction).

77. *See* Law No. 218, art. 64(1)(d) (Italy), *translated in* Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 779–80 (expressing that a foreign judgment which "became final according to the law in force in the place where it was pronounced" will be recognized in Italy without requiring further proceedings); *see also* Matthew Goode, *The Tortured Tale of Criminal Jurisdiction*, 21 MELB. U. L. REV. 411, 447–48 (1997) (citing a case in which an Englishman who was convicted of a crime and imprisoned in Italy could not subsequently be prosecuted in England or forced in other ways to bear the consequences of the Italian judgment); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 262 (2000) (positing that the principle of double jeopardy in Italy prevents a case which has been finally decided from being reopened or subjected to any revision).

B. Service and Right of Defense (Letter "b")[78]

1) Service

The purpose of this section is twofold: it concerns both the service of the complaint and the right of defense.[79] The first prong of the rule is quite straightforward: service of the complaint (or of whatever different act formally starts the proceeding abroad) to the debtor must be done in compliance with the foreign rules concerning service of process.[80] The law does not require the complaint to be written in the language where the service is affected.[81]

2) Right of Defense

The part of the provision addressing the right of defense has generated much more speculation and investigation on the exact meaning and range of the rule.[82] Preliminarily, it must be emphasized that the right of defense includes different but analogous concepts that may be synthesized in right of defense *tout court*, procedural public policy and adversary process.[83]

The purpose of this section is obviously not to have the Italian court verify whether the foreign court applied the Italian rules of procedure, which would be pointless, but rather to

78. *See* Law No. 218, art. 64(1)(b) (Italy), *translated in* Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 780 (stating that a foreign judgment is recognized in Italy if a defendant was properly served pursuant to the laws of the place in which the proceedings took place and if there was compliance with the fundamental rights of the defense).

79. *Id.* (establishing that the dual purposes of service of process and the fundamental rights of the defense are encompassed in Article 64(b) of Law No. 218/95).

80. *Id.* (indicating that the first prong of the rule requires a defendant to receive proper service of process under the law of the country in which the proceedings shall occur); *see also* Dreyfuss, *supra* note 1, at 16–17 (reiterating that service of process pursuant to Article 64 of Law No. 218/95 must comply with the provisions of the law of the country in which the proceeding ensued). *See generally* Russo &. Rains, *supra* note 33, at 277–78 (interpreting the criteria set forth in Article 64).

81. *See* Law No. 218, art. 71 (Italy), *translated in* Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 782 (enumerating the requirements of proper service of foreign documents under Italy's Law No. 218/95); *cf.* Hague Convention, Nov. 15, 1965, art. 15, *available at* http://hcch.evision.nl/index_en.php?act=conventions.pdf&cid=17 (last visited Oct. 3, 2004) (demonstrating that the provision of the Hague Convention, to which Italy adheres, regarding service of process abroad lacks language requirements); *cf.* Julie C. Ferguson & David A. Pearl, *Practicing Law in the Americas: The New Hemispheric Reality*, 13 AM. U. INT'L L. REV. 953, 954–56 (1998) (commenting that Rule 4(f) of the Federal Rules of Civil Procedure of the United States which provides for service of process abroad does not set forth any criteria pertaining to the language of the complaint).

82. *See* Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145, 154 n.40 (1995) (suggesting that the definition of the right of defense has been subject to interpretation).

83. *See Survey on Foreign Recognition of U.S. Money Judgments*, *at* http://www.cptech.org/ecom/jurisdiction/CFCL.rtf (last visited Oct. 3, 2004) (reporting the importance of public policy considerations when determining whether Italy will recognize a foreign judgment); *see also* Dreyfuss, *supra* note 1, at 26–27 (recognizing the close linkage among the principle of an adversarial process, Italian public policy, and the essential rights of defense encompassed by Law No. 218).

check if the foreign rules of procedure in fact guarantee a fair trial and respect the basic rights of defense of the parties.[84] The textual analysis of this section marks out the word "essential": only the essential rights of defense must be preserved and guaranteed.[85]

No formal standard governs whether the infringement of a right of defense is to be considered essential, and thus the determination is left to the discretion of the Italian courts, and to the scholars' elaboration.[86] Both courts and scholars have by and large relied on a broad concept of right of defense.[87]

3) Procedural Public Policy

Scholars and courts have tried to define the right of defense by making reference to the so-called *procedural public policy* (*ordine pubblico procedurale*), which is deemed to consist of a minimal set of procedural rules that must always be followed.[88] Procedural public policy, in general, includes principles that constitute inalienable values according to the Italian system.[89]

The Court of Cassation, in its decision in the matter of *Emilianauto S.p.a. v. Bicketts Solicitors*,[90] stated that the right of defense constitutes an expression of Italian procedural public policy.[91] A foreign procedural law:

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84. *See* Bar of the City of New York, Symposium, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 171 n.23 (asserting that foreign courts will typically recognize American judgments as long as there is evidence that the defendant received a fair hearing in court and that the judgment is in accordance with public policy); *see also Survey on Foreign Recognition of U.S. Money Judgments*, *at* http://www.cptech.org/ecom/jurisdiction/CFCL.rtf (last visited on July 31, 2001) (finding that under Italian law, pains are taken to assess whether a foreign court has followed its rules pertaining to service and notice to ensure that their provisions satisfy Italian due process requirements).

85. *See* Dreyfuss, *supra* note 1, at 17 (demonstrating the significance of the term "essential" in Law No. 218); *see also id.* at 16 (citing Article 64(1)(b)).

86. *See* Dreyfuss, *supra* note 1, at 25 (proposing that "there is no formal standard that governs whether an infringed right of defense is essential," therefore Italian courts must exercise their discretion in making this determination). *See generally* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 460 (2004) (implying that Italian courts and specifically, Italian judges, are the guarantors of due process of law).

87. *See* Dreyfuss, *supra* note 1, at 25 (acknowledging that the Italian court has to use its judgment in dealing with the right of defense).

88. *See* Gustavo Carvajal Isunza & Fernando Gonzalez Rojas, *NAFTA Chapter 11: Evidentiary Issues in NAFTA Chapter 11 Arbitration: Inquiring the Truth Between States and Investors Under NAFTA Chapter 11*, 3 ASPER. REV. INT'L BUS. & TRADE L. 121, 125–27 (2003) (affirming that procedural public policy involves the equal treatment of parties in their ability to present their cases fairly).

89. *See* Steven M. Wise, *Hardly a Revolution–The Eligibility of Nonhuman Animals for Dignity–Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 858 (1998) (clarifying that Article 2 of the Italian Constitution includes the inalienable rights of men).

90. *See* Dreyfuss, *supra* note 1, at 17, n.79 (citing *Emilianauto S.P.A. v. Bicketts Solicitors* as a case where the court held that public policy included both the procedure and the content of foreign judgments, and that both must maintain the right of defense).

91. *Id.* at 17 (commenting that Italian procedural policy includes the assurance of the right of defense).

> is not incompatible with Italian public policy when it fully honors the essence of the adversary process principle. In this respect it bears repeating that Italian public policy, with which foreign judgments must comply for the purpose of a decree of enforceability in Italy, consists not so much in the individual rules of the Italian legal system, but in the concepts that inspire the legal system and, more precisely, consists in the fundamental principles recognized by the legislature to be necessary conditions for the very existence of society. And in this light it is clear that compliance with the adversary process principle is not to be determined by a passive comparison of the foreign rules with those of the Italian procedural system, but rather by the requirement that the foreign proceeding substantially guaranteed the parties an adequate opportunity to be heard.[92]

Many of the principles that constitute the procedural public policy are expressed in the Italian Constitution (*Costituzione*, mentioned above).[93] Article 24 of the Constitution states that a defense is an inalienable right and that any defendant, regardless of financial means, shall receive counsel to defend his cause in court.[94] It includes the right to be heard in all stages of a proceeding, whether at the trial level or on appeal.[95] However, the Constitution does not require the exercise of this right to be governed in an identical manner for all procedures and in

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92. *See* Russo & Rains, *supra* note 33, at 277–78 (discussing how Article 64 of the Italian Constitution sets the standard for recognition of foreign judgments in Italy).

93. *See* The Constitution of the Italian Republic, Italy Const. art. 2–28, *available at* http://www.oefre.unibe.ch/law/icl/it00000_.html (last visited Oct. 4, 2004) (detailing the rights of the Italian citizen); *see also* Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 344 (1996) (declaring that the Italian Constitution includes many fundamental human rights). *See generally* Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 312 (2003) (discussing that the Italian Constitution demonstrates an understanding of basic rights).

94. *See* Racc. uff. corte cost., 2 Feb. 1982, Guir. It. I982, I, 965, 984 (stating that the right to prosecute and defend an action arises mainly from Article 24 of the Constitution); *see* The Constitution of the Italian Republic, Italy Const. art. 24 *available at* http://www.oefre.unibe.ch/law/icl/it00000_.html (last visited Oct. 4, 2004) (displaying that Article 24 of the Italian Constitution gives the Italian citizen the right to judicial actions); *see also* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 263 (1992) (emphasizing that Article 24 of the Italian Constitution guarantees the right to assert legal claims to all people). *See generally* Richard B. Bilder & Andrea Bianchi, *Saverio De Bellis' L'immunita Delle Organizzazioni internazionali Dalla Giurisdizione*, 88 AM. J. INT'L L. 212, 213 (1994) (book review) (establishing that Article 24 of the Italian Constitution guarantees the protection of individual rights in the judicial process).The Corte Costituzionale has stated that the right to prosecute and defend an action arises mainly from Article 24 of the Constitution.

95. This right is stated in the second section of Article 24 of the Constitution. *See* Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 879 (2004) (explaining that the Corte Costituzionale, the Italian Constitutional Court, deemed the right to defense at every stage of trial to be a crucial right). *Accord* Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L.J. 467, 512–13 (1999) (expressing that Article 14 of the Mexican Constitution includes the right to be heard).

all procedural stages.[96] The meaning of the rule is rather that the right of defense must never be significantly impaired.[97]

The Italian Constitutional Court has stated that the Court of Appeals, when deciding a case for recognition of a foreign judgment, must check whether the foreign proceeding abided by the essential rights to pursue and oppose an action for the protection of the interests of an individual, which is considered one of the "supreme principles of the constitutional system."[98]

This kind of procedural public policy has been also referred to as "constitutional procedural law."[99]

Scholars have also rejected adoption of foreign judgments found to be fraudulent (due to a deliberate deception on the part of the judge or of the counterpart).[100]

One scholar thinks that the foreign judgment should be rejected if based on false evidence which the debtor did not know was false at the time of the proceeding, or when new, decisive documents are found after the decision is issued.[101]

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96. *See* Racc. uff. corte cost., 29 July 1982, n.160, Guir. It. 1982, I, 537, 539; *see* Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 275 (1995) (finding that judges are expected to be consistent and predictable in their decisions).

97. *See* Vigoriti Cappelletti, *I diritti Costituzionali delle Parti nel Processo Civile Italiano* [*Constitutional Rights of the Parties to an Italian Civil Law Trial*], 26 RIVISTA DI DIRITTO PROCESSUALE (R.D.P.) 604, 622 (1971); Pizzi & Montagna, *supra* note 86, at 431 (illustrating that the Italian Parliament mandated that the right to the adversarial system was guaranteed to all defendants).

98. *See* Racc. uff. corte cost., 2 Feb. 1982, n.18, Guir. It. I982, I, 1, 965; s*ee* VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 12:22 (2004) (maintaining that in Italy, recognition of foreign judgments is under the control of the Code of Civil Procedures and that one of the requirements is that the right to be heard must be preserved); *see also* Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341–42 (1993) (indicating that in Italy, the requirements for recognition of foreign judgments can be found in Article 797 of the Code of Civil Procedure).

99. *See* Dreyfuss, *supra* note 1, at 18 n.80 (explaining the meaning of Italian "constitutional procedural law" (citing Lugi Paolo Comglio, *Valori etici e Ideologie del "Giusto Processo" (Modelli a Confronto)* [*Ethical Values and Ideologies of the Just Proceedings (Comparison between Models)*]; 52 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 887 (R.T.D.P), 896–97 (1998))).

100. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987) (noting that in the United States, courts do not need to recognize judgments of foreign courts if these judgments are obtained by fraud); *see also* Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 149 (2001) (proclaiming that foreign judgments are enforced when no evidence is found of fraud in obtaining said judgment). *But see* Christopher P. Hall & David B. Gordon, *Enforcement of Foreign Judgments in the United States*, 10 INT'L L. PRACTICUM 57, 59 (1997) (commenting that challenges to foreign judgments based on fraud are very uncommon and only occur when a defendant does not have the opportunity to defend himself or herself).

101. *See* Claudio Consolo, *Il Ruolo del Guidicato Formale Quale Requisito per il Riconoscimento delle Sentenze Straniere* [*The Role of the Formal Final Judgment for the Recognition of the Foreign Decision*], *in* RIVISTA DEL DIRITTO PROCESSUALE (R.D.P.) 1074 (fasc. 4 1991); *see also* Federico Carpi, *Il Riconoscimento e L'Efficacia delle Sentenze Straniere* [*Recognition and Effectiveness of Foreign Decisions*], *in* RIVISTA DEL DIRITTO PROCESSUALE (R.D.P.) 981–98 (fasc. 4 1997); Simeone, *supra* note 98, at, 360 (outlining that in Italy, defendants can make motions to re-examine their cases if the foreign judgment was based on false documentary evidence).

Another question focuses on whether reasoning is always necessary as a component of procedural public policy. The *Corte di Cassazione* has stated that while Article III, first paragraph, of the Italian Constitution[102] requires that judgments be accompanied by a reasoning, "this requirement is a peculiarity of the Italian system and is not to be included in the public policy requisites needed for recognition and enforcement of foreign judgments."[103] This decision has been confirmed by another very recent decision of the Court of Cassation, which specified that lack of reasoning in the foreign judgment is not an impediment to recognition and enforcement in Italy.[104] The same decision has gone even further, stating that errors in foreign judgments are not impediments to recognition. Scholars do not agree on this point (see comment under III.G. *infra*).[105]

Procedural public policy also requires that the defendant be given a reasonable time to appear before the court. The reasonableness of such term will be evaluated by the Italian judge independently of both the foreign rules and the Italian rules.[106]

4) Adversary Process Principle

Moreover, the *principio del contraddittorio* contributes towards outlining the right of defense and can be considered as a subcategory of the right of defense.[107] The real meaning of *principio del contraddittorio* is not easy to translate. It has been referred to as right to an adver-

102. *See* Italy Const. (The Constitution of the Italian Republic) art. 111 (presenting the rules for administering trials), *available at* http://www.oefre.unibe.ch/law/icl/it00000_.html (last visited Oct. 4, 2004); *see also* Pizzi & Montagna, *supra* note 87, at 460–62 (reviewing the due process reforms to Article III of the Italian Constitution).

103. *See* Dreyfuss, *supra* note 1, at 25 (explaining the holding of the court in S.p.A. Emilianauto v. Bicketts Solicitors, Cass. civ., sez. I, 18 May 1995, n.5451 (unpublished)); Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 351–52 (1994) (reiterating that while the Italian courts require explanations for their decisions, American courts require only general verdicts); *see also* Rachel A. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 11 EMORY INT'L L. REV. 419, 447 (1997) (remarking that Article III of the Italian Constitution requires that reasons must be included in legal proceedings).

104. *See* Cas. Civ. sez. I, 25 June 2002, n.9247 (unpublished) (holding that a lack of reasoning by a foreign court does not mean Italy will not recognize the judgment); Dreyfuss, *supra* note 1, at 25 (showing that while the Italian Constitution states there must be reasoning supporting courts' decisions, this requirement does not need to be present in order to recognize any foreign judgments).

105. *See generally* J. Noelle Hicks, Note, Andrew P. Vance Memorial Writing Competition Winner Facilitating International Trade: *The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOKLYN J. INT'L L. 155, 174 (2002) (citing a German court that refused to enforce an American judgment because it violated German public policy in failing to explain the reasoning behind the decision).

106. *See* Cass. civ., sez. I, 5 June 1985, n. 3354 (unpublished) (noting that the Italian judge decides how long a defendant has to appear before the court). *See generally* Felix D. Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT'L & COMP. L.J. 55, 66 (1999) (commenting that a court can refuse to enforce a foreign judgment, even when the foreign court clearly maintains jurisdiction, if the decision violates the state's public policy and fundamental concepts of justice).

107. *See*, *e.g.*, Constituzione [Constitution] art. 24(2) (providing a defendant with the a guaranteed right of defense), Int'l Constitutional Law, *available at* http://www.oefre.unibe.ch/law/icl/it00000_.html (last visited on May 31, 2003).

sarial proceeding[108] or right to confrontation. Perhaps the best definition would be "the right to confront your adversary."

Article III of the Constitution states that any proceeding must be carried out with impartiality and in the discussion of the parties before an impartial judge.[109] The *principio del contraddittorio* is considered one of the fundamental guarantees underpinning Italian civil procedure.[110] In its basic formulation, we could say the principle is composed of a set of rules guaranteeing:

> a) The dialectic and interplay between litigants throughout the course of the proceeding[111] and
>
> b) The equality of the parties.[112]

As far as the dialectic is concerned, the parties must have the right to challenge the factual and legal bases of the claims advanced against them and formulate affirmative defenses, as well as present contrary evidence.[113] According to the principle, every stage of the proceeding must be structured in such a way that the parties have an opportunity to advocate their respective positions and to pursue an active participation in the proceeding.[114] The right to be informed is part of this principle as well.[115]

The law in this regard has not changed under 218/95.[116] The Milan Court of Appeals confirmed this point when it stated that a judgment rendered in Iowa was recognizable in Italy

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108. *See* Dreyfuss, *supra* note 1, at 18–19 (referring to *principio del contraddittorio* as the adversary process principle).

109. *See*, *e.g.*, Constituzione [Constitution] art. 111 (listing the provisions for legal proceedings in Italy), Int'l Constitutional Law, *available at* http://www.oefre.unibe.ch/law/icl/it00000_.html (last visited on May 31, 2003).

110. *See* Dreyfuss, *supra* note 1, at 18–19 (identifying the *principio del contraddittorio* as one of the fundamental bases of civil procedure in Italy).

111. *Id.* at 19 (describing the adversary process as establishing an arena in which parties can interact and engage in logical debate).

112. *Id.* (concluding that the adversary system in Italy allows both parties to have equal opportunities of winning a favorable outcome from the court); *see also* Grande, *supra* note 77, at 237 (asserting that equal treatment of the parties in the adversarial process permits a fact finder to ascertain the truth).

113. *See* Dreyfuss, *supra* note 1, at 19 (maintaining that the adversarial process guarantees the right to contest testimony and evidence, assert affirmative defenses, and produce opposing evidence); *see also* Pizzi & Montagna, *supra* note 86, at 430–31 (noting a change in the Italian Constitution in 1999 that ensured defendants' right to confront and cross-examine testimony against them).

114. *See* Mauro Cappelletti & Vincenzo Vigoriti, *I diritti costituzionali delle parti nel processo civile italiano*, 26 RIVISTA DI DIRITTO PROCESSUALE (RIV. DIR. PROC.) 604, 634 (1971); *see also* Dreyfuss, *supra* note 1, at 15 (reporting that the Italian Constitution maintains that a party be guaranteed a right to be heard throughout all stages of a legal proceeding).

115. *See* Grande, *supra* note 77, at 257 (pointing out the changes in Article III of the Italian Constitution that ensured a defendant at a criminal trial the right to be informed of the charges against him as soon as possible).

116. *See* Dreyfuss, *supra* note 1, at 15 (citing Law No. 218, passed on May 31, 1995, as the source of Italy's statutory scheme for acknowledging and enforcing foreign judgments).

and rejected the argument that the requests for admissions effected in Iowa were in contrast with the *principio del contraddittorio* and in general with Italian public policy.[117]

The Milan Court of Appeals rejected this argument, highlighting that the requested party had in fact a reasonable period of time to submit a defense by providing written denials.[118]

5) Role of the Italian Constitutional Court in Defining the Right of Defense, the Procedural Public Policy and the Adversary Process Principle

The Italian Constitutional Court has helped define the effective meaning of these principles in a number of decisions.[119] It has been noted that such *modus operandi* of the *Corte Costituzionale* is somehow similar to the pivotal role played by the American courts, which, with their decisions, have defined the meaning of the Due Process Clause set forth by the Fifth and Fourteenth Amendments of the U.S. Constitution.[120]

The court created a series of specific procedural guarantees.[121] For example, it stated that the adversary process principle includes the court's duty to base its decision on evidence submitted by the parties.[122] The right to present evidence, the court stated, is guaranteed by the Constitution and must be safeguarded at each stage of the proceeding.[123] The court also enunciated that statutes which place unreasonable limitations on the proof of relevant facts are to be considered at odds with the adversary process principle. Moreover, the court ruled that the

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117. *See* Mercy Hosp. Med. Ctr. and Iowa Heart Ctr. P.C. v. Deutsche Bank Leasing S.p.A., corte app. Milan, 24 May 1996 (unpublished); *see also* Dreyfuss, *supra* note 1, at 26 n.146 (describing the Milan Court of Appeals decision to uphold a judgment from an Iowa court because the Iowa procedural rules did not violate the Italian principle of adversarial process).

118. *See* Mercy Hosp. Med. Ctr. and Iowa Heart Ctr. P.C. v. Deutsche Bank Leasing S.p.A., corte app. Milan, 24 May 1996 (unpublished); *see also* Dreyfuss, *supra* note 1, at 26 n.146 (noting that the Milan Court of Appeals upheld the Iowa court judgment specifically because, as the Italian system of adversarial process requires, the defendant had been provided with sufficient time to present a defense via written denials).

119. *See* Dreyfuss, *supra* note 1, at 20 (stating that there have been numerous decisions which the Italian Constitutional Court has used to develop the broad principles of the Italian Constitution).

120. *Id.* (comparing the Italian Constitutional Court providing meaning to the broad procedural rights set forth by the Italian Constitution through numerous decisions to the role of American courts in developing the constitutional right of due process).

121. *Id.* at 21 (asserting that the Constitutional Court used Article 24 of the Italian Constitution to create guarantees within the various proceedings that protect the principles of the adversarial process).

122. *Id.* (describing the court's requirement to reach a decision based on evidence provided by the litigants as one of the key components of the adversary process).

123. *See* Luigi Paolo Comoglio, *Preclusioni Istruttorie e Diritto alla Prova* [*Evidence Foreclosures and the Right to Evidence*], 53 RIVISTA DI DIRITTO PROCESSUALE [PROCEDURAL LAW REVIEW] 968, 979 (1998) (providing the rules regarding the right to evidence); *see*, *e.g.*, Grande, *supra* note 77, at 242 (discussing the defendant's right to present and rebut evidence at the preliminary stage); *see also* GIUSEPPE CAMPEIS & ARRIGO DE PAULI, LA PROCEDURA CIVILE INTERNAZIONALE 313 (2d ed. 1996) (discussing the procedural rules).

right to defense includes the right to an adjudicative judicial proceeding, which safeguards the complete adversarial process.[124]

C. Appearance or Default (Letter "c")

In order to understand the Italian rule on default judgments, a primer on Italian default judgments is needed.

In the Italian system, there is a presumption concerning the defense of the defaulting party: the presumption is called *ficta contestatio* (presumed opposition).[125] The system is diametrically opposed to the U.S. system, where the presumption is considered, perhaps more wisely, a *ficta confessio* (presumed admission).[126] This is to say that in the Italian system the defaulting party is considered to have challenged all plaintiff's claims, and therefore the plaintiff will bear the burden of proving his claim, as if his opposing party was present in the proceeding.[127]

The Court of Cassation, in a recent decision, (issued on the old rules, which were similar), stated that the American notion of default judgment and the rules hereby applicable are not at odds with the Italian system in general because, even if to a very different extent, the Italian system attaches certain consequences to the non-appearing party.[128] Another difference relates to whether the proxy requirement must be in writing. In the U.S., it is possible to give proxy to a lawyer when one wants to be represented in court without issuing a formal written proxy.[129] In Italy, this is not possible (the proxy must always be in writing, and specific formal requirements must be complied with).[130] This raises a further question: When a foreign judgment has been issued at the outset of a proceeding in which the lawyer representing the debtor did not have a formal proxy, can the debtor allege in the course of the recognition proceeding that his rights of

124. *See Giudizio Di Legittimita' Constituzionale in Via Incidentale*, CORTE CONSTITUZIONALE DELLA REPUBBLICA ITALIANA *at* http://www.cortecostituzionale.it/eng/attivitacorte/pronunceemassime/massime/schedaMS.asp?Comando=LET&NoMS=5760&TrmT=difesa&TrmL=> (July 14, 1971) (last visited Oct. 13, 2004) (granting a defendant the right to a defense throughout proceedings).

125. *See Proposed Commission 23*, *available at* http://www.judicium.it/news/proposte_commissione_23.htm (Dec. 10, 2002) (discussing *ficta contestatio* with respect to *ficta confessio* in Italian law).

126. *See* Carmen García Poveda, *Valoración de la Negativa del Demandado a la Práctica de la Prueba Biológica*, NOTICIAS JURÍDICAS, *at* http://noticias.juridicas.com/areas/60-Derecho%20Procesal%20Civil/10-Art%EDculos/200311-50551217910352891.html (defining *ficta confessio* as an implicit admission) (last visited Oct. 13, 2004).

127. *See* Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L & COMP. L. REV. 227, 233 (1997) (noting Italy's policy of maintaining the plaintiff's burden of proof).

128. Cass., 22 Mar. 2000, n. 3365, Foro It. I, *reprinted in* MASSIMARIO DEL FORO ITALIANO [ITALIAN COLLECTION OF MAXIMS] (2000) (discussing the American notion of default judgment).

129. *See* Charles Silver, *Practice: Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1620 (1994) (stating the right of defense attorneys to represent their clients without written formal agreements); *see also* Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147, 1148 (1996) (implying the legitimacy of oral retainer agreements).

130. Mallen, *supra* note 129, at 1149.

defense have been harmed and therefore oppose recognition on this basis? This poses a difficult scenario that scholars seem to advocate resolving on a case-by-case basis.

D. Res Judicata (Letter "d")

This section basically states that, in order to be recognized, the foreign judgment must be final (conclusive) in the country where it was issued.[131]

The meaning is quite straightforward: the foreign judgment is not subject to appeal anymore.[132] It is definitive among the parties.[133] The burden of proving that such judgment is final is on the creditor, who shall do so by filing legal opinions of experts from the country where the decision was rendered.[134] In other words, the foreign judgment must be indisputable, in the sense that no "ordinary" appeal can still be brought against it.[135] Nevertheless, scholars have split opinions on this topic.[136] Some think that only the rules of the foreign legal system should be applied,[137] while others apply a two-prong test to determine:

a) if the foreign judgment is considered final according to the foreign laws;

and

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131. *See* Russo & Rains, *supra* note 33, at 277–78 (outlining Article 64's provisions); *see also* Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOKLYN J. INT'L L. 167, 180 (2000) (hereinafter "Weintraub, *How Substantial*") (referring to Italian policy to adhere to final foreign judgments). *See generally* Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments in the United Kingdom and Germany*, 18 S. ILL. U. L. J. 517, 542 (1994) (detailing a similar policy among American states in recognizing conclusive foreign judgments).

132. *See* Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 1 n.3 (2000) (uncovering a similar policy among American states of barring review of foreign judgments); Russo &. Rains, *supra* note 33, at 277 (2000) (finding final foreign judgments unable to be appealed).

133. *See* Russo & Rains, *supra* note 33, at 277 (noting the nonreviewable nature of finalized foreign judgments). *But see* Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of* ChromAlloy, 17 B.U. INT'L L.J. 141, 189, n.249 (1999) (noting a requirement that Italian courts first validate the foreign judgment to ensure it does not conflict with local policy).

134. *See* Korzec, *supra* note 127, at 233 (explaining that Italy requires the plaintiff to show burden of proof).

135. *See* Aldo Attardi, *La Nuova Disciplina in Tema di Giurisdizione Italiana e di Riconoscimento delle Sentenze Straniere* [*The New Discipline on Italian Jurisdiction and the Recognition of Foreign Decisions*], 6 RIVISTA DI DIRITTO CIVILE [CIVIL LAW REVIEW] 727, 763 (1995) (discussing the moment that Italian law applies to a judgment and the role of foreign law prior to the determination of a judgment); *see also* Broggini, *Riconoscimento ed Esecuzione dell Sentenze Civili Straniere nel ius Commune Italiano* [*Recognition and Execution of the Foreign Civil Decisions in the Italian Ius Commune*], RIVISTA 848 (1993) (noting that a judgment must be conclusive in order to be recognized); Carlevaris, *supra* note 55 at 82 (examining the nature of the foreign judgment); *see also* Claudio Consolo, *Il Ruolo del "Giudicato Formale" Quale Requisito per il Riconoscimento delle Sentenze Straniere* [*The Role of the Formal Final Judgment for the Recognition of the Foreign Decision*], 4 RIVISTA DI DIRITTO PROCESSUALE [PROCEDURAL LAW REVIEW] 1074, 1074 (1991) (explaining the criteria for the recognition of foreign judgments).

136. *See* Lupoi, *Recognition, supra* note 6, at 356; Dreyfuss, *supra* note 1, at 36 (stating that Italian courts will examine the award to see whether it conflicts with its policies).

137. See Russo & Rains, *supra* note 33, at 277 (stating that the law of the country where the judgment is pronounced should be used to determine if the judgment is final).

> b) whether the foreign judgment would be subject, in Italy, to any of the Italian means of appeal.[138]

Another approach applies a different two-prong test to ascertain the conclusiveness of the foreign judgment. The requisites to be applied to determine the conclusiveness of the foreign judgment should be the ones provided for by the foreign laws, but the concept of res judicata concretely used to ascertain the conclusiveness of the foreign judgment should be the Italian concept.[139]

Further, there are exceptions that could be recognized in Italy.[140]

Examples include cases where:

> a) The creditor obtains a precautionary measure in an Italian proceeding against the debtor;[141]
>
> b) An ordinary proceeding is started in the country where the decision was rendered between the creditor and the debtor;[142]
>
> c) A judgment is rendered in favor of the debtor in such proceeding.[143]

In this case, the foreign judgment has immediate effects in Italy: the precautionary measure is immediately annulled as a consequence of the foreign judgment, even though it is not final.[144]

Scholars have also considered the effect of extraordinary cases when the foreign judgment was revoked or otherwise annulled in the country where it was rendered.[145] The solution given to such case may be that: (1) either no recognition can be granted[146] or (2) if the Court of

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138. *See generally Judgments*, ITALY LAW DIGEST, 2004, *available at* LEXIS, News Library, Intdig File (maintaining that the law of the foreign country should be used to decide if the judgment is final).

139. *See generally* ASSOC. OF THE BAR OF THE CITY OF NEW YORK: SURVEY ON FOREIGN RECOGNITION OF U.S. MONEY JUDGMENTS, 15 (July 2001), *available at* http://www.brownwelsh.com/Archive/ABCNY_Study_Enforcing_Judgments.pdf (last visited Dec. 4, 2004) (claiming that Italy, among other countries, requires judgments to be res judicata before they can be recognized for enforcement).

140. *See* Lupoi, *Recognition, supra* note 6, at 356.

141. *Id.*

142. *See* Dreyfuss, *supra* note 1, at 36.

143. *Id.*

144. *Contra* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM .J. INT'L L. 805, 806 (exploring the English system of recognizing annulled arbitral awards).

145. *Contra* Yves. P. Piantino, *Recognition and Enforcement of Money Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 91, 118 (1997) (commenting on extraordinary situations in which foreign judgments are reopened).

146. *See* Davis, *supra* note 19, at 58 (hypothesizing that under the traditional approach, most countries would not recognize annulled foreign arbitral awards); Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 461 (2000) (noting that in traditional circumstances, most countries will not recognize an annulled foreign arbitral judgment).

Appeals granted recognition to the foreign judgment upon request of the creditor, the Italian judgment of recognition will be subsequently revoked.[147]

In fact, the subsequent foreign judgment which revokes and annuls the first foreign judgment will be granted automatic recognition in the Italian system.[148]

E. No Prior Italian Judgment

This section states that a foreign judgment must not conflict with an Italian judgment that, at the time recognition is requested, has already reached the status of res judicata in Italy.[149] The content of this rule has been interpreted by scholars in the following way:

> a) If the Italian judgment is contrary to the foreign judgment, the foreign judgment will be denied recognition;[150] but
>
> b) If the Italian judgment is merely dissimilar or different from the foreign judgment, the latter can be granted recognition.[151]

In order to compare judgments in Italy, the concepts of *petitum* and *causa petendi* must be applied.[152]

Petitum relates to the object of the controversy (e.g., obligation to pay a sum arising from a contract) as well as the concrete order that the parties request the judge to issue (e.g., order to pay),[153] while *causa petendi* is the basis for the controversy (e.g., in the previous example, contract giving rise to the obligation to pay).[154]

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147. *See Bariatti, supra* note 21; *see also* Lupoi, *Recognition, supra* note 6, at 356.

148. *Contra* Drahozal, *supra* note 146, at 462 (discussing that in some instances, French courts will recognize annulled foreign judgments).

149. *See* Davis, *supra* note 19, at 58.

150. *See* Dreyfuss, *supra* note 1, at 16 (asserting that in order for a foreign judgment to be valid it cannot conflict with an Italian judgment); *see also* John Schmertz & Mike Meier, *Italy has enacted Law No. 218 that comprehensively updates Italian system of private international law as to jurisdiction, choice of law, obtaining evidence and serving documents*, INTERNATIONAL LAW UPDATE, Aug. 1996, *available at* LEXIS, News Library, Ilawup File (noting Italian requirement of finality to recognize a foreign judgment).

151. *See generally* Michael Looyens, *Reforms of International Private Law Rules Recognize the International Dimension of Doing Business in Italy*, EUROWATCH, May 27, 1996, vol. 8, no. 7, *available at* LEXIS, News Library, Intltr File (explaining a situation in which a foreign judgment may be recognized).

152. *Cf.* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 799 (1989) (pointing out that in determining whether res judicata applies, one should look at the parties, the subject matter of the dispute, and the *causa petendi*).

153. *See* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 366 (2000) (defining *petitum* as the "object" of the dispute). *But see* LUIGI MASTELLONE, LEGAL AND COMMERCIAL DICTIONARY—ENGLISH/ITALIAN 150 (1980) (asserting that *oggetto della causa* means the "subject matter of the action" in Italian).

154. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 340 (Grotius Publications Limited 1987) (defining *causa petendi* as the "grounds" of the dispute). *But see* WEST'S LAW AND COMMERCIAL DICTIONARY IN FIVE LANGUAGES 725 (1985) (defining "ground of action" to be *fondamento di una causa* or *oggetto di una causa* in Italian).

In order for two Italian proceedings to be considered identical, and therefore for lis pendens to be declared in Italy, they must be between the same parties and have either the *causa petendi* or the *petitum* in common.[155] However, some scholars think the concept should be broader and that recognition should go beyond an inquiry based on *petitum* or *causa petendi* as long as the content and effect of the decision is compatible with Italian law.[156]

1) Foreign Judgment Conflicting with Other Foreign Judgments

Another interesting problem arises when one foreign judgment conflicts with another foreign judgment, which potentially might be recognized in Italy on any of the above-mentioned bases (Brussels Convention, Bilateral Convention or Law 218/95).[157] As a general rule, if two contrasting judgments are issued in different foreign jurisdictions, the one acquiring the status of res judicata first will prevail in Italy.[158] However, if:

> a) The judgment rendered in the third country became final before the other foreign judgment, but
>
> b) The latter was recognized in Italy before the former through a proceeding before the Court of Appeals,
>
> c) And the parties did not claim res judicata in reference to the third country judgment nor made reference to it during the proceeding,
>
> Then the other foreign judgment will prevail in Italy, at least until the decision of the Court of Appeals is formally challenged in Italy.[159]

The same reasoning applies if the opposite occurs.[160]

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155. *See In re* S.S. Newchwang, 16 AM. J. INT'L L. 323, 324 (1922) (asserting that it is a well-established principle of international law that res judicata applies only where the parties and the question at issue are identical in both cases). *But see* Dodge, *supra* note 153, at 366 (positing that there is authority supporting the proposition that in order for res judicata to apply, both the *petitum* and the *causa petendi* must be the same in both cases).

156. *See*, *e.g.*, Bariatti, *supra* note 21, at 1229 (highlighting that this is the solution adopted by the Brussels Convention, which considers more the effects of the decisions than the total identity of *petitum* and *causa petendi*).

157. *See* Sara L. Uberman, Note, *The Brussels II Convention: A Tool Necessary to Enforce Individual Rights Relating to Matrimonial Matters Within the European Union*, 23 SUFFOLK TRANSNAT'L L. REV. 157, 171 n.83 (1999) (stating that the Italian Court of Appeals will recognize and enforce any foreign judgment so long as: 1) the foreign court had proper jurisdiction under Italian rules; 2) service of process was proper; 3) both parties entered a proper appearance; 4) the judgment became res judicata; 5) the judgment does not contradict Italian public policy).

158. *See* Bonomi, *supra* note 9, at 267 (describing how a judgment that has acquired res judicata status in a foreign country will automatically be recognized as res judicata in Italy).

159. *Id.* (asserting that the determination of whether a judgment, which has reached res judicata status in a foreign country, is res judicata in Italy will be made by the Italian Court of Appeals only if the registrar asks the attorney general to render a decision, and the attorney general refuses).

160. *Cf.* Dreyfuss, *supra* note 1, at 16–17 (asserting that under the new law a foreign judgment shall not conflict with a final Italian judgment, and that the parties may not commence an action in a foreign forum if that same action has already been commenced in Italy).

2) Harmonization with Article 7

The interpretation of this section[161] must be harmonized with the interpretation of Article 7 of Law 218/95, which states:

> When in a proceeding a plea of lis pendens is brought concerning an action between the same parties having the same object and the same title, the Italian court may stay the proceeding if it deems that the decision of the foreign court may have an effect in the Italian legal system. If the foreign court declines its jurisdiction or the foreign decision is not recognized under Italian law, the Italian court shall continue the proceeding upon the application of the party concerned.[162] (Legge 218/95, Articolo 7)
>
> The condition of lis pendens shall be established pursuant to the law of the Country where the action is brought. If the outcome of a proceeding in an Italian court depends upon the outcome of a proceeding pending before a foreign court, the Italian court may stay its proceeding when it deems that the foreign judgment may have an effect in the Italian legal system.[163]

F. Lis Pendens (Letter "f")[164]

A foreign judgment will not be recognized if a proceeding is pending before an Italian court between the same parties and on the same subject matter and the Italian proceeding was initiated before the foreign proceeding.[165]

In the old Italian system of international private law, it was not required that the Italian proceeding be initiated before the foreign proceeding: the Italian proceeding would prevail

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161. [T]he judgement does not conflict with any other final judgement pronounced by an Italian court/authority." Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, 35 I.L.M. 760, 780.

162. Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, 35 I.L.M. 760, 766.

163. *Id.*

164. This section states that "no proceedings are pending before an Italian court between the same parties and on the same object, which was initiated before the foreign proceedings." Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, 35 I.L.M. 760, 780.

165. *See* Italy: Law Reforming the Italian System of Private International Law, May 31, 1995, 35 I.L.M. 760, 780 ("A judgement rendered by a foreign authority shall be recognized in Italy without requiring any further proceedings if . . . no proceedings are pending before an Italian court between the same parties and on the same object, which was initiated before the foreign proceedings"). *See generally* Simeone, *supra* note 98, at 359–60 (stating that Article 797 of the Code of Civil Procedure would allow a foreign judgment to be recognized in Italy if that judgment was final in its country of origin).

regardless of the sequence.[166] The new solution seems much more compliant with the spirit of Law 218/95.[167] A very rare case could arise if:

a) Recognition of a foreign judgment is required; and

b) A third-country proceeding is pending between the same parties, on the same object and subject matter.

In this case, recognition of the foreign judgment can be granted, because the proceeding pending in the third country is not enough to forestall recognition.[168]

G. Public Policy (Letter "g")[169]

The original project of Law 218/95 required that the foreign judgment not be *openly* contrary to public policy.[170]

The adjective "openly" has been removed from the final draft of the Law, and therefore today *any* contrast with public policy renders the foreign decision invalid.[171]

The Court of Cassation stated that the Court of Appeals should evaluate "the status of the Italian and European law as a whole."[172] Scholars have identified two different types of public

166. *See* Simeone, *supra* note 98, at 359–60 (stating that Article 797 of the Italian Code of Civil Procedure would allow a foreign judgment to be recognized in Italy so long as the same action, instituted prior to the completion of the present action in the foreign jurisdiction, was not pending between the same parties in Italy).

167. *See* ITALY: LAW REFORMING THE ITALIAN SYSTEM OF INTERNATIONAL LAW, Gazz. Uff., 3 giugno 1995, n.128, suppl. Ord, n.68, Lex LXXXI, part I, 1808 (1995), *translated in* 35 I.L.M. 760 (1996) (illustrating a general reformation of the Italian system of international law). *See generally* Simeone, *supra* note 98, at 359–60 (referring to the old Italian system of the recognition of foreign judgments and international law).

168. *See generally* Schmertz & Meier, *supra* note 150 (stating that Article 64 of Law 218/95 sets forth the standard conditions for the recognition of foreign judgments).

169. *See* ITALY: LAW REFORMING THE ITALIAN SYSTEM OF INTERNATIONAL LAW, Gazz. Uff., 3 giugno 1995, n.128, suppl. Ord, n.68, Lex LXXXI, part I, 1808 (1995), *translated in* 35 I.L.M. 760 at 780 (1996) (asserting that the foreign judgments do not conflict with the requirements of Italian public policy).

170. *Id.* (showing that the adjective "openly" has been removed and inserting a provision that prevents recognition of a foreign judgment that conflicts with public policy). *See generally* William J. Koyatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 279 (2000) (demonstrating that it is widely accepted that nations reject foreign judgments because they violate their public policies).

171. *See* Bonomi, *supra* note 9, at 257 (indicating that the test for the validity of foreign legal rules is whether the rules conflict or are incompatible with public policy). *See generally* Dreyfuss, *supra* note 1, at 15 (showing that the Italian judicial process requires petition to the Court of Appeals for an opinion as to whether recognition of a foreign judgment would violate Italian public policy).

172. Cass., 5 May. 1989, n. 2102, *reprinted in* RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [PRIVATE AND PROCEDURAL INTERNATIONAL LAW REVIEW], 177 (1991) (concerning the evaluation of Italian and American law in their entirety).

policy: substantive public policy and procedural public policy.[173] The latter has been explained under III.B. *supra*. Substantive public policy refers to substantive laws and is the concept to which this section refers.[174] It is the ethical nature of a juridical system.

A second distinction has been advocated by scholars. First, there is an internal, Italian public policy, which is broader and is composed of all the fundamental principles of the national legal order.[175] This section does not refer to internal public policy.[176]

Second, there is an international public policy, which is composed of principles common to all nations of similar cultural traditions.[177] This policy is aimed at safeguarding fundamental rights and is the one to which this section refers.[178] Therefore, in certain cases an Italian judge may be able to recognize a decision based on international public policy even though it may not comply with Italian public policy.[179]

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173. *See* Dreyfuss, *supra* note 1, at 6 (declaring that foreign courts scrutinize foreign judgments for violations of substantive and procedural public policy); *see also* Yves P. Piantino, *Switzerland's Treatment of U.S. Money Judgments*, 48 AM. J. COMP. L. 181, 185 (1998) (acknowledging that there are two different types of public policy: substantive public policy and procedural public policy). *See generally* Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 225 (1994) (enumerating that public policy grounds for non-enforcement of foreign judgments may arise from procedural differences as well as substantive differences).

174. *See* Italy: Law Reforming the Italian System of International Law, Gazz. Uff., 3 giugno 1995, n.128, suppl. Ord, n.68, Lex LXXXI, part I, 1808 (1995), *translated in* 35 I.L.M. 760, 780 (1996) (showing section (g) refers to the recognition of foreign judgments that do not conflict with public policy). *See generally* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 352 (1988) (illustrating that foreign state's substantive laws do not require recognition if contrary to a nation's public policy).

175. *See* Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 601 (1985) (demonstrating that the Italian legal order is composed of and adopts international law). *See generally* Antonio Brancaccio, 70 ST. JOHN'S L. REV. 101, 105 (1996) (commenting that Italian jurisprudence preempts domestic law for broader international law).

176. *See* Italy: Law Reforming the Italian System of International Law, Gazz. Uff., 3 giugno 1995, n.128, suppl. Ord, n.68, Lex LXXXI, part I, 1808 (1995), *translated in* 35 I.L.M. 760, 780 (1996) (inferring that the provision (g) does not refer to the broader internal Italian public policy but states a judgment cannot conflict with the "ordre public"). *See generally* Bonomi, *supra* note 9, at 257 (announcing that the "ordre public" has been reaffirmed and applies to prevent the recognition of foreign judgments); Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 514–15 (1989) (stating that the meaning of "ordre public" which includes rules of "public law," can always be applied regardless of foreign laws).

177. *See* Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Choice of Law in International Commercial Arbitration?*, 10 INT'L TAX & BUS. LAW 59, 63 n.20 (1992) (stating that international public policy "alludes to a universal concept of justice common to all civilized nations"); *see also* Li-Ann Thio, *English Public Policy, The Act of State Doctrine and Flagrant Violations of Fundamental International Law:* Kuwait Airways Corp. v. Iraqi Airways Co., 18 CONN. J. INT'L L. 585, 594 (2002) (showing international public policy reflects fundamental principles of international solidarity and morality that is incorporated into nations' domestic public policy).

178. *See* Leanne M. Fecteau, Note, *The Ayahuasca Patent Revocation: Raising Questions About Current U.S. Patent Policy*, 21 B.C. THIRD WORLD L.J. 69, 93 (2001) (showing that the policy of *ordre public* is used to prevent foreign law that would violate fundamental rights). *See generally* Friedler, *supra* note 176 at 513 (stating that the concept of *ordre public* is broader than public policy and refers to principles that prevent application of foreign law).

179. *See* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third-Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179, 188 (2002) (showing that an Italian court has the authority to refuse to recognize foreign law if contrary to public policy).

The difficulty with the concept of public policy, of course, is that it is constantly evolving with society.[180]

The Italian Court of Cassation, with a decision partially at odds with the above-mentioned concept of international public policy, has clarified that the two different concepts of public policy should be applied in the following manner:

> a) when at least one part in the proceeding is Italian, the Italian public policy must be applied;
>
> b) when no party in the proceeding is Italian, the international public policy must be applied.[181]

In the Italian cases, public policy is often dealt with in matters involving family or personal rights and in particular in proceedings for recognition of ecclesiastic judgments.[182] A few examples will clarify the types of objections raised by Italian courts in these cases.

The Court of Appeals denied recognition to a judgment that validated an adoption in which the adopter and the adoptee agreed in writing that they were free from any reciprocal obligation whatsoever (e.g., right to alimony).[183] Such agreement would be null and void in Italy because an individual cannot waive the right to alimony under Italian law.[184] Another decision rejected the request for recognition of a foreign judgment that acknowledged an individual's aristocratic title (aristocratic titles have been formally abolished by the Constitution since 1948).[185]

In the Italian system, public policy was widely invoked before the promulgation of the law that allowed divorce in Italy (Law 1, December 1970, note 898) to safeguard the indissolubility

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180. *See* Cass., 24 Nov. 1989, n. 5074, Giur. It. 1990, I. 926 (concerning the public policy to be applied); *see also* Lupoi, *Recognition, supra* note 6, at 347–74 (explaining the enforcement of foreign judgments in Italy); Dreyfuss, *supra* note 1, at 18 (showing the changes to the concept of public policy).

181. Corte di Cass., Nov. 24, 1989, n.5074 ; *see also* Lupoi, *Recognition, supra* note 6 (criticizing this distinction and stating that "at the end of the day, a foreign judgment should not be recognized in Italy on public policy grounds only if it is incompatible with some fundamental principle of the Italian legal order or with the basic structure of a given institution.").

182. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 840 n.17 (2000) (indicating that public policy was taken into consideration by Italian legislators on the matter of technological conception); *see also* Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121, 145 (1998) (discussing how same-sex marriages are not recognized in Italy for public policy reasons).

183. *See* Russo & Rains, *supra* note 33, at 322–24 (outlining modern adoption law in Italy).

184. *See* MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE, AND THE LAW 180 (The Univ. of Chi. Press, 1972) (signifying that if there is no expectation of alimony, then under Italian law there is no divorce).

185. *See* Costituzione [Constitution] art. 3 (Italy).

of marriages between Italian citizens,[186] while divorces between foreign citizens were generally recognized.[187]

Another interesting question is whether the Court of Appeals should check the compliance of the foreign decision with foreign public policy. A very old precedent (a decision of the Italian Court of Appeals from the 1960s, unpublished) stated that a Swiss decision could not be recognized in Italy because it was contrary to Swiss public policy.[188] Scholars criticized this decision because, they noted, that Italian law only permits the Court of Appeals to take Italian public policy into account.[189]

Many European countries have raised concerns regarding the following issues of substantive U.S. law:

- Strict liabilities theories;
- Damages compensating for pain and suffering; and
- Punitive damages.[190]

On the procedural public policy side, the following issues have been considered:

- Judgments obtained with intrusive pre-trial discovery;
- Lack of service of a decision, thus forestalling right to appeal;
- Absence of reasoning in jury trials (but see the above-mentioned decision of the Court of Cassation: Cass. 18 May 1995, note 5451); and
- Disregard for substantive justice.[191]

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186. *But cf.* Peter Holzer, *The Second Legal Assistance Symposium—Part III: Legal Assistance Overseas: A Practical Guide to German Divorce Law*, 112 MIL. L. REV. 121, 123–24 (1986) (stating that Italy has divorce recognition agreements with Germany, Spain, and Turkey as of 1986).

187. *See* MARRIAGE AND DIVORCE LAWS OF THE WORLD 52 (Hyacinthe Ringrose ed., Fred B. Rothman & Co. 1988) (expressing that while divorces between Italian citizens were not recognized, divorces between foreign citizens were acknowledged).

188. *But see* THE REFORM OF FAMILY LAW IN EUROPE 318–19 (A.G. Chloros ed., Kluwer 1978) (demonstrating that a Swiss decision on divorce contrary to public policy could be recognized in Italy).

189. *See* Uberman, *supra* note 157, at 171 n.83 (indicating the limited criteria the Italian Court of Appeals will use to determine if a foreign judgment is enforceable).

190. *See* Dreyfuss, *supra* note 1, at 6–7 (enumerating European concerns with substantive American law); *see also* Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 302 (1989) (analyzing the difference between German and American conceptions of strict liability).

191. *See* Gerfried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199, 205 (1994) (distinguishing German and American approaches to pre-trial discovery); *see also* Yves P. Piantino, *Recognition and Enforcement of Money Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 91, 122 (1997) (describing a Swiss decision on default judgments forestalling the right to appeal and absence of reasoning).

It has been noted that the intensity of the public policy check changes with the strength of the connection between the controversy and the country where the foreign judgment must be enforced.[192] The more a controversy is connected to a country, the more scrutiny courts will be apt to apply in considering public policy.[193]

In many cases, the controversy is intentionally started in a foreign country to avoid Italian jurisdiction.[194] In these cases, the examination of the foreign judgment will be heavily scrutinized.[195] This is true not only in Italy, but also throughout the European courts.[196] In some cases, laws have been aimed at preventing foreign judgments on specific controversies.[197] For instance, the Swiss Law on International Private Right (Articles 135 and 137) states that tort claims arising from product defects and antitrust litigation cannot be decided based upon the application of foreign laws.[198] Because no foreign law can be applied, it follows that foreign judgments will not be recognized and enforced.[199]

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192. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 792–94 (2004) (suggesting that a high standard of variance from local public policy must be met before a foreign judgment will be struck down in the United States).

193. *See* David A. Crerar, *A Proposal for a Principled Public Policy Doctrine Post-Tolofson*, 8 WINDSOR REV. LEGAL & SOC. ISSUES 23, 59 (1998) (positing that nations use a sliding scale to determine whether public policy goals justify rejection of foreign decisions).

194. *See* Rochelle C. Dreyfuss & Jane C. Ginsburg, *Symposium on Constructing International Intellectual Property Law: The Role of National Courts: Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065, 1113, 1129 (2002) (describing situations known colloquially as "Italian torpedoes," where controversies are intentionally started in Italy to avoid jurisdiction in other European countries).

195. *But cf.* Dreyfuss, *supra* note 1, at 7 (stating that some U.S. judgments are scrutinized in Italian courts due to their complex nature). *See generally* Maurits S. Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor*, 50 AM. J. COMP. L. 555 (2002) (discussing the history and ad hoc use of public policy in conflicts law throughout Europe).

196. *See Symposium on U.S.-E.C. Legal Relations: Enforcement of Judgments in the United States and Europe,* 13 J.L. & COM. 211, 231 (stating the stance of German law that enforcement of a foreign judgment simply must not violate fundamental principles of German law). *Compare* Symposium, *Symposium on U.S.-E.C. Legal Relations: Enforcement of Judgments in the United States and Europe,* 13 J.L. & COM. 193, 197–98 (1994) (listing the United States rules on foreign judgments, which also heavily scrutinize circumstances wherein one or more of the parties was attempting to avoid U.S. jurisdiction), *with* Robert Laurence, *The Off-Reservation Garnishment of an Off-Reservation Debt And Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355, 359 (1998) (noting the suggestion that courts presume that foreign judgments are consistent with local policy unless enforcement would "shock the conscience" of the local community).

197. *See* Joseph E. Neuhaus, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law,* 81 COLUM. L. REV. 1097, 1104–06 (1981) (describing the British Protection of Trading Interests Act, which prevents the enforcement of foreign judgments against British citizens within the United Kingdom); *see also* Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions,* 19 BERKELEY J. INT'L L. 44, 64 (2001) (noting that European countries will soon be incorporating into their local laws the European Community's general discrimination against non-EC judgments).

198. *See* SR 291 law 135, 137 (stating that foreign law cannot be applied to tort claims based on product liability); *see also* Strebel, *supra* note 106, at 128 (providing an English translation of the Swiss Private International Law).

199. *See* SR 291 art. 135, 137 (stating that foreign law cannot be applied to tort claims based on product liability); *see also* Strebel, *supra* note 106, at 129 (providing an English translation of the Swiss Private International Law). For a discussion of a decision on public policy, see under part V.F. *infra*, Court of Cassation March 22, 2000, Note 3365 on Public Policy.

H. Effects of Recognition

A foreign res judicata will be treated exactly as an Italian res judicata.[200]

The effects of recognition are not allowed to exceed the Italian concept of res judicata.[201] However, it can be problematic and controversial to determine what constitutes the concept of Italian res judicata.[202] For example, when a foreign court ascertains the obligation to pay the price based on a particular contract, is any matter concerning the validity of such contract precluded from future litigation or it can still be litigated instead?

Two basic trends face each other:

a) On one side, scholars think that the concept of res judicata comprises only matters expressly decided by the foreign courts.[203]

b) On the other side, the cases have stated that res judicata comprises also some preliminary issues, even though they did not expressly form part of the foreign decision.[204]

IV. Recognition in Case of Opposition and Enforcement

The new discipline introduced by Law 218/95 may have more theoretical than practical implications.[205] This is true because: (i) whenever the foreign decision is challenged, and, in any case, (ii) when enforcement is sought, the recognition will not be automatic, but a formal decision on recognition shall need to be taken by the Court of Appeals.[206]

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200. *See* Uberman, *supra* note 157, at 171 n.83 (citing Report by Mr. P. Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 5)) (stating that in order to be enforced in Italy, a foreign judgment must become res judicata).

201. *See* Lupoi, *Recognition, supra* note 6, at 360.

202. *Id.*

203. *See* Symposium, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States,* 5 CHAP. L. REV. 87, 149 n.632 (stating that Japan only recognizes the res judicata effects of foreign judgments upon the immediate parties and express matters in the case).

204. *See* William W. Park, *Duty and Discretion in International Arbitration,* 15-1 MEALEY'S INTL. ARB. REP. 14 (2000) (discussing the European practice of deferring to foreign award annulments but not to foreign award confirmations).

205. *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 94 (1999) (stating that for the present, the problems associated with the non-recognition of U.S. judgments in Europe are more theory than reality).

206. *See* Ottavio Campanella, *The Italian Legal Profession,* 19 J. LEGAL PROF. 59, 78 (stating that the Italian Court of Appeals has exclusive jurisdiction over cases involving the enforcement of foreign judgments).

(i) Challenge of Foreign Decisions

It will be enough for the debtor to challenge the recognition of a foreign judgment, alleging the lack of any of the requirements of Article 64, to forestall any attempt of the creditor to put the foreign judgment into execution.[207]

(ii) Enforcement in Lack of Spontaneous Compliance

Whenever the debtor does not comply spontaneously with the foreign judgment, the creditor will have no other choice but to ask the Court of Appeals to issue a decision on the matter, granting or denying recognition and consequent enforcement.[208] It must be stressed that, once enforcement is sought, the Court of Appeals shall always also issue a decision on recognition (which conceptually comes before enforcement).[209] The decision of the Court of Appeals in this case is called *exequatur.*[210] It must also be stressed that enforcement can be granted only to decisions that are susceptible to enforcement in the decision's country of origin.

The above-mentioned provisions make recognition automatic only when the decision is not challenged by the debtor and spontaneously complied with. Nevertheless, the principle of automatic recognition has a value of its own and an immediate practical consequence which should not be overlooked: any person who has an interest is entitled to request that a registration be made in a public register on the basis of the foreign judgment, e.g., in the registrar for birth, marriages and deaths or in the register of real estate properties.[211]

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207. *See* Dreyfuss, *supra* note 1, at 16 (listing the requirements of Article 64).

208. *Id*. at 15 (stating that anyone wishing to enforce a foreign judgment in Italy must petition the Court of Appeals for an order stating that the judgment meets Italian statutory standards).

209. *See* Law No. 218 of May 31, 1995, art. 64, *translated in* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 779 (1996) (explaining that whenever enforcement of a decision is sought, the person seeking the enforcement has to obtain an order of recognition from the Court of Appeals).

210. This term refers to the order given by the Court of Appeals to any officer who is requested to do so, to effectively enforce the foreign judgment. *See* Fransesco P. Mansi, *Global Developments: Recognition and Enforcement of Foreign Arbitral Awards in Italy—Old Problems and New Trends,* 6 CROAT. ARB. Y.B. 101 (1999) (explaining that under Italian law the enforcement of foreign awards are to be granted after exequatur proceedings).

211. *See* Bonomi, *supra* note 9, at 266 (explaining that individuals may require that foreign judgments such as births or deaths be listed in the public register); Carlevaris, *supra* note 55, at 82 (mentioning that an individual who receives a foreign judgment is entitled to have it recorded in the public register); Salerno, *La Circolare Ministeriale Esplicacative sull'iscrizione delle Sentenze Straniere nei Registri dello Stato Civile*, RIV. DIR. INT. 178 (1997) (stating that any person who has an interest is entitled to request that a registration be made in a public register on the basis of the foreign judgment); Marongui Buonaiuti, *Il Riconoscimento e l'esecuzione delle Sentenze Straniere e la Circolare Ministeriale agli Uffi dello Stato Civile* 2998, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 338 (highlighting the ability of interested persons to request information be made part of the register on the basis of a foreign judgment); Manzo, *Sentenze Straniere e Registri dello Stato Civile*, FORO IT. V, 146 (1997) (observing the power of individuals to request that the public register add the holdings of foreign judgments); Grassano, *La Circolare Ministeriale sull'iscrizione delle Sentenze*, STATO CIVILE ITALIANO 806 (1997) (citing the right of an individual to have the public register officially note a foreign judgment).

The registrar will have the burden of summarily deciding whether the foreign judgment meets the requisites for recognition.[212] If uncertain, the registrar should seek the Attorney General's advice: the decision, in this case, will be taken by the Attorney General.[213] If he denies registration, the person who has an interest will have the right to act before the Court of Appeal to seek recognition (for mere registration, the procedure before the Court of Appeals is possible only if and when the Attorney General issues its decision).[214]

In conclusion, it must be highlighted that the foreign decision will have its effect from the moment it became final in the foreign country not pending final adjudication in Italy (this is a consequence of the declarative effects of the decision on recognition).[215]

A. Duration of the Proceedings and Judicial Expenses; Statute of Limitations

When a mere enforcement is requested ((ii) *supra*) the proceeding may take up to two years to complete. When the debtor has objected to the recognition, the proceeding may take from two to four years to complete.[216] The enforcement procedure, in Italy, may be also quite long.[217]

In the Italian system, the losing party usually is forced to pay judicial expenses and legal fees to the winning party: this may be a deterrent for the debtor who does not have a winning case and is just trying to delay the enforcement of a righteous decision.[218] Nevertheless, it must

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212. *See generally* Michele Angelo Lupoi, *Italy* , *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS, Italy-1, Italy-91 (R. Blanpain ed., Kluwer Law International 2002) (emphasizing that once a case is registered, the judge of the court where the case is registered decides the case and the plaintiff cannot file it in any other court).

213. *See* Bonomi, *supra* note 9 (noting that the procedure for registration of foreign judgments in the public register is now governed by circular n.1/50/FG/29 of January 7, 1997, issued by the Ministry of Justice and published in *Stato Civile Italiano* (Italian Civil State) 1997, 26.); *see also* Lupoi, *Recognition, supra* note 6 (providing a detailed discussion of the judicial procedure required in order for an individual to have a foreign judgment recorded in the public register).

214. *See, e.g.*, Sean D. Murphy, *An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L. L. 391, 412 (1991) (indicating that an Italian Attorney General has authority to forbid a suit based on a foreign law).

215. *See* Bariatti, *supra* note 21, at 1243 (remarking that foreign decisions have effect from the moment they became final in the foreign country); Lupoi, *Recognition, supra* note 6 (observing the finality of foreign decisions from the moment they became final in the foreign country and not pending final adjudication in Italy).

216. The estimates of duration of proceedings are merely subjective and aim at giving a rough idea to the practitioner. Such estimates change as the Court of Appeals changes. *See generally* Giani Manca et al., *Italy, in* EC LEGAL SYSTEM: AN INTRODUCTORY GUIDE, Italy-1, Italy-31 (Sandra Dutczak & Helen Briton eds., Butterworths 1992) (emphasizing that the judgment at first instance and subsequent appeal is approximately two years).

217. This is due in part to an archaic and inefficient system of enforcement that favors the debtor and usually makes the enforcement of judgments a very difficult and lengthy process. Such delay may be in the interest of the debtor: her strategy may be to request a decision of the Court of Appeals, and then to seek a settlement in terms more benign than the ones of the judgment to be recognized. *See* Lupoi, *supra* note 6 (emphasizing that the enforcement of judgments in Italy can be problematic and time consuming).

218. *Id.* (indicating that the general rule in Italy is that the losing party bears the costs of the other side and the costs include lawyers' costs and court's costs); *see* STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE at 1386 (Sweet & Maxwell, 1989) (explaining that the losing party will pay the lawyer's fees of the winning party).

be noted that courts have the power to take their decisions on judicial expenses independently from their decisions on the merits.[219] Therefore, the court may as well decide to completely offset the legal expenses and fees awarded to the parties. This is a discretionary decision for the court, often based on the strength of the case and seen from an *ex ante* perspective.[220] It should be noted that the amount granted by the court for judicial expenses to the winning party is frequently but a small fraction of the actual fees that the party must pay to its lawyers.[221]

Aside from legal fees, a tax must be paid on any decision rendered by the Court of Appeals.[222] The tax is either a fixed amount or is proportional to the amount at stake in the matter and can be considerable in some cases.[223] The tax is usually paid by the winning party, who has the immediate interest in enforcing the decision.[224] He will then try to collect the amount of the tax from the losing party: when enforcing the decision, he will also ask for the repayment of the advanced amount.[225] Thus, the legal counsel must make his client aware of tax-related consequences of an adverse ruling in advance.[226] If the tax is not paid, the decision of the Court of Appeals (and therefore the foreign decision) will not be enforceable.[227]

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219. *See* O'MALLEY & LAYTON, *supra* note 218 at 1375 (explaining that the costs will be submitted to the judge for him to determine who bears the burden of paying them).

220. *Id.* at 1375 (explaining that the issue of legal costs is decided by a judge).

221. *Id.* (explaining that the winning party will only recover a portion of its legal expenses from a losing party).

222. *See* Lupoi, *supra* note 216 (indicating that most disputes in Italy are taxed. However, decisions on labor, divorce and legal separation are not taxed).

223. *Id. at* Italy-1, Italy-127 (explaining that the taxes in Italy might be fixed, such as for registration, or proportionate, such as taxes on legal costs and in the case of the plurality of parties, depending on their interest in the case).

224. *See generally* Martindale-Hubbell International Law Digest, 2004 Italy Law Digest, Civil Actions and Procedure, Judgments, *available at* LEXIS, Legal folder, Martindale-Hubbell International Law Digest file (stating that a party seeking enforcement of a decision in Italy must file with the proper Court of Appeals). *See generally* Gardella & Radicati Di Brozolo, *supra* note 59, at 629–30 (applying game theory to recognition and enforcement of foreign judgments).

225. *See* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 780–81 (1996) (noting that a party may request the Court of Appeals to determine the prerequisites for enforcement of judgment).

226. *See* Dreyfuss, *supra* note 1, at 15–16 (explaining procedure followed by Court of Appeals before start of enforcement proceedings).

227. *See generally* Bonomi, *supra* note 9, at 266 (1999) (explaining that a judgment which is still subject to appeal cannot be recognized and enforced, even if it has been declared provisionally enforceable).

The proceeding for recognition and enforcement of foreign judgments is not *per se* subject to any statute of limitations.[228] As already noted, however, a statute of limitations may be raised by the debtor in a foreign judgment according to foreign laws.[229]

However, some scholars think that during the actual execution proceeding the debtor may raise an objection concerning the enforcement of the judgment, when such enforcement is sought more than 10 years after the rendition of such judgment in the foreign country.[230] This opinion is controversial among scholars.[231]

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228. *See* Bariatti, *supra* note 21, at 1243; Lupoi, *Recognition, supra* note 6, at 361. *See generally* Martindale-Hubbell International Law Digest, 2004 Italy Law Digest, Civil Actions and Procedure, Limitation of Actions, *available at* LEXIS, Legal folder, Martindale-Hubbell International Law Digest file (detailing ten-year statute of limitations and exceptions).

229. *See* MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE 305 (Padova ed., 1991) (1954) (noting that a number of decisions addressed this specific point and resolved it accordingly); *see, e.g.*, Cass, sez. un., 17 Oct. 1989, n.4165, RIVISTA DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 1990, 994 (providing an example of a debtor in a foreign judgment successfully raising a foreign statute of limitations issue); Cass, sez. un., 16 Feb. 1993, n.1882, RIVISTA DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 117 (holding that a debtor in a foreign judgment may cite a foreign statute of limitations); Cass., sez. un., 23 Oct. 1993, n.19557, RIVISTA DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 628 (finding that the court will respect foreign statutes of limitations raised in a case against a foreign debtor); *cf.* Cass., sez. un., 6 Aug. 1962, n.2386, Giust. Civ. II (finding that rights not subject to waiver are never held to any statute of limitations). *See also* In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in December 1984, 26 I.L.M. 1008, 1018 (1987) (discussing the waiver by defendant of statute of limitations as a defense to the enforceability of an Indian judgment against a U.S. company).

230. *Cf.* MIGLIAZZA, LE SENTENZE STRANIERE NEL DIRITO ITALIANO 195 (Milan 1968) (providing scholarly opinions regarding the ability of the debtor to raise an objection concerning the enforcement of the judgment when such enforcement is sought more than 10 years after the rendition of such foreign judgment). *See generally* Peter J. Carney, *Comment, International* Forum Non Conveniens*: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 483–84 (1995) (discussing which nation's statute of limitations should govern when there is a conflict of laws with respect to a defendant's mandatory waiver of a statute of limitations defense).

231. *See* BALLARINO, DIRITTO INTERNAZIONALE PRIVATO, 180 (Padua 1982) (referring to statute of limitations provided for by the laws of the country where the decision was rendered). *See generally* John F. Molloy, *Miami Conference Summary of Presentations*, 20 ARIZ. J. INT'L & COMP. L. 47, 80–81 (2003) (stating that after a *forum non conveniens* decision is made about an alternative foreign forum, the judge has no right to require a defendant to commit to not asserting a statute of limitations defense).

The relevant provision governing recognition and enforcement procedure is Article 67 of Law 218/95.[232] The reference of Section (i) to "anyone who has an interest" means the parties of the foreign proceeding and their heirs, as well as anybody whose rights depend upon those who were the object of the foreign proceeding.[233] In this latter case, however, the parties of the foreign proceeding shall join the proceeding itself.[234]

The reference in Section (i) to "non-adversary proceedings" refers to the Italian concept of *volontaria giurisdizione,* which has no parallel in the U.S. system: in some cases, the Italian courts are entrusted with duties that are more administrative than judicial in nature.[235]

Section (ii) requires that, in order to proceed with enforcement, the creditor shall be provided with a copy of the foreign judgment together with a copy of the decision of the Court of Appeals.[236]

The proper Court of Appeals is based on the circuit where the foreign judgment shall have its effects.[237] When it is not possible to ascertain where the judgment will have its effects, the proper forum will be determined according to the general rules of competence, contained in

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232. *See* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 780–81 (1996) (outlining Italian Private International Law No. 218/1995, art. 67).

"Art. 67 – Enforcement of foreign judgments and rulings relating to non-adversary jurisdiction, and challenging of recognition.

"(i) Whenever foreign judgments, or rulings relating to non-adversary proceedings, are not complied with or are challenged as to their recognition, or whenever it is necessary to proceed with judicial enforcement, anyone who has an interest may request the Court of Appeals of the district where the enforcement is sought to ascertain whether the requisites for recognition exist.

"(ii) The foreign judgment, or judicial order in non-adversary proceedings, together with the decision stating that the requisites for recognition exist, constitute the necessary written instrument for the implementation and judicial enforcement of the judgment.

"(iii) If a foreign judgment, or ruling relating to non-adversary proceeding, is contested during the course of another proceeding, the judge shall decide the issue with effects limited to this sole proceeding."

233. *See* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 780 (1996) (providing language of section 1 of Italian Private International Law No. 218/1995, art. 67). *See generally* Dreyfuss, *supra* note 1, at 15 (explaining that any interested person wishing to enforce a judgment must petition the Court of Appeals).

234. *See generally* Bonomi, *supra* note 9, at 267 (stating that any interested person can request that a registration be made in a public register on the basis of a foreign judgment).

235. Such proceedings concern, for example, appointment of a guardian for a minor or authorization for such guardian to perform acts on behalf of the minor. *See* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 767 (1996) (outlining Italian Private International Law No. 218/1995, art. 9).

236. *See* Law No. 218/95, art. 67 (Italy), *translated in* 35 I.L.M. 760, 779 (stating which written instruments are necessary in order to proceed with the enforcement of a foreign judgment); *see also* Dreyfuss, *supra* note 1, at 15–16 (describing the judicial process of enforcing a foreign judgment in Italy).

237. *Id.* (stating that the Court of Appeals of the district where enforcement is sought has jurisdiction); *see also* Ursula R. Kubal, Comment, *U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union,* 25 N.C.J. INT'L L. & COM. REG. 217, 278 (1999) (noting that pursuant to Article 67 of the statute, a person may petition the Court of Appeals located where the foreign judgment was implemented).

the Code of Civil Procedure.[238] In the rare cases when the foreign judgment may have effects in more than one place, there will be a concurrent jurisdiction of all Courts of Appeals having jurisdiction on the decision.[239]

The procedural rules to be followed before the Court of Appeals for this kind of proceeding are exactly the same followed for general proceedings before the Court of Appeals.[240] Therefore, the creditor shall start the proceeding with a pleading to be served to the debtor.[241] In the pleading, the creditor will indicate the day on which the defendant shall appear before the court.[242] Therefore, the plaintiff has the right to choose the day of the first hearing, insofar as he complies with the relevant rules.[243]

There has been debate concerning the composition of the court. Regular appeals are decided by panels of three judges.[244] In this particular case, however, sometimes in the initial phases of the proceeding only one judge prepares the case, which is then decided by a panel of three judges.[245] No case law exists on this point, and therefore, *in dubio*, the Court of Appeals

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238. *See generally* Romito & Sant 'Elia, *supra* note 69, at 203 n.19 (discussing the function of competence in Italy in cases involving the Brussels Convention).

239. *See* Annalisa Ciampi, *International Decisions*: Public Prosecutor v. Ashby, 93 AM. J. INT'L L. 219, 223 (1999) (discussing the purpose of concurrent jurisdiction).

240. This topic is controversial among courts and scholars. A discussion of the matter can be found *infra*, under part V.B. Venice Court of Appeals, November 26, 1997, on Procedural Rules. *See generally* Lupoi, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, *Civil Procedure* at 155–62 (Kluwer International 2002) (hereinafter "Lupoi, INTERNATIONAL") (detailing the rules of civil procedure followed in Italy regarding the enforcement of judgments).

241. *See* Lupoi, INTERNATIONAL, *supra* note 240 at 156 (discussing the procedures to follow for the enforcement of judgments in Italy); *see also* Dreyfuss, *supra* note 1, at 15–16 (stating that in order to enforce the foreign judgment the petitioner must serve the debtor with a copy of the court's order).

242. *See* Barbara C. Salken, *To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code,* 58 BROOKLYN L. REV. 641, 646–47 (1992) (comparing New York's rules of evidence to its rules of pleading).

243. Between the day on which the complaint is served and the day of the hearing, 60 days must elapse (120 in case the defendant is domiciled outside Italy). The plaintiff, when a need for a fast proceeding arises, may request the judge to halve the 60-day term. Should the plaintiff decide to unreasonably postpone the first hearing, the defendant shall have the right to request the president of the court to anticipate such hearing. In this case, the creditor will have a strong interest in indicating the shortest possible term, as he will be willing to have a fast decision and therefore a fast recognition of the judgment.

The assistance of counsel is mandatory: the parties shall be represented by lawyers who can plead before the Italian Court of Appeals. *See generally* N.Y. CPLR 103 (2004) (stating that pleadings shall be liberally construed).

244. *See* Vincenzo Varano, *Civil Procedure Reform in Italy,* 45 AM. J. COMP. L. 657, 658–59 (1997) (stating that the courts of general jurisdiction in Italy are composed of a panel of three judges).

245. *Id.* (stating that in Italy, the initial stages of a proceedings are handled by only one member of the panel of three judges).

should sit from the beginning of the proceeding in a panel of three judges (thus avoiding procedural challenges).[246]

The Italian court has the power to raise ex officio the lack of any of the requirements of Article 64.[247] The party who then has an interest in sustaining the lack of such requirements shall bear the burden of proving that the requirement is not complied with.[248]

A scholar points out that usually the court raises ex officio lack of jurisdiction pursuant to Article 64, Letter "a," and often in combination with public policy pursuant to Article 64, Letter "e."[249] Proof of the definitiveness of the foreign decision will usually be found on the actual copy of the foreign judgment filed with the Court of Appeals (usually a certification of the officers of the foreign court).[250]

It may be that at least some of the requirements provided for by Article 64 are lacking at the beginning of the Italian recognition proceeding, but then come into existence later. An example may be a change in the Italian rules of jurisdiction. Another example may be the case when the foreign decision becomes *res iudicata* after the Italian proceeding is started. In these cases, recognition can be granted: it will not be necessary to start a brand-new proceeding just because the requirements were lacking at the outset.[251]

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246. *See* Claudio Consolo, *Evoluzioni nel Riconoscimiento delle Sentenze [Evolutions in Recognizing Decisions],* RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [QUARTERLY REVIEW OF LAW AND CIVIL PROCEDURE], Sept. 1997, at 603 (discussing the Court of Appeals' ability to sit from the beginning of a proceeding); *see also* Federico Carpi, *Il riconoscimento e l'efficacia delle sentenze straniere* [*Recognition and Effectiveness of Foreign Decisions]*, in ATTI DEL XXI CONVEGNO DELL'ASSOCIAZIONE ITALIANA FRA GLI STUDIOSI DEL PROCESSO CIVILE [FILES OF THE XXI MEETING OF THE ITALIAN ASSOCIATION AMONG STUDENTS OF CIVIL PROCEEDINGS], Parma, October 11–12, 1996 (noting that a three-judge panel from the Court of Appeals would circumvent procedural challenges). *See generally* Lupoi, *Recognition, supra* note 6 (agreeing that a three-judge panel from the Court of Appeals should sit from the beginning of the proceeding in order to avoid procedural challenges).

247. *See* Lupoi, INTERNATIONAL, *supra* note 240 at 82–83 (stating that the most serious irregularities in a proceeding may be raised *ex officio* by an Italian judge).

248. *Id.* at 129 (explaining that in Italy the defendant bears the burden of proving the facts that extinguish the actionability of a claim).

249. *See* MICHELE ANGELO LUPOI ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF APPLICATION OF THE BRUSSELS AND LUGANO CONVENTIONS (Kluwer Law International 2000) (conducting an interesting description of the practical aspects of this proceeding).

250. *See* Dreyfuss, *supra* note 1, at 15 n.65 (stating that copies of the foreign judgment and all other documents must also be accompanied by a sworn translation into Italian).

251. *See* Uberman, *supra* note 157, at 171 n.83 (stating that the res judicata effect of foreign litigation is only one of the factors that must be met in order for foreign judgments to be recognized). *See generally* Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels,* 45 HARV. INT'L L.J. 239 (2004) (arguing that litigants engage in forum shopping: seeking out the jurisdiction with the highest probability of applying law favorable to their position, understanding that other jurisdictions may give the resulting judgment res judicata effect).

The Court of Appeals will likely be unfamiliar with foreign laws governing service of process, appearance in court and—when applicable—default.[252] Article 14 of Law 218/95 states that the court should investigate the content of the foreign law on its own.[253] The parties will have a chance to co-operate with the judge in his research of the foreign law, and will in practice often provide him with detailed (and translated) explanations of the foreign law that they deem applicable.[254]

When the debtor alleges violation of Letter "e" or "f," the burden of proving that another proceeding is pending, or that there is another precedent *judicatum* in Italy, will be on him.[255] The debtor shall thus file with the court either a certification issued by the other Italian court stating that another proceeding is pending or a certified (official) copy of the other final decision.[256]

It is not necessary that the requesting party file a translation of the foreign judgment, as a translator will be appointed if the judge does not know English.[257] Italian law does not require that jurisdiction over the debtor is obtained by the Italian courts in the enforcement action.[258] The only jurisdiction to be reviewed will be the jurisdiction of the foreign court.[259] The decision of the Court of Appeals, due to the fact that the foreign judgment is automatically recog-

252. *See* Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law,* 12 ARIZ. J. INT'L & COMP. L. 225, 232 (1995) (commenting on the holding of the Italian Court of Cassation that the knowledge of foreign law is not part of the official and mandatory science of the Italian judge).

253. *See* Gazz. Uff., 3 giugno 1995, n.128, suppl. ord. n.68, Lex LXXXI, 1995, I, 1808, *at* http://www.altalex.com/index.php?idstr=31&idnot=1178 (displaying Italian Law 218/1995, Reform of the Italian System of Private International Right).

254. *See* Romito & Sant 'Elia, *supra* note 69 at 190 (listing the methods by which Italian judges ascertain foreign law, as set forth by Article 14 of Law 218/1995).

255. *See* Russo & Rains, *supra* note 33, at 312 (examining the Italian procedures involved in simultaneous foreign litigation).

256. *Id.* at 271 (discussing the method by which Italian courts, under the Brussels Convention, handle the recognition of concurrent foreign litigation).

257. It is good practice, however, for the creditor to file a translation with the court, at least of the relevant parts of the foreign judgments, together with the complaint. *See* Commission Proposal for a Proposal for a Council Regulation Creating a European Enforcement Order for Uncontested Claims, art. 3, 23 O.J. (C 85) 1 (stating that translations are normally not required in most cases because multilingual standard forms are used for the certification of a foreign judgment).

258. *See* Law No. 218/95, art. 64 (Italy), *translated in* 35 I.L.M. *760, *779 (showing Italian Law 218/1995); *see also* Dreyfuss, *supra* note 1, at 15–16 (stating that the requirements to initiate enforcement actions are located in Article 67 of Italian Law 218/1995, and require only that the foreign court had proper jurisdiction).

259. *See* Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 545 (2004) (stressing that Italian courts do not have discretion to decline jurisdiction where jurisdiction would have been proper in the forum state). *But see* Maura E. Wilson, Note, *Let Go of That Case! British Anti-Suit Injunctions against Brussels Convention Members*, 36 CORNELL INT'L L.J. 207, 211 (2003) (recognizing that the Brussels Convention requires that the final determination of jurisdiction be decided by the court of first jurisdiction in the case in question).

nized, has mere declarative effects (no new right is established),[260] and this is one of the most important innovations of the new law: before, the decision of the Court of Appeals had constitutive effects.[261]

When issuing a decision on the recognition and enforcement of the foreign judgment, the Court of Appeals shall not review the merits of the foreign decision (no *révision au fond* is possible in the Italian system).[262] The foreign decision shall be reviewed only to verify compliance with the requirements provided for by Article 64.[263]

Therefore, for instance, the creditor is not entitled to receive interest on the original judgment regardless of whether the original judgment amount included interest.

Quite surprisingly, the Court of Cassation has issued a very recent decision literally stating that "Law 218/95, introducing the principle of the automatic recognition of foreign judgment, has not made clear whether, in case of dispute, the Italian judge should limit himself to checking the compliance of the formal requirements or may instead examine the controversial rights

260. *See* Michel Looyens, *Reforms of Private International Law Rules Recognize the International Dimension of Doing Business in Italy*, EUROWATCH, May 27, 1996, at 1 (explaining how the Brussels Convention played a central role in the emergence of Italy's current international law system, where members automatically recognize and enforce judgments of its sister members in the Convention). *See generally* Uberman, *supra* note 157, at 174 (establishing that the Brussels Convention's members automatically recognize and enforce judgments concerning civil and commercial matters rendered by other members); Roland Lechner, Note, *Walking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation in Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 1021 (2002) (stating that the European Council, while seeking uniformity in international law, requires that a judgment made by one of the member's state will automatically be recognized by the other member states, Italy being one of those members).

261. *See generally* Santo F. Russo, Comment, *In Re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1276, 1303 (1993) (reviewing the significance of the Italian Court of Cassation's decision to use international law instead of Italy's own provisions found in the Italian Penal Code).

262. *See* Symposium, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?,* 24 BROOK. J. INT'L L. 167, 180 (1998) (remarking on Italy's recent legislation that recognizes foreign judgments and its disapproval of the *revision au fond*). *See generally* Symposium, *Could a Treaty Trump Supreme Court Jurisdictional Doctrine?: The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1302 (1998) (commenting that the prohibition of the *revision au fond* is now standard and helps to facilitate the enforcement of foreign judgments).

263. *See* Dreyfuss, *supra* note 1, at 15–16 (stating that foreign judgments will be recognized when in compliance with Article 64); Russo & Rains, *supra* note 33, at 277–78 (examining in detail the Article 64 requirements and what needs to be reviewed in order to enforce a foreign judgment).

of the parties."[264] Such decision seems to take into serious consideration that a *révision au fond* may be possible, and therefore devolves the matter to the *Sezioni Unite* of the Court of Cassation.[265]

Apart from the way this matter will be decided in the future by the Court of Cassation, it must be highlighted that a *révision au fond* is possible in other countries.[266] In the previous system set forth by Article 797 of the Code of Civil Procedure a *révision au fond* was possible in two important types of cases:

a) Select, exceptional cases that allow extraordinary means of appeal[267] and

b) Foreign decisions rendered in default.[268]

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264. *Cassazione* (Court of Cassation), June 14, 2002, n. 8592 (observing that Law No. 218/95 does not provide Italian judges with any guidance as to whether they must merely enforce the judgment or rule on the rights of the parties). *See generally* Reuland, *supra* note 44, at 575–76 (explaining that the Brussels Convention does not define the terms "civil and commercial" which are the terms that force members of the Convention to recognize other foreign judgments, hence the court may use some discretion when determining the scope of the case and to review its merits).

265. The Court of Cassation is subdivided into five *Sezioni* (subdivisions). Each such subdivision has a different expertise. The first three have competence over various civil matters. The fourth *Sezione* has competence over labor matters and the fifth has competence over fiscal matters. On top of the above-mentioned five *Sezioni*, there is a plenary session (*Sezioni Unite*), which is appointed to decide particular matters, which, for their complexity, must be decided by the highest judge. In many cases, the *Sezioni Unite* get to decide cases which have been decided in dissimilar or conflicting ways by some of the five *Sezioni*, and thus a harmonization of the laws is required. *See generally* Peter Gottwald, *Principles and Current Problems of Uniform Procedural Law in Europe Under the Brussels Convention*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 139, 157–61 (1997) (summarizing different circumstances in which a member of the Brussels Convention can apply a *revision au fond*: issues of due process rights, conflicting and incompatible judgments, national conflicts of law and public policy); Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57 (1993) (asserting four conditions under which a foreign judgment does not have to be automatically recognized).

266. *See* Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 234 (1995) (stating that Belgium has its own methods of accepting or rejecting foreign judgments); *see* Symposium, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 219 (1994) (claiming that the *revision au fond* has not been abandoned by all European countries and footnoting that Belgium is one of those countries).

267. *But see* John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 722 (1993) (stating that parties to the Convention, including Italy, have only limited situations in which jurisdictional tests and review of the case may apply).

268. This case is perhaps the most important, as default judgments have been often regarded by the Italian courts as a dangerous area, to be scrutinized carefully. The new rule got rid of such a provision, and now default judgments can be recognized and enforced in Italy, provided that rules on default judgments have been strictly followed by the foreign courts and that the basic rights of defense have not been violated. *See generally* Alan Reed, *A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?*, 25 LOY. L.A. INT'L & COMP. L. REV. 243, 264 (2003) (remarking that in contrast to common law forums, such as the United States, members of the Brussels Convention, do not review decisions rendered in default).

This old rule was frequently abused by debtors who risked default judgment in the foreign proceeding and then asked for a revision of the decision (in practice, a new decision) during the *delibazione* proceeding before the Court of Appeals.[269]

Another important consequence of the no-review-on-the-merits principle is that, even when the debtor alleges that he has already complied with the foreign proceeding, the Court of Appeals shall not take this argument into consideration, and shall take its decision on recognition and enforcement apart from this allegation.[270] The debtor will be entitled to oppose the execution of the decision further on, when effectively requested to comply with the decision.[271]

The Court of Appeals will issue a *sentenza,* containing its reasoning and the decision on recognition and enforcement.[272] The Court of Appeals may decide to grant only partial recognition to the decision, in effect dividing the foreign decision into multiple parts.[273] The enforcement of the decision itself is procedurally regulated as well.[274] The foreign judgment, together with the decision of the Court of Appeals, will be enforced by means of an attachment of the debtor's goods. In Italy, the attachment is called *pignoramento.*[275]

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269. *See* Case C-172/97 OP, SIVU du plan d'eau da la Vallee du Lot v. Commission of the European Communities, 2001 E.C.R. I-6699 (2001) (illustrating a scenario where there has been a request to set aside a default judgment and a party has asked for a new revision of the decision).

270. *See* Schlosser, *supra* note 76 at 29 (indicating that a court can only review the formal requirements, thus not giving the debtor a chance to be heard).

271. *See* Case C-220/84, AS-Autoteile Service GmbH v. Pierre Malhe, 1985 ECJ CELEX LEXIS 6949 (1985) (clarifying that under German law and the Brussels Convention, a decision must first be executed by the first court in order for the debtor to raise objections to the execution of that decision). *See generally* Schlosser, *supra* note 76 at 30 (stating that judgments, even though enforced, do not have to be final and are subject to change if the debtor opposes the first judgment).

272. *See* John Ferejohn & Pasquale Pasquino, *Comparative Avenues in Constitutional Structures and Institutional Designs: Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004) (noting that a *sentenza* is simply the official, published opinion of the Italian court).

273. *See* John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake* of Mastrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59, 104 (1997) (discussing the fact that some countries allow for partial recognition and enforcement of foreign judgments).

274. *See* William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 19 (1999) (establishing that in Italy decisions of the Court of Appeals are not final because the Court of Cassation has the power to overturn them); *see also* Weintraub, *How Substantial,* supra note 131, at 180 (discussing Italy's movement toward facilitating recognition of foreign judgments).

275. As it may have become apparent, the recognition and enforcement proceeding in Italy is quite convoluted: the government has tried to introduce an amendment in the law in order to render the proceeding faster and easier. Nevertheless, such reform has not been implemented yet.

B. Interim Relief

The creditor, pending a recognition and enforcement proceeding, is entitled to request *interim* relief according to the rules of Italian Civil Procedure.[276] Therefore, provided that he shows a *fumus boni iuris* (prima facie case) and a *periculum in mora* (possible danger due to delay in enforcement), the two general requirements of any interim relief in Italy, he will be entitled to a provisional measure by the Court of Appeals.[277]

C. Interlocutory Recognition

The Italian courts also have the power to verify the existence and compliance of foreign judgments with Article 64 when the recognition is necessary for a different proceeding.[278] In this case, the effects of the recognition of the foreign judgment will be limited only to the proceeding where the recognition has been sought and will not have any effects outside of it.[279] Thus, the creditor shall seek a whole new recognition if he intends to enforce the foreign decision in Italy.[280]

D. Appeal of the Decision of the Court of Appeals

If the Court of Appeals rejects the request of recognition of the foreign judgment:

> a) A new enforcement proceeding can be started if the rejection is based on procedural mistakes in the recognition proceeding;[281]
>
> b) A new recognition proceeding can be started if the rejection is based on a failure to satisfy Article 64 requirements, but only if there has been a change of such nature that the outcome of the proceeding may be different: e.g., the Italian rules on jurisdiction have been amended;[282]

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276. *See* William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOKLYN J. INT'L L. 1059, 1092 (2003) (stressing that recourse to national courts is the only manner of pursuing interim relief in the Italian court system); *see also* Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983) (discussing the appropriateness of interim relief in international matters)

277. *See* Anne Peters, *International Decisions,* 89 AM. J. INT'L L. 376, 377 (1995) (stating the two primary requirements for the granting of interim relief).

278. *See* Russo & Rains, *supra* note 33, at 277–78 (examining the guidelines used by the Italian courts for recognizing foreign judgments, as set forth in Article 64); *see also* Dreyfuss, *supra* note 1, at 15 (clarifying that the Italian courts turn to Article 64 when determining whether or not to follow foreign decisions).

279. *See* Schmertz & Meier, *supra* note 150 (explaining where Italy's Law No. 218 takes precedent over other laws).

280. *See* Dreyfuss, *supra* note 1, at 15 (explaining the procedural steps that must be taken in order to attempt to enforce a foreign judgment in Italy).

281. *See* Ciampi, *supra* note 216, at 921–22 (discussing an instance where the Italian Court of Appeals made a procedural mistake in recognizing a foreign decision).

282. *See* Dreyfuss, *supra* note 1, at 16 (explaining the circumstances during which the Italian Court of Appeals must recognize a foreign judgment. If the court fails to do so under these circumstances, then a new recognition proceeding can be commenced.).

> c) The creditor can always start a brand-new, separate proceeding in Italy for the same matter which formed the object of the foreign, unrecognized proceeding.[283]

A decision rendered by the Court of Appeals can be appealed before the court of last resort in Italy, the Court of Cassation.[284] Only the losing party can appeal the decision.[285] The Court of Cassation is only empowered to review the legitimacy of Court of Appeals decisions based on conclusions of law, not fact.[286] Thus, the Court of Cassation will not review the grounds on which recognition was either granted or denied.[287] Legitimate reasons include violation of domestic rules of competence of the Court of Appeals, violation or misapplication of the law, fault in the reasoning and other peremptory nullities in the decision or in the proceeding.[288]

The terms within which the judgment of the Court of Appeals can be appealed before the Court of Cassation are different depending upon service of the Court of Appeals decision.[289]

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283. *See* Stephen T. Ostrowski & Yuval Shany, Chromalloy*: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1672 (1998) (noting that whether or not a foreign judgment is recognized, a party can always start a new, separate domestic proceeding).

284. *See* Francesco G. Mazzotta, *Precedent in Italian Law*, 9 MSU-DCL J. INT'L L. 121, 145 (2000) (quoting Article 65 of the "Rules on the Judicial Organization" which defines the role of the highest court, the Court of Cassation); *see* Daniel S. Dengler, Comment, *The Italian Constitutional Court: Safeguard of the Constitution*, 19 DICK. J. INT'L L. 363, 365 n.16 (2001) (defining the Court of Cassation as the highest civil and criminal court in Italy). *See generally U.S. District Court Refuses to Enforce Foreign Arbitral Award*, 11 WORLD ARB. & MEDIATION REP. 100, 100 (2000) (discussing a decision affirmed by the Court of Cassation).

285. *See Italy Law Digest*, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, JUDGMENTS (Reed Elsevier Inc. 2004) (explaining the appeal process when a losing party wants to challenge an unfavorable decision).

286. *See* Luigi Moccia, *The Italian Legal System in the Comparative Law Perspective: An Overview*, 27 INT'L J. LEGAL INFO. 230, 241 (1999) (indicating that the Court of Cassation's jurisdiction extends all over the country and relates to questions of law only); *see* Dottoressa Maria Timoteo, *Italy: Some Recent Judicial Interpretations of Family Law*, 33 U. LOUISVILLE J. FAM. L. 409, 409 (1994) (providing that the Court of Cassation only has jurisdiction over questions of law); *see* Vittorfranco S. Pisano, *The Italian Intelligence Establishment: A Time for Reform?*, 21 PA. ST. INT'L L. REV. 263, 265 n.4 (2003) (clarifying the jurisdiction of the Court of Cassation).

287. *See Principles of Italian Civil Procedure*, COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE *at* 28A.03 (Matthew Bender 2004) (explaining that the Court of Cassation may not explore the facts again on appeal). *See generally Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 408 (2001) (noting that on appeal review will be limited to questions of law).

288. *See* Dreyfuss, *supra* note 1, at 15 (providing text from Article 64 of the Code of Civil Procedure which provides the factors Italian courts consider when determining if a foreign judgment should be recognized). *See generally* Bonomi, *supra* note 9, at 265 (explaining that recognition and enforcement of judgments from contracting States will only be denied in three specific grounds).

289. *See* Italian Civil Procedure Code (C.P.C.) art. 742 (1969) (detailing the timelines that apply to appeals) (If the creditor has served the debtor with the decision of the Court of Appeals, an appeal must be filed within 60 days from service. If instead the service has not been effected, an appeal must be filed within one year from the day on which the decision was deposited by the Clerk's office in the Court of Appeals. Please note that the Italian system of Civil Procedure (Law 742/1969) provides for a "suspension of judicial terms" due to summer holidays from August 1 to September 15, each year. During this period of time, no ordinary hearing is held by the courts (only a number of "urgent cases" are heard, such as petitions for summary injunction). Therefore, those 45 days are not to be included in the terms. An example will clarify this provision. If the decision of the Court of Appeals is rendered on July 31, 2002, and it has not been served to the debtor, the debtor will have the right to appeal such decision until September 16, 2003: 1 year (the term) + 45 days (i.e., the "suspended-terms period")).

While the appeal is pending before the Court of Cassation, the judgment of the Court of Appeals can still be enforced (unless the debtor is likely to suffer irreparable harm from the enforcement of such decision).[290] All other legal remedies provided by the Italian Code of Civil Procedure are available,[291] such as opposition of third parties (*opposizione di terzo*)[292] and special request for review of the court's decision (*revocazione*).[293]

V. Caselaw

There are a limited number of Italian decisions on recognition and enforcement of foreign decisions, especially for monetary judgments.[294] It is much easier to find published decisions concerning divorces, child custody or alimony.[295]

The new rules concerning recognition and enforcement of foreign decisions have been enacted quite recently and therefore very few cases have been decided under Law 218/95.[296] It must be kept in mind that the provisions of Law 218/95 apply in general to proceedings started on or after September 1, 1995, but the provisions on recognition and enforcement of judgments apply to proceedings started on or after December 31, 1996.[297] A brief review of some significant cases follows.

A. Court of Cassation, April 6, 1995, on Public Policy

In 1995 the Italian Court of Cassation denied enforcement of a foreign money judgment basing its decision on the fact that the contract on which the claim was based had not been

290. *See Principles of Italian Civil Procedure*, COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE at 28A.03 (Matthew Bender 2004) (explaining that throughout the appeal proceedings the judgment can be enforced and its execution may only be stopped by the judge of the appeal on "serious grounds").

291. *Id.* (informing that a judgment can be contested through the existing legal remedies).

292. *See* Francesco G. Mazzotta, *Precedent in Italian Law*, 9 MSU-DCL J. INT'L L. 121, 135 (2000) (referring to an alternative for contesting the final judgment based on the effects of the decision upon third parties).

293. *Id.* (indicating that a judgment is final when remedies such as *revocazione* are exhausted).

294. *See* Italy: Law Reforming the Italian System of Private International Law, 35 I.L.M. 760, 760 (1996) (discussing how the Italian legal system's way to address recognition and enforcement of foreign judgments became more flexible after the passage of Law 218 in 1995).

295. *See* Adair Dyer, *The Internationalization of Family Law*, 30 U. CAL. DAVIS L. REV. 625, 637–38 (1997) (noting that international private law is generally a new phenomenon); Russo & Rains, *supra* note 33 (stating that changes in Italian law makes family law no longer a purely domestic issue); *see also* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 216–17 (2003) (asserting that development of international family law occurred during the second half of the 20th century).

296. *See* Francois Rigaux, *Codification of Private International Law: Pros and Cons*, 60 LA. L. REV. 1321, 1321 (2000) (stating that the new Italian private international law was enacted in 1995); *see also* Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 15 (2002) (noting that the law was put into effect on May 31, 1995). *See generally* Clermont, *supra* note 205 at 131 (outlining provisions of Law 218/95).

297. *See* Schmertz & Meier, *supra* note 150 (announcing that Law 218/95 took effect on Sept. 1, 1995).

authorized by certain Exchange Control authorities.[298] The lack of clearance has been considered to be in contrast with Italian public policy.[299] The regulation which made the clearance compulsory is now no longer in force.[300]

B. Venice Court of Appeals, November 26, 1997, on Procedural Rules

In a recent case, the Venice Court of Appeals addressed a problem that has been thoroughly discussed among scholars and courts: which procedure should be followed before the Court of Appeals in proceedings for recognition and enforcement of foreign judgments.[301]

The most dependable solution utilizes the ordinary procedure (*procedimento ordinario*), the standard procedure usually followed for proceedings before the Court of Appeals.[302] This solution, which appears to be the most correct in the silence of the law, nevertheless applies some burdensome inconveniences. The ordinary proceeding is in fact designed and structured to deal with actual controversies and facts, while the only matter at stake in the recognition proceedings is whether the foreign judgment shall be recognized.[303] In recognition proceedings

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298. *Cassazione* (Court of Cassation), April 6, 1995, n. 4033, in 148 Giur. It. I, 51 (1996) (refusing to enforce a contract that had not been approved by Exchange Control authorities); *see also* IL FALLIMENTO 1996 at 117 (reporting the 1995 Court of Cassation decision that declined to enforce a foreign money judgment). *See generally* Tomaso Cenci, *An Italian Law Firm That Can Expedite International Trade*, THE METROPOLITAN CORP. COUNSEL, Oct. 2002, at 21 (alleging that contract claims between American and Italian parties can be governed by law other than Italian law and still be recognized in Italian courts).

299. *See* Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 795 (1996) (describing how Italian courts can refuse to enforce foreign judgments that are not in accord with Italian public policy); *see also* Russo & Rains, *supra* note 33, at 273 (noting that Article 64 of Italy's 1995 international private law states that Italy will not enforce foreign judgments which produce effects that are contrary to public policy).

300. *See* Minehan, *supra* note 299, at 818 (explaining that countries are generally judicious in their use of the public policy exception that would allow them not to enforce foreign judgments). *See generally* Silberman, *supra* note 53 at 351–52 (indicating that U.S. courts are more generous in their treatment of foreign judgments than are European courts). *See generally* Apisith John Sutham, *The Asian Financial Crisis and the Deregulation and Liberalization of Thailand's Financial Services Sector: Barbarians at the Gate*, 21 FORDHAM INT'L L.J. 1890, 1892 (1998) (noting that in many instances, as countries deregulate, certain exchange control authorities have been abolished).

301. Article 67 of Law 218/95 is silent on this particular point, and therefore the matter is subject to interpretation and analogical inquiry. *See* Law No. 218/95, art. 64 (Italy), *translated in* 35 I.L.M. *760, *779 (1996) (reforming the Italian system of international private law); Corte d'Appello di Venezia, 26 Nov. 1997, Fimez S.p.a. v. Vernon; *see also* 34 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE (INTERNATIONAL PRIVATE AND PROCEDURAL LAW REVIEW) 631 (1998) (publishing the Venetian Court of Appeals' decision in *Fimez S.p.a. v. Vernon*).

302. *See Civil Actions and Procedure*, 2004 MARTINDALE-HUBBELL, ITALY LAW DIGEST (outlining rules used by Italian courts in recognizing foreign judgments).

303. *See* Michael Loovens, *Reforms of Private International Law Rules Recognize the International Dimension of Doing Business in Italy*, EUROWATCH, May 27, 1996 (explaining the standards under which an Italian Court of Appeals will recognize a foreign judgment).

the preliminary investigation phase (equivalent to "discovery" in the U.S.) is almost totally absent in the Italian system—no *révision au fond* is possible.[304]

As a result, scholars and courts have suggested two alternatives, which would both be viable in theory.[305] One is a shorter proceeding introduced by a petition and decided with a decree *inaudita altera parte.*[306] The other is a shorter proceeding, also introduced by a petition, but conducted in the presence of the two parties with a decision (*sentenza*).[307]

The decision of the Venice Court of Appeals states that the recognition proceeding before the Italian Court of Appeals must be conducted as an ordinary proceeding.[308] The same Venice Court of Appeals reached the decision mentioned above after navigating through a complex mix of contradicting trends.[309]

On April 9, 1997, the court sustained a request for recognition of a foreign judgment in a proceeding and granted recognition and enforcement to a foreign judgment with decree *inaudita altera parte.*[310] The defendant had not been called in the proceeding. Apparently the court thought that if the defendant wanted to challenge the decree, he had the right to do so by starting an ordinary proceeding.[311]

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304. *See* Donncadh Woods, *The Growth of Private Rights of Action Outside the U.S.: Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 443–44 (2004) (concluding that discovery in Italy is much more restrictive than it is in the U.S.). *See generally* Donald C. Dowling, Jr., *Forum Shopping and Other Reflections Involving U.S. and European Businesses*, 7 PACE INT'L L. REV. 465, 476–78 (1995) (describing how the United States offers more expansive pre-trial discovery procedures than do other countries).

305. *See* Cenci, *supra* note 298 at 21 (admitting that although ordinary proceedings in Italian courts can be very time-consuming, Italian civil procedure contains more efficient means of undertaking civil proceedings).

306. *See* Larry Coury, *C'est What? Saisie! A Comparison of Patent Infringement Remedies Among the G7 Economic Nations*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1148–49 (2003) (commenting that provisional measures *inaudita altera parte* are appropriate where any delay in judicial action is likely to cause irreparable harm to a party, or where there is a demonstrable risk that evidence will be destroyed); *see also* Alberto Giampieri & Giovanni Nardulli, *Enforceability of International Documentary Letters of Credit: An Italian Perspective*, 27 INT'L LAW 1013, 1013 (1993) (stating that procedures *inaudita altera parte* are conducted in the absence of the respondent).

307. *See* Andrea Carlevaris, *Il Nuovo Procedimento per Accertare l'efficacia delle Sentenze Straniere, e le Prime Difficolta' Applicative*, *in* RIVISTA DEL DIRITTO INTERNAZIONALE, 1030 (1999) (discussing the new proceedings to ascertain the effectiveness of the foreign decisions and the first applicability problems). *But see* Bariatti, *supra* note 21, at 1224 (arguing that the petition is possible only when the decision concerns "voluntary proceedings," or when the parties agree. In all other cases, a summons will be needed.); Francesco Finocchiaro, *Riconoscimento delle Sentenze Ecclesiastiche* [*Recognition of Ecclesiastic Decision*], in ENCYCLOPEDIA GIURISPRUDENZIA XXVIII, Rome, 1992, 4 *et seq.* (agreeing that the petition for the shorter type of proceeding is not possible in all cases). *See generally Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1, 9 (2000) (describing procedures by which Italian courts can speed up proceedings).

308. *Fimez S.p.a. v. Vernon* (Venice Court of Appeals, November 26, 1997).

309. *Id.*

310. *See* Campeis e De Pauli, *La Delibazione Tra Rito Camerale e Rito Ordinario: Acrobazie Processuali Nel Silenzio Della Legge di Riforma N. 218/95*, *in* NUOVA GUIRISPRIDENZA CIVILE COMMENTATA, 890 (1997) (discussing the recognition of the decision in two different types of proceedings).

311. Fimez S.p.a. v. Vernon (Venice Court of Appeals, April 9, 1997).

The defendant did in fact challenge the court's decision and also the procedure followed to reach the decision, and eventually an ordinary proceeding was established.[312]

With the decision, handed down on November 26, 1997, the court overruled its previous decision[313] and stated that the procedural rules to be used in proceedings for the recognition of foreign judgments should be the rules for ordinary proceedings.[314] But the matter is not resolved. After the Venice decision, the Bari Court of Appeals issued a decision on recognition of a foreign judgment with a decree *inaudita altera parte*.[315]

The decision of the Venice Court of Appeals also addressed the fulfillment of the requirements of Article 64.[316] The court granted recognition to the decision (which was taken in an Iowa court) and noted that the essential rights of defense of the debtor had not been violated in the foreign proceeding, that the court had jurisdiction, and that the decision was compliant with public policy.[317] The court did not state the grounds upon which its conclusions were reached.[318]

C. Milan Court of Appeals, February 17, 1998, on Procedural Rules

The Milan Court of Appeals, with a notice dated February 17, 1998, stated that Italian law only allows for the recognition of foreign judgments based upon ordinary procedure (*procedimento ordinario*).[319]

D. Milan Court of Appeals, February 27, 1998, on Res Judicata

The Milan Court of Appeals denied recognition of an Egyptian money judgment because the plaintiff was able to prove that the foreign decision was provisionally enforceable, but did not prove that such judgment was res judicata pursuant to Article 64, Letter "d."[320] In this

312. *Id.*

313. *Fimez S.p.a. v. Vernon* (Venice Court of Appeals, November 26, 1997).

314. *Id.* The court did not provide an exhaustive reasoning for its decision. Scholars have pointed out that the main reason for having an ordinary proceeding instead of a "simplified" one is that the defendant should be granted the chance to argue the lack of the recognition requirements as set forth by Article 64. It has been pointed out that especially some of these requirements may be the object of debate before the court: for example, the requirements of Letters "b," "c," "e" and "f" of Article 64.

315. Corte app. di Bari, 26 Jan. 1999. Such decree has been appealed, and as in the case of the Venice Court of Appeals, an ordinary proceeding was established: the decision is discussed below.

316. *Fimez S.p.a. v. Vernon* (Court of Appeals of Venice, November 26, 1997).

317. *Id.*

318. *Id.*

319. *See Comuncato della Corte di Milano sull'applicazione dell'art 67 della Legge n. 218/95*, in RIVISTA DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [INT'L PRIVATE AND PROCEDURAL L REV.] 271 (1997) (providing notice through a statement of the Milan Appeal Court on the applicability of Article 67 of Law 218/95).

320. *See* Misir and El Nasr v. Trimital, Corte app., 27 Feb. 1998, RIVISTA DEL DIRITTO INTERNAZIONALE PRIVATE E PROCESSUALE, 1998, I, 1, 563 (holding an Egyptian money judgment unenforceable because the plaintiff did not prove that the judgment was res judicata).

decision the Court of Appeals did not discuss in detail the otherwise interesting topic of what concept of res judicata should have been applied to decide whether the foreign decision was *judicatum*.[321]

E. Court of Cassation, November 29, 1999, Note 13315 on Default Judgments

The Court of Cassation has issued an interesting decision concerning both default judgments and service of process.[322] The Court of Cassation heard the case on appeal from a decision of the Court of Appeals (according to the old procedural rules), which rejected recognition of a California default judgment.[323] The court noted that the Court of Appeals should have granted recognition to the foreign judgment because the service of process had been affected according to the procedural rules of the state of California.[324] The court also noted that, according to such rules, a default judgment becomes final if the service of process has been effected properly.[325] Because the service of process had in fact been duly made, the court concluded that the foreign judgment was res judicata and thus was recognizable in Italy.[326]

F. Court of Cassation, March 22, 2000, Note 3365 on Public Policy

The Court of Cassation issued another decision addressing a number of public policy issues.[327] The case came to the Court of Cassation on appeal from a decision of the Court of Appeals (according to the old procedural rules) which rejected recognition of a New York judgment.[328] The defendant claimed that the foreign judgment could not be recognized because:

a) The foreign judgment was at odds with Italian public policy;

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321. *Id.* The court limited itself to saying that the foreign judgment was not *judicatum* pursuant to the Egyptian laws, with no further comment.

322. *See* Rivkin v. Etablissement Clamose, Cass., 29 Nov. 1999, RIVISTA DEL DIRITTO INTERNATIONALE PRIVATO E PROCESSUALE, 162 (2000) (concluding that because service of process was duly made, the foreign judgment was res judicata).

323. *Id.*

324. *Id.*

325. *Id.*

326. *See* Case C-38/98, Regie nationale des usinew Renault SA v. Mexicar SPA and Orazio Formento, 2000, E.C.R. I-2973 (2000) at 28 (holding that even when based on a foreign judgment, a judgment that is res judicata is recognized in Italy); Solo Kleinmotoren GmbH v. Emilio Boch, BGH 6981, 7 (stating that a foreign judgment that is res judicata cannot be disputed).

327. A. Ali, *La riforma della giustizia comunitaria: le recenti modifiche del regolamento di procedura della Corte di giustizia e del Tribunale di primo grado delle Comunità europee*, 37 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [RIV. DIR. INT'L PRIV. PROC.] 365, 388 (2001) (citing Burra v. Tawfik, Ainetchi, Amiantite America Inc. and Bhoori, fallimento Amiantite S.p.A. and Rencanati, a decision of the Court of Cassation dated March 22, 2000).

328. *See Burra v. Tawfik*, Cass., 22 Mar. 2000, n. 3365, 2001, 389; Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes,* 7 ANN. SURV. L. INT'L & COMP. L. 21, 32 (2001) (analyzing a decision by the French Court of Cassation which overturned a decision made by the Court of Appeals that was similar to a New York judgment).

> b) The right of defense had been violated because some of the defendants were judged in default and the rules on default judgments had not been complied with;
>
> c) The foreign judgment was lacking reasoning;
>
> d) The foreign judgment ordered the defendant to pay a sum on behalf of the Company.[329]

The Court of Cassation found that none of the claims could be sustained and confirmed the decision of the Court of Appeals granting recognition to the foreign judgment.[330] Under a) the court noted that neither Italian public policy nor the adversary process principle had been violated because the defendant had been given the chance to properly defend himself.[331]

Under b) the court noted that the rules on default judgments were properly followed.[332] In particular, the court acknowledged the fact that the New York court amended its first default judgment and gave the defendants additional time to defend themselves in the proceeding.[333] They failed to do so and were left to suffer the consequences.[334]

Under c) the court noted that a foreign judgment can be recognized even when it does not have any reasoning because the defendant could have inferred the meaning of the decision by reading both the decision and the plaintiff's arguments.[335] The court cited to two other decisions of the Court of Cassation.[336]

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329. *See Burra v. Tawfik*, at 389; *see* Dieter Krombach v. Andre Bamberski BGH 9265, 21–22 (holding that a justified ground for refusal of a foreign recognition is "that the operative part of the judgment is at variance with the public policy of the legal system in which the judgment is to take effect"). *See generally* Case C-38/98, Regie nationale des usinew Renault SA v. Mexicar SPA and Orazio Formento, 2000, E.C.R. I-2973 (2000) at 28 (explaining that a foreign judgment cannot be refused recognition just because the legal theories of the state and foreign nations do not coincide); Philip L. McGarrigle, *The Role of Foreign Judgments in Patent Litigation: A Perspective and Strategic Overview*, 39 IDEA 107 (1998) (listing the grounds where a foreign judgment need not be recognized).

330. *See Burra v. Tawfik*. *See generally* Nina Gumzej, *Global Development: New York Convention—Reconsidered Contribution to the 45th Anniversary of the Convention: Certain Aspects of Public Policy in Enforcement of Foreign Arbitral Awards*, 10 CROAT. ARBIT. Y.B. 39, 70 (citing that the words of the Egyptian Court of Cassation should apply in deciding the enforcement of a foreign award).

331. *See Burra v. Tawfik*; *see* Hrvoje Sikiric, *Arbitration and Public Policy*, 7 CROAT. ARBIT. Y.B. 85, 90 (2000) (noting that there was not a violation of Swiss public policy where the GSA was able to defend itself in writing).

332. *See Burra v. Tawfik*; *see also* Delvin J. Losing, Note, *Comity in the Free Trade Zone*, 74 N.D. L. REV. 737, 751 (1998) (establishing that in recognizing a foreign judgment it is appropriate to make sure that proper notice was given in default judgments in compliance with the rules of the foreign country).

333. *See Burra v. Tawfik*. *See generally* Jose & Giocondia v. Metro. Gov't of Nashville & Davidson County, Tenn. d/b/a Metro. Nashville General Hospital, 128 S.W. 3d 653, 655 (2003) (granting defendant's motion to amend to allow additional time to properly defend the action).

334. *See Burra v. Tawfik*. *But see* Goolsby v. Green, 431 So. 2d 955, 960 (1983) (giving defendants additional time to defend themselves after the motion to amend even though defendant claimed to be prepared).

335. *See Burra v. Tawfik*; *see* Case 145/86, Horst Ludwig Martin Hoffman/Adelheid Kreig, 1988 E.C.R. 645 (1988) (stating that in enforcing foreign judgments the state is allowed to draw inferences).

336. *See* Massimario del Foro Italiano, Cass. 18 May 1995, n. 5451, 124.

Under d) the court noted that the defendant was wrong in asserting that the Italian system does not have any provision according to which the defendant can be held responsible on behalf of the company.[337]

G. Rome Court of Appeals, April 12, 2000, on Right to Defense

This decision was rendered in a recognition of a divorce decision, but it is worth reviewing because it contains a general principle concerning the right of defense and service of process.[338] The Rome Court of Appeals denied recognition to a foreign divorce judgment because the right of defense of the defendant had been "inevitably harmed" in the foreign judgment.[339] The court pointed out that the requirement set forth by this section of Article 64 had not been met: the rules of the foreign country for the service of process had been violated, and thus the introductory act of the foreign proceeding had not been served properly to the defendant.[340]

The foreign country was Venezuela and both the husband and the wife were Italian.[341] The plaintiff effected the service of process pursuant to a Venezuelan Rule of Civil Procedure which is applied when the defendant's whereabouts are unknown.[342] Notice of the pleading was published in Venezuelan newspapers.[343] The Rome Court of Appeals found that the plaintiff was well aware of the fact that the defendant was residing in Italy.[344] The court concluded that recognition was improper because the introduction of the proceeding was vitiated and the remainder of the proceeding was vitiated as well.[345]

H. Bari Court of Appeals, May 11, 2000, on Jurisdiction and Service of Process

The Bari Court of Appeals decided with a *sentenza* a case on which it had issued a decree *inaudita altera parte* and affirmed a previous decision granting recognition of the foreign judg-

337. *Id. See generally* Case C-163/96, Criminal Proceedings Against Silvano Raso and Others, 1997 E.C.R. I-00533 (1997) at 7–9 (holding that in Italian port legislation the person who fails to follow the rules will be the one held responsible).

338. *See* E.V.M. v. E.G., Corte app., 12 Apr. 2000, n. 2001, 128; s*ee* Cases 175/86 & 209/86, M v. Council of the European Communities, 1988 E.C.R. 1891 (1986) (illustrating a case based on a divorce decree and service of process).

339. *Id.*; *see* Martha I. Morgan & Neal Hutchens, *Celebrating the Centennial of the Alabama Constitution: An Impetus For Reflection: The Tangled Web of Alabama's Equality Doctrine After* Melof*: Historical Reflections on Equal Protection and the Alabama Constitution*, 55 ALA. L. REV. 135, 201 (2001) (citing to a decision that stated a divorce statute favoring wives could deny husbands of their fundamental rights of citizenship); *see also* Carlevaris, *supra* note 55, at 128 (listing decisions of the Rome Court of Appeals).

340. *See E.V.M. v. E.G.* at 128. *See generally* Silberman, *supra* note 53, at 327 (explaining that if a foreign judgment rests on jurisdictional grounds like service of process the jurisdictional standard will be followed).

341. *See E.V.M. v. E.G.*

342. *Id.*

343. Id.

344. *Id.*

345. *Id.*

ment.[346] In the case at stake, the foreign decision was issued by the New York District Court.[347] The first part of the decision addressed the matter of jurisdiction. The defendant claimed that the U.S. court did not have jurisdiction pursuant to Letter "a" of Article 64 because, in his view, the contractual obligation was to be performed exclusively in Italy.[348] The court pointed out that the foreign judgment concerned not only contractual claims, but also tort claims asserting commercial fraud and unfair competition, the negative consequences of which occurred in the U.S.[349] Therefore, the U.S. court had jurisdiction over the case.[350]

The second part of the decision addressed service of process. The defendant claimed that the U.S. rules for service of process were not complied with, and that therefore the foreign judgment could not be recognized.[351] This claim was also rejected because the court noted that the pleading had been personally handed out to the defendant and that no violation of the right of defense had occurred.[352]

The defendant claimed also that the U.S. decision lacked finality because a petition for review had been filed.[353] The Bari Court of Appeals also rejected this claim, noting that the petition for review was considered an exceptional means of appeal and that the finality of the foreign judgment was not affected by it.[354] The reasoning of the court upon this potentially

346. *See* Semerano & Confezioni Mario Valente-Firenze S.R.L. v. Mario Valente Collezioni Ltd., Corte App., 11 May 2000, 2001, 135. *But see* Italian Leather SPA v. WECO Polstermobel GmbH & Co., BGH 3556 (discussing the Bari Court of Appeals' refusal to recognize the foreign judgment). *See also* Carlevaris, *supra* note 55, at 135 (describing a case in which the Bari of Court of Appeals decided a jurisdictional issue with a *sentenza*).

347. *See Semerano & Confezioni Mario Valente-Firenze S.R.L. v. Mario Valente Collezioni Ltd.*

348. *See generally* Russo & Bains, *supra* note 34, at 330 (explaining the circumstances under which Italian judges may recognize foreign decisions).

349. *See* Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L., 264 F.3d 32, 37 (2d. Cir. 2001) (explaining that because both the tort and contract claims occurred in New York, there was no jurisdiction dispute, remanding on the due process claim). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987) (explaining the grounds upon which jurisdiction lies).

350. *Mario Valente Collezioni*, 264 F.3d at 36–37 (explaining the function of New York's long-arm statute). *See, e.g.,* N.Y. CPLR 302 (describing acts that create jurisdiction under New York State law).

351. Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad,* 17 HARV. J. LAW & TEC. 211, 217–19 (2003) (explaining how in-hand service is the preferred method of service because it best meets due process requirements of foreign defendants).

352. *Cf.* Varano, *supra* note 244, at 658–59 (describing ordinary stages of civil procedure in the Italian legal system).

353. It was not possible to infer from the Italian judgment what kind of review was requested before the U.S. court. In the Italian decision, it has been referred to as *riesame. See* Giardina, *supra* note 8, at 779–80 (explaining the circumstances under which a foreign judgment, including a final judgment, will be recognized in Italy).

354. Antonio Gidi, Geoffrey C. Hazard, Michael Taruffo & Rolf Stumurner, *Principles and Rules of Transnational Civil Procedure: Introduction to the Principles and Rules of Transnational Civil Procedure,* 33 N.Y.U. J. INT'L L. & POL. 769 (2001) (describing how most international procedural rules relating to service of process and the enforcement of judgments are so similar that disputes among different legal systems are usually resolved); *See generally* Giardina, *supra* note 8, at 779–780 (explaining the circumstances under which foreign judgments will be recognized in Italy).

pivotal claim does not go further, and thus it is not possible to fully appreciate the reach of the decision.[355]

I. Venice Court of Appeals on Public Policy and Punitive Damages

Recently, the Venice Court of Appeals issued a decision denying recognition of a U.S. judgment issued on September 14, 1994 by the Jefferson County (Alabama) District Court.[356] This is one of the very few Italian decisions on this delicate aspect. Here are the facts of the case: On September 17, 1985, Kurt Parrot died when a car hit his motorcycle, his helmet fell off and his head violently struck the ground.[357] On March 29, 1988, Judy Parrot, sole heir of Kurt Parrot, sued the Italian helmet manufacturer, Fimez S.p.a., alleging that the buckle which supposedly should have kept the helmet in its place was defective.[358] Fimez initially appeared in court but subsequently abandoned the proceeding.[359]

The Alabama District Court first issued a provisional decision in favor of Mrs. Parrot, ordering Fimez to pay $1,000,000 to Mrs. Parrot.[360] The decision was not appealed and became final through a judge's order issued September 14, 1994.[361] On January 15, 1995 Mrs. Parrot sued Fimez seeking recognition and enforcement of the Alabama judgment.[362] The recognition and enforcement of such judgment was still governed by the old rules (Articles 797 et seq. of the Code of Civil Procedure).[363]

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355. *See* Carlevaris, *supra* note 55 at 135 (mentioning a res judicata concept in the Italian judicial system termed *giudicato formale*). *See generally* Giardina, *supra* note 8, at 779 (explaining the circumstances under which a foreign judgment will be recognized in Italy).

356. *See* Parris v. Fimez S.p.a., 32 F. Supp. 2d 321, 322–24 (Dist. Ala. 1994) (explaining that the court entered a judgment in favor of the plaintiff because defendant failed to present a defense).

357. *See generally* Anita Bernstein & Paul Fanning, *Heirs of Leonardo: Cultural Obstacles to Product Liability,* 27 VAND. J. TRANSNAT'L L. 1, 3 (1994) (explaining that there are cultural obstacles to a strict products liability law in Italy).

358. *See* Parrot v. Fimez S.p.a., 32 F. Supp. 2d at 322–24 (explaining that the court entered a judgment in favor of the plaintiff because defendant failed to present a defense). *See generally* Bernstein & Fanning, *supra* note 357, at 3 (explaining that there are cultural obstacles to a strict products liability law in Italy).

359. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1989) (explaining the circumstance under which a judgment issued by a foreign court will be recognized in the United States).

360. RESTATEMENT OF THE LAW (SECOND), JUDGMENTS § 18 (1982) (explaining the doctrine of merger, which holds that once a judgment is rendered on the claim, plaintiff cannot maintain an action on the original claim).

361. *See generally* David M. Gold, *Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History,* 31 CUMB. L. REV. 287, 287–89 (2001) (arguing that Alabama is one of the few states in which limits on punitive damages have been held to violate a person's right to a jury trial).

362. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987) (explaining that the individual states of the United States recognize judgments of foreign courts).

363. The decision is nevertheless very interesting, as it concerns public policy, the definition of which remained basically the same under both the old and the new discipline. *But see* Russo & Rains, *supra* note 33, at 277–78 (explaining that under the new rules the judgment enforcement would have been relatively easy to enforce because there was no longer a right of appeal in the United States).

Before analyzing the public policy aspect of the decision, it is necessary to examine other aspects of the decision that take into account some of the problems addressed above. First of all, the Venice Court of Appeals stated that the *principio del contraddittorio* had not been violated, because Fimez acknowledged that a proceeding was started against it and the term (30 days) given to Fimez between the service of the pleading and the day of the hearing was fair.[364] Fimez could not easily demonstrate that its rights of defense were violated because it had appointed a lawyer who appeared in court on its behalf.[365] Fimez also claimed that, because it abandoned the proceeding after it was started, the decision was a default judgment and therefore it had to be analyzed pursuant to the stricter rules applicable to default judgments.[366] Fimez, opposing recognition, also pointed out that the decision was lacking reasoning and therefore could not be recognized.

The court observed that there were two decisions, not one.[367] The first, a provisional decision, lacked reasoning.[368] The second decision contained a reasoning that addressed only a single aspect of the controversy—whether the damages granted to Mrs. Parrot were due but not how the court calculated damages.[369]

As we will see, the Venice Court of Appeals did not grant recognition to the foreign decision because it could not determine whether the damages were punitive or compensatory.[370] The Venice court confirmed that the lack of reasoning is not per se an impediment to the recognition of a foreign judgment and does not conflict with the Italian public policy.[371] The court quoted two decisions of the Court of Cassation, each stating that "the compliance [to the

364. *See* Parrot v. Fimez S.p.a., 32 F. Supp. 2d 321, 322–24 (Dist. Ala. 1994) (suggesting that there was no dispute over service of process); *see also* Parrot v. Fimez S.p.a., Corte d'appello di Venezia, sez. trez, 15 Jan. 1995, n.0319, Giur. It. 1995 I.1,132 (explaining that even though the old rules were in effect, the *principio contradittoriio* had not been violated because Fimez admitted that it suffered no violation of due process).

365. *See* Parrot v. Fimez S.p.a. (explaining that even though the old rules were in effect, the *principio contradittoriio* had not been violated because Fimez admitted that it had an attorney present at the proceedings); *see also* Giardina, *supra* note 8, at 779–80 (explaining that the fundamental rights of defense were complied with).

366. Such defense was rejected by the Court of Appeals, which noted that Fimez autonomously decided to quit the proceeding, and therefore was not entitled to claim that the judgment was rendered in default. *See* Parrot v. Fimez S.p.a. (explaining that there was no default judgment because Fimez decided to quit the proceedings). *See generally* European Communities: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, art. 27, 29 I.L.M. 1417, 1424 (explaining that default treaties are not recognized by the signatories, of which Italy is one).

367. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (observing that the Alabama District Court made two decisions in its holding).

368. *Id.* (noting that the provincial decision lacked reasoning).

369. Such distinction is very important to the Continental judge: one of the strongest differences between the European judge and the U.S. judge is that the former must always provide a reasoning for his or her decisions (which is also often the basis for appeals). *See* Parrot v. Fimez S.p.a., Corte app. Venezia (determining that the District Court only reasoned whether Mrs. Parrot was due damages but not the method of calculation).

370. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (refusing to recognize the foreign decision because it could not determine whether the damages were punitive or compensatory).

371. *Id.* (confirming that lack of reasoning is not per se an impediment to the recognition of a foreign judgment and does not conflict with Italian public policy).

Italian public policy], even in lack of reasoning, may be inferred from the mere reference to the laws of a foreign legal system, because such laws and their grounds and not the mere reasoning are governing such case in point."[372] Nevertheless, the court pointed out that the lack of reasoning or an insufficient reasoning may impede recognition because the consequence of the deficiency makes it impossible to ensure compliance with public policy.[373]

The Venice court also pointed out that multiple defendants were involved in the suit and that it was unable to determine the portion of the $1,000,000 judgment as directed at Fimez.[374] The Italian judge, when quantifying damages, must always give grounds for his decision, specifying the basis on which the damages were granted and the calculation which led to the figure.[375] Being unable to confirm that the means of calculation and basis for the judgment were consistent with Italian public policy, the Venice court refused to recognize the decision.[376]

The Venice Court of Appeals also affirmed that the Italian system refuses to recognize punitive damages.[377] If the Alabama decision provided for such type of damages, it could not have been recognized. Because it was not possible to understand whether the damages were punitive or compensatory, recognition was denied.[378] The court clarified that the American punitive damages, in its opinion, do not have any reparatory purpose, but have exclusively a punitive purpose.[379] Therefore, the court said that punitive damages are a sort of subrogating action, which is given to the private citizen, so that he can inflict to the perpetrator of the damage patrimonial sanctions so strong that they will serve as an effective deterrent toward future

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372. Court of Cassation, May 22, 1990, n. 4618, in RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 1991, 766 and Cassazione March 13, 1993, n. 3029, in RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 1994, 124. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (quoting decisions of the Court of Cassation stating that foreign laws and their grounds are more important than the reasoning behind the decision).

373. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (impeding recognition of the foreign judgment because the lack of reasoning makes it impossible to assure compliance with public policy). *But see* Sikiric, *supra* note 331, at 113 (holding that in arbitration cases, it is not contrary to Italian public policy to enforce an award despite a deficiency of reasoning). *See generally* John Y. Gotanda, *Punitive Damages: A Comparative Analysis,* 42 COLUM. J. TRANSNAT'L L. 391, 392–93 (2004) (hereinafter "Gotanda, *Punitive*") (noting that punitive damages are generally not available in civil law countries such as Italy, where punitive damages run counter to public policy).

374. The other parties were the driver of the car that hit Kurt Parrot, the distributor of the helmet in the U.S., and the manufacturer of the motorcycle. The court claimed that it was not in a position to understand how the liability was divided among the parties which caused Mr. Parrot's death. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (pointing out that multiple defendants were involved in the case and the court was unable to determine what amount of the damages were directed at Fimez).

375. *See* Gotanda, *supra* note 273 at 79–80 (explaining that under general international arbitration rules, a judge must give the grounds for his or reasons for his award).

376. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (refusing to recognize the decision because of the lack of explicit reasoning in the prior decision).

377. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (affirming that the Italian judicial system refuses to recognize punitive damages).

378. *Id.* (holding that because the court could not determine whether the damages were punitive or compensatory, it did not recognize the judgment).

379. *Id.* (clarifying that American punitive damages have exclusively a punitive purpose).

behavior.[380] Therefore, the court concluded, punitive damages are similar to criminal sanctions.[381] This is the turning point in the reasoning of the Venice Court of Appeals because only the state can inflict criminal sanctions in the Continental system.[382] Punitive damages cannot be recognized in Italy.[383] The court went on by saying that the community does not benefit at all from punitive damages.[384] Only the person who has suffered the damage will benefit from such damages.[385]

Also very interesting is that the Venice court made reference to the decision of the U.S. Supreme Court, in *Gore v. BMW*, where the Supreme Court, invoking the Due Process Clause,[386] reduced the damages awarded by the jury to Mr. Gore in the previous proceed-

380. *Id.* (stating that punitive damages are a sort of subrogating action which punishes the perpetrator to deter future behavior). *See* Gotanda, *Punitive, supra* note 373 at 396 (summarizing justifications for punitive damages in that they punish and deter certain conduct and "vent the indignation of the victimized"). *See generally* Dreyfuss, *The Italian Law, supra* note 1, at 63 (asserting that an Italian plaintiff may recover patrimonial damages, as opposed to punitive damages, and that moral damages may only be recovered if they resulted from a crime).

381. *See* Parrot v. Fimez S.p.a., Corte app. Venezia (concluding that punitive damages are similar to criminal sanctions). *See generally* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1578–80 (1997) (stating that punitive damages are quasi-criminal sanctions and are in a sense a state-imposed penalty for anti-social conduct); Strebel, *supra* note 106 (discussing the similarities between punitive damages and punishments in criminal law; punitive damages aim to punish the wrongdoer).

382. *See generally* Gumzej, *supra* note 330, at 78 (explaining the German approach to foreign judgments, "sanctions which are intended to be punitive or deterrent," are "part of the monopoly on punishment held by the state"); Strebel, *supra* note 106, at 102 (describing that foreign punitive damage judgments must be characterized as a civil matter, or else they are criminal law punishments which fall under the state's right to punish, and are unenforceable).

383. *See* Dreyfuss, *The Italian Law, supra* note 1 at 90 (maintaining that Italian court awards tend to exclude punitive damages).

384. *See generally* Lisa A. Perillo, Comment, *Scraping the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability Theories?*, 32 HOFSTRA L. REV. 1039, 1095 (2004) (illustrating the effects of punitive damages awards in regard to the closure of businesses and its resulting negative effect on the local community).

385. Such benefit is regarded as iniquitous by the court and in general by the Italian system, because it looks like the victim of the tort benefits from an *arricchimento senza causa*, an unjustified enrichment. The Continental jurist, because of its *forma mentis*, does not understand why the victim of a tort, who already was granted a sum as compensatory damages (which are aimed to compensate him of the damage suffered) should also be allowed to make a profit (an additional sum as punitive damages). One of the problems which puzzles most European jurists is that the punitive damages are not mathematically connected to the extent of the damage suffered. Such conception is considered sacrilegious and illogical in a system which tends (at least in theory) to be as logical as possible. *See* Gotanda, *Punitive, supra* note 373 at 392–93 (proclaiming that the benefits of punitive damages are a major point of contention among legal scholars).

386. *See* BMW of North America v. Gore, 517 U.S. 559 (1995) (recognizing that awards that impose grossly high punishment on tortfeasors are a violation of due process based on the Fourteenth Amendment); *see also* Edward F. Sherman, *Introduction to the Symposium: Complex Litigation: Plagued by the Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 601 (2004) (illustrating the Supreme Court's interpretations of cases with comparable damage ratios to *BMW v. Gore*).

ings.[387] The Venice court pointed out that this might have been a turning point in the U.S. system of punitive damages.[388] The court also stressed that some American states are changing their legislation so that punitive damages are paid to the state and not to the victim of the tort, even though the sums paid shall be used for social purposes.[389]

Going back to public policy, the Venice court made a very strong statement: "punitive damages, because of their criminal law connotation, are to be considered as private exercise of public authority, and therefore are clearly at odds with public policy."[390] The court acknowledged that, in the Italian system, there is an exceptional case of private sanction: Article 1382 of the Italian Civil Code provides for the *clausola penale*.[391] The parties, when they enter into a contract, may agree on a fee to be paid to the other party in certain cases (for example, breach of contract by one party).[392] The court concluded such a fee is not a punitive damage because the fee is based exclusively on the express agreement of the parties.[393]

In conclusion, the court did not grant recognition to the Alabama judgment because it was not possible to understand whether the damages awarded were punitive.[394] The court decided that it is likely that damages in this case were punitive, "also because Fimez was the manufacturer of the helmet" and therefore it is likely that the Alabama court intended to punish it.[395]

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387. *See BMW v. Gore* (reducing the award granted by the Alabama court because a 500-to-1 ratio between award and actual harm to the purchaser is excessive); *see also* Bradley W. Joondeph, *Rethinking the Dormant Commerce Clause in the State Tax Jurisdiction*, 24 VA. TAX REV. 109, 124 (2004) (noting that the court looked at both state sovereignty and comity when it reduced the punitive damage award in *BMW v. Gore*).

388. *See* Robert Max Junker, *Defendants Facing Punitive Damages Awards are Entitled to Protection Under the Due Process Clause:* State Farm Mutual Automobile Insurance Company v. Campbell, 42 DUQ. L. REV 887, 890 (2004) (stating that the Supreme Court has utilized the reasoning in *BMW v. Gore* to reduce excessive punitive awards); *see also* Bruce J. McKee, *The Implication of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 176 (1996) (discussing the reality that the *BMW* decision still may not lead to uniform legislation across the states).

389. *See generally* Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1115 (2004) (commenting on the major tobacco litigations that include punitive penalties being paid directly to the states for the social good).

390. *See* Dreyfuss, *supra* note 1, at 14 (emphasizing the Italian court's scrutiny of U.S. judgments regarding public policy considerations).

391. *See* Cappalli & Consolo, *supra* note 94, at 261 (providing an overview of the Italian legal system with regard to issues such as class actions).

392. *See* Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades*, 37 ARIZ. L. REV. 1153, 1153 (1995) (asserting that parties may still be liable for punitive damages even if these damages were not contemplated when the contract was made).

393. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 94 (discussing the limitations imposed on punitive damages by express contracts).

394. *See* Paul V. Nieweyer, *Awards for Pain and Suffering: the Irrational Centerpiece of our Tort System*, 90 VA. L. REV. 1401, 1405 (2004) (emphasizing that the role of punitive damages has traditionally been to punish the tortfeasor).

395. *See* Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes Over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 241 (recognizing that the world generally views the U.S. court system as extremely plaintiff-friendly regarding punitive damages).

VI. Conclusion

As has been demonstrated, the United States common law system and Italian civil law vary enormously. The recognition and enforcement of U.S. judgments in Italy particularly exemplifies the disparities. Although an attempt has been made to make the Italian system more open to foreign judgments, Italian statutory and common law on this subject can perplex even the savviest practitioner. Hopefully, this article has ameliorated some of the perplexities concerning the Italian recognition requirements for United States and other foreign judgments.

A Survey of the Internet Jurisdiction Universe

By John Di Bari*

In December 2002, the High Court of Australia sent shivers down the spines of Internet publishers throughout the world when it allowed jurisdiction over an American publisher of allegedly defamatory material published on the Internet and made available in Australia.[1] With this ruling the Australian judges considered the values and policies behind free speech in direct opposition to the right to be free from offensive speech.[2] Although traditional principles are generally applied to recent Internet applications, uncertainty reigns when a court is to determine where the publication actually took place, what country's laws should govern information put on the Internet and which national courts should have jurisdiction.[3] The Internet, in a more complete way than any previous medium, expands the potential for forum shopping, as potential plaintiffs will seek to bring suit in those jurisdictions that have the lowest hurdles for recovery in terms of burden of proof at trial, against whom suit can be brought, and where potential defendants have the most assets.

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1. Dow Jones & Co. v. Gutnick, No. BC200207411, 2002 Austl. High Ct. LEXIS 61, at *5 (High Ct. Austl. Dec. 10, 2002) (dismissing Dow Jones' appeal of the Supreme Court of Victoria's decision that Victoria was not a clearly inappropriate forum for trial of the proceeding). *See generally* Matthew Rose, *Leading the News: Australia to Hear Web Libel Suit In Landmark Case*, WALL ST. J., Dec. 11, 2002, at A3 (referring to the opinion of Michael Collins, a noted Internet defamation scholar and author).

2. *See* Mark Stephens, *Libel Is Not the Sort of Tourism that Countries Want to Encourage*, TIMES (London), Dec. 17, 2002, at 23 (stating that "[i]t has long been recognized that different legal systems will contain different checks and balances between the rights to free speech and a person's reputation"); *see also* Lisa M. Bowman, *Global Treaty Could Transform Web*, CNET News.com (June 22, 2001) (addressing the difficulty in harmonizing entrenched social values with competing interests in developing a just solution as evidenced by the limited success representatives of several nations have had for the last ten years in trying to agree on the Hague Convention on Jurisdiction and Foreign Judgments), *at* http://news.com.com/2100-1023-268850.html?legacy=cnet.

3. *See* Dugie Standeford, *U.K. Panel Issues Report on Impact of Defamation Law on Internet*, WASH. INTERNET DAILY, Dec. 19, 2002 (citing a recent report by a United Kingdom Law Commission concerning the issue of defamation over the Internet); *see also* Tara Blake Garfinkel, Comment, *Jurisdiction Over Communication Torts: Can You be Pulled into Another Country's Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 TRANSNAT'L L. 489, 516–38 (1996) (discussing jurisdiction issues of defamation over the Internet in the United States and United Kingdom); Scott Sterling, Note & Comment, *International Law of Mystery: Holding Internet Service Providers Liable For Defamation and the Need For a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327, 331 (2001) (stating that international issues may arise in Internet defamation).

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Deciding what law applies to the Internet is hardly a new issue,[4] but we are quickly approaching the point where we need to transition from theories and ideas to real law and principles as Internet usage continues to multiply.[5] This article will evaluate the Australian High Court's decision, show how the issue of jurisdiction over international defamation has been treated by courts in America, explore other issues arising by virtue of increased use of the Internet and examine how courts have dealt with these issues.

I. The Australian High Court Decision of *Gutnick v. Dow Jones*

A. Summary of the Facts

Mr. Gutnick is a private Australian citizen who resides in Victoria, Australia.[6] More than that, he is the chairman of a publicly traded corporation and is involved in various endeavors in Australia and abroad which include "philanthropic, political, sporting and religious activities."[7] On October 29, 2000, however, Mr. Gutnick's reputation was called into serious question as a result of an article posted on appellant's *Wall Street Journal* website.[8] An article titled "Unholy Gains" written by a *Barron*'s journalist, Bill Alpert, made several allusions to Mr. Gutnick's participation in illegal activities with Nachum Goldberg, a person recently convicted of tax eva-

4. *See, e.g.*, Susan Nauss Exon, *A New Shoe Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 3–4 (2000) (discussing the issues of personal jurisdiction in the Internet environment); *see also* Christopher W. Meyer, Note, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH & LEE L. REV. 1269, 1271–73 (stating the jurisdictional issues arising between advertisers and the World Wide Web); Richard Philip Rollo, Case Note, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 668 (1999) (stating that federal circuits are using different standards with respect to personal jurisdiction in the Internet context); Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U.L. REV. 337, 337 (1997) (explaining the development of personal jurisdiction in the Internet world).

5. *See Symposium Bridging the Digital Divide: Equality in the Information Age: Forward*, 20 CARDOZO ARTS & ENT. L.J. 1, 3–5 (2002) (providing statistical data regarding the worldwide increase in Internet usage); *see also* Jennifer Newton, Note, *Global Solutions to Prevent Copyright Infringement of Music Over the Internet: The Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandates*, 12 IND. INT'L & COMP. L. REV. 125, 126 (2001) (explaining the breadth and growth of Internet usage worldwide); American Bar Association, *Global Internet Jurisdiction: The ABA/ICC Survey* (Apr. 2004) (stating that one of its key findings was that "[b]y a ratio of six to one, U.S. companies said that the Internet jurisdiction issue has become worse over the past two years and four of every five companies say they feel that matters will worsen by 2005"), *at* http://www.mgblog.com/resc/Global%20Internet%20Survey.pdf.

6. Dow Jones & Co. v. Gutnick, 2002 Austl. High Ct. LEXIS 61, at *129. *See* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 358 (2004) (stating the background of Mr. Gutnick); *see also* Nathan W. Garnett, Comment, Dow Jones & Co. v. Gutnick: *Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?,* 13 PAC. RIM L. & POL'Y J. 61, 62 (2004) (explaining Mr. Gutnick's background).

7. Dow Jones v. Gutnick, at *129. *See* David Fickling & Stuart Millar, *How Diamond Joe's Libel Case Could Change the Future of the Internet: Australian Court Gives Millionaire Go-ahead to Sue US Website*, GUARDIAN, Dec. 11, 2002, at 3 (describing Mr. Gutnick's community involvement); *see also* Michael Skapinker, *The Hidden Cost of Free Speech*, FIN. TIMES (London), Dec. 14, 2002, at 10 (discussing Mr. Gutnick's activities).

8. Gutnick v. Dow Jones & Co., 2001 V.S.C., at ¶ 1 (Sup. Ct. of Victoria, Aug. 28, 2001); Bill Alpert, *Unholy Gains: When Stock Promoters Cross Paths with Religious Charities, Investors Had Best Be On Guard*, BARRON'S, Oct. 30, 2000 (putting into question Mr. Gutnick's reputation), available at 2000 WL-BARRONS 28967054.

sion.[9] Furthermore, the article implied Mr. Gutnick used charities as a way to manipulate stock prices.[10]

Although no exact account exists as to how many people in Australia accessed the website, evidence was presented that the site had about 550,000 subscribers, of which 1,700 paid their subscription fees by credit cards whose holders had Australian addresses.[11] As for the printed version of the article, about 305,563 copies of the article were sold overall, with a small amount sold in Australia and an even lesser amount sold in Victoria.[12] Defendant/appellant also admitted that several hundred subscribers of the website were not only from Victoria, but included significant stockbrokers, in addition to financial and business persons, some of whom, the trial court inferred, downloaded the article.[13]

Gutnick instituted this defamation action solely for the damage done to his reputation in Victoria despite his connections to the United States, and presumably, the damage done to his reputation there.[14] This pre-trial litigation revolved mainly around three issues: (1) where the cause of action arose, (2) whether the Court should apply Australian choice of law rules and if Australia was the correct forum, and (3) whether it would clearly be an inappropriate forum.[15]

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9. Gutnick v. Dow Jones, at ¶ 3; Alpert, *supra* note 8 (making several unfavorable inferences with regard to Mr. Gutnick).

10. Gutnick v. Dow Jones, at ¶ 13; Alpert, *supra* note 8; *see also* David Rolph, *Before the High Court: The Message, Not the Medium: Defamation, Publication and the Internet in* Dow Jones & Co. Inc. v. Gutnick, 24 SYDNEY L. REV. 263, 264 (2002) (discussing the allegations in the Unholy Gains article).

11. Dow Jones v. Gutnick, at *129; s*ee also* Bryan P. Werley, Note & Comment, *Aussie Rules: Universal Jurisdiction Over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 202 (2004) (providing the statistics of subscribers to the Dow Jones website).

12. Gutnick v. Dow Jones, 2001 V.S.C. at ¶ 1; *see also* Brian Fitzgerald, Case Note, Dow Jones & Co Inc v. Gutnick*: Negotiation 'American Legal Hegemony' in the Transnational World of Cyberspace*, 27 MELB. U. L. REV. 590, 594 (2003) (providing statistical data on the printed copies sold); Werley, *supra* note 11, at 202 (stating the statistics of the number of magazines sold and the number of online subscribers); Gary Chan Kok Yew, *Internet Defamation and Choice of Law in* Dow Jones & Company Inc. v. Gutnick, 2003 SINGAPORE J. LEGAL STUD. 483 at ¶ 11 (2003) (explaining the small number of copies sold in Victoria).

13. Gutnick v. Dow Jones, at ¶ 3. *See generally* Beverley Earle & Gerald A. Madek, *International Cyberspace: From Borderless to Balkanized?*, 31 GA. J. INT'L & COMP. L. 225, 255 (2003) (indicating that the plaintiff had affidavits from people who downloaded the article); *Recent Developments*, Dow Jones & Co. v. Gutnick, 19 BERKELEY TECH. L.J. 613, 613 (2004) (stating that many Australians downloaded the article to view in Victoria).

14. Gutnick v. Dow Jones, at ¶ 175; *see also* Kent A. Halkett, *Determining Personal Jurisdiction in Internet-Related Litigation*, 26 L.A. LAW. 21, 28 (2003) (stating the plaintiff's argument that he had been defamed in Victoria because of damage done to his reputation there).

15. *See* Dow Jones v. Gutnick, at *49 (J. Kirby, concurring) (listing the three issues of the appeal). *See generally* Ken Kraus & Dan Polatsek, *Enforcement of Foreign Media Judgments in the Aftermath of* Gutnick v. Dow Jones & Co., 21 COMM. LAW. 1, 24 (2003) (discussing Justice Kirby's concurrence and the impact of the decision); Megan Richardson, *The Private Life After* Douglas v. Hello!, 2003 SINGAPORE J. LEGAL STUD. 311 (2003) (explaining Justice Kirby's third alternative).

B. The Court's Decision and Rationale

In the end, however, neither Dow Jones, nor the "intervenors" allowed to advocate on Dow Jones' behalf,[16] were quite able to clear the substantial hurdles presented by this case. Dow Jones' primary goal was to argue publication took place where they made the article available to the Internet, i.e., when they "uploaded" the article on their servers in New Jersey.[17] In support of the idea that suit should be brought in the United States, Dow Jones argued the article was published in New Jersey, as they advocated a rule in which a publisher should govern its "conduct according to the law of the place where it maintained its web servers, unless that place was merely adventitious *or* opportunistic."[18] Otherwise, Dow Jones contended, a publisher would be charged with knowing and respecting the defamation laws of every country on earth, since there was no way to effectively prevent any person in any country from downloading information put on a Web server.[19]

The majority of the High Court agreed that publisher confidence in what law is applicable to its conduct is a very important principle, but disagreed that allowing suit in one place is a necessary predicate for such confidence.[20] The Court recognized that such activities may have effects in multiple jurisdictions, and may be of concern to various legal systems. The Court,

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16. Dow Jones v. Gutnick, at *56, n.96 (intervening for Dow Jones were corporations such as: Amazon.com, Inc.; Associated Press; Cable News Network LP, LLLP; Guardian Newspapers Ltd.; The New York Times Co.; News Ltd.; Time, Inc.; Tribune Co.; The Washington Post Co.; Yahoo! Inc.; and John Fairfax Holdings Ltd.). *See* Darrin Farrant, *Media Giants to Log Into* Gutnick *Net Case*, THE AGE, May 29, 2002, *available at* 2002 WL 19622592 (stating the various intervenors approved by the majority of the court); *see also* Katherine Towers, *Media's Big Guns Try to Intervene in* Gutnick *Case*, AUSTL. FIN. REV., May 15, 2002, available at 2002 WL 21078355 (listing the companies that sought to intervene).

17. *See* Katherine Towers, *Dow Jones Looks at High Court Move in* Gutnick *Action*, AUSTL. FIN. REV., Sept. 22, 2001, at 9 (stating Dow Jones' argument of where the publication occurred); *see also* Juanita Darling, *Forum Shopping and the Cyber Pamphleteer:* Banamex v. Rodriguez, 8 COMM. L. & POL'Y 361, 376 (2003) (explaining Dow Jones' argument that the article was uploaded and, therefore, published in New Jersey).

18. Dow Jones v. Gutnick, at *12 (discussing Dow Jones' argument of how publishers should govern their conduct). *See generally* Cherie Dawson, Note, *Creating Borders on the Internet: Free Speech, The United States, and International Jurisdiction*, 44 VA. J. INT'L L. 637, 645 (2004) (stating the High Court of Australia's rejection of Dow Jones' argument).

19. *See* Dow Jones v. Gutnick, at *13 (discussing implications for publishers if they did not govern their conduct based on the law of the place of where they maintained their Web servers). *See generally* Carole Aciman & Diane Vo-Verde, *Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities*, 19 COMPUTER & INTERNET LAW. 16, 21 (2002) (stating the rejection of the Dow Jones argument that this decision would have a "chilling effect" on online publishers).

20. *See* Dow Jones v. Gutnick, at *15 (discussing the importance of publisher confidence); *see also* Rolph, *supra* note 10, at 272 (asserting that "[r]eputations, like publications, can now cross borders," therefore, "they may warrant protection across those borders as well . . .").

therefore, determined that the place that the defamation is deemed to have occurred should be evaluated with regards to the various policies underlying the law that made the conduct illegal.[21]

Needless to say, defamation law has quite a different face in Australia than in the United States. Operating more like a strict liability tort, the focus is upon the damage to reputation, rather than the actions and mind-set of the defendant.[22] As such, the Court went on to say, "[h]arm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer."[23] Although the principle of resolving issues between litigants in one action rather than successive pleadings is favored, the majority argued that it does not mandate identifying a single place of publication regardless of how far and wide the defamatory material is spread.[24] Nor, the court concluded, does the ubiquitous nature of the Internet alter the equation in any way.[25] Despite the defendant's strenuous arguments as to the Internet's special nature, while the majority accepted that the Internet had a very broad reach, they argued that it was not unique, as satellite television services also allow a very wide dissemination, and in addition, the issue of such widely disseminated publications was hardly new.[26]

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21. *See* Dow Jones v. Gutnick, at *16 (discussing the purposes served by the law of defamation); *see also* Peter Bartlett, Gutnick *Shows Need for New International Jurisdictional Principles*, 20 COMM. LAW. 16, 16 (2003) (stating the Court's awareness of the far-reaching implications of its decision and that the protection of publishers could be achieved without creating jurisdictional rules). *See generally Allegedly Defamatory Article About Melbourne Businessman Joseph Gutnick in "Barrons Online" Was Published in Australia, Even Though Dow Jones' Web Servers Are in New Jersey, Australian Court Rules in Deciding it has Jurisdiction to Hear Case*, 23 ENT. L. REP. 7 (2001) (explaining Justice Henigan's conclusion that you may be liable in a jurisdiction when you decide to indulge in the freedom of publishing information in that jurisdiction).

22. *See Dow Jones v. Gutnick*, at *16 (describing the tort of defamation).

23. *Id.* at *17 (explaining harm to reputation); *see also* Gutnick v. Dow Jones & Co. (2001) 2001 V.S.C. 305, at ¶ 31–33 (Sup. Ct. of Victoria, Aug. 28, 2001) (recognizing publication for the purposes of defamation law occurs at the time and place of the listener's or observer's comprehension); RODNEY A. SMOLLA, LAW OF DEFAMATION § 12:24.50 (2d ed. 2004) (stating that damage to a person's reputation does not occur until the material is read and comprehended by a third party).

24. *See* Dow Jones v. Gutnick, at *26–28 (discussing defamation and single action versus successive proceedings). *But see* Van Buskirk v. The New York Times Co., 325 F.3d 87 (2d Cir. 2003) (following the New York Court of Appeals' decision in *Firth* and citing its reasons for applying the single publication rule); Mitan v. Davis, 243 F. Supp. 2d 719 (W.D. Ky. 2003) (asserting that multiple suits and the resultant drain on judicial resources, in addition to maintaining the statute of limitations, are the reasons for the single publication rule); Firth v. State of New York, 98 N.Y.2d 365 (2002) (applying the single publication rule to Internet publication because this rule allowed all damages to be litigated in one action whereas the multiple publication rule allowed for vexatious litigation via multiple suits and it would effectively eviscerate the statute of limitations).

25. *See* Dow Jones v. Gutnick, 210 C.L.R. at 630–31 (explaining that although the Internet possesses novel technological features, it shares many characteristics with traditional information distribution media); *see also* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 167 (S.D.N.Y. 1997) (recognizing that the innovativeness of the Internet does not exempt it from traditional legal principles); 2 RICHARD RAYSMAN ET AL., EMERGING TECHNOLOGIES AND THE LAW § 9.06[4], at 9-51 to 9-53 (2002) (citing the trend in recent defamation case law of downplaying the Internet's *sui generis* nature by analogizing it to traditional print media).

26. *See* Dow Jones v. Gutnick, at 630–31; *see also* Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1355–60 (2001) (discussing how and why law has responded to rapid technological changes, including the Internet, by adopting a technology-neutral stance).

The Court acknowledged publication necessarily involves at least two parties and, therefore, there might be two or more places with territorial connections to publication,[27] but found, regardless, that defamation "is to be located at the place where the damage to reputation occurs."[28] In the case of Internet publication, the Court reasoned, material is not available in comprehensible form until downloaded onto a person's computer, and therefore, once that occurs, the injury to reputation takes place, and therefore, the location of the download is where the defamation takes place.[29]

The Court also rejected Dow Jones' argument that Victoria was clearly an inappropriate forum for this litigation by finding that the primary judge abused his discretion by refusing to stay the proceedings. Based on local law, the Court concluded that this was an action for a tort committed in Victoria and for damages suffered there as well.[30] According to a concurring judge, finding Victoria as the location of the tort strongly supported jurisdiction by the Supreme Court of Victoria and application of Victorian law while also providing strong arguments against staying or setting aside the proceedings on inconvenient-forum grounds.[31]

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27. *See* Dow Jones v. Gutnick, at 601, 605 (acknowledging two principles, either where the tortfeasor acted or in the last location the tortfeasor acted that led to liability, which generally guide the court in determining where the tort took place, but refusing to "uncritical[ly]" apply them); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36 (1971) (providing that jurisdiction may be exercised by the state over the tortfeasor for a tort arising in that state).

28. *See* Dow Jones v. Gutnick, at 606; *see also* Voth v. Manildra Flour Mills Pty. (1990) 171 C.L.R. 538, 568 (embracing the approach of determining where the tort arises by asking where the tortious act occurred); Eva Fried, *Issues and Challenges Presented by Defamation on the Internet*, J. INTERNET L., June 2003, at 3, 4 (contrasting the High Court's finding in *Dow Jones v. Gutnick* with findings by American jurisdictions).

29. *See* Dow Jones v. Gutnick, at 607 (stating that "[i]t is where [a] person downloads the material that the damage to reputation may be done. . . . [T]hat will be the place where the tort of defamation is committed."); *see also* William Crane, Legislative Update, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 267, 303–04 (2001) (summarizing the broad scope of jurisdiction exercised under French law); *cf.* MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET § 24.25, at 295–96 (2001) (highlighting that under current European Union regulations binding member countries, the tort occurs both in the place where the defamatory publication is distributed and where the publisher is established).

30. *See* Dow Jones v. Gutnick, at 607–08; *see also* Kurt Wimmer, *International Law and the Enforcement of Foreign Judgments Based on Internet Content*, 17 (Aug. 2002) (advising potential litigants in England to argue that asserting jurisdiction over Internet statements violates traditional jurisdictional principles of international law), *at* http://www.cov.com/publications/download/oid6637/347.pdf (last visited Oct. 14, 2004).

31. *See* Dow Jones v. Gutnick, at 640–42 (Kirby, J., concurring); *see also* Lawrence W. Newman & David Zaslowsky, *Jurisdiction Through the Internet*, N.Y.L.J., Feb. 26, 2003, at 3 (suggesting that this result may give rise to an entire jurisprudence of U.S. enforcement of foreign judgments on Internet activity). *But see* WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 296 (2003) (positing that without more, courts generally resist allowing an aggrieved party to sue in any jurisdiction reached by the Internet).

While the High Court readily solved the choice-of-law question because of Mr. Gutnick's limited suit, i.e., only for those damages occurring in Victoria,[32] the Court went on to identify what issues might arise out of suit claiming damages for publication in many places.[33] The first factor, according to the Court, was whether the plaintiff's forum was clearly inappropriate, or if more than one action is brought, whether an "anti-suit injunction" would be merited based on the theory of vexatious litigation.[34] Second, the Court reasoned, it would invite attention to the reasonableness of the publisher's conduct and all relevant considerations, including where the conduct took place, as a possible defense to the claim.[35]

The Court also noted if plaintiff commenced suit in Australia and part of the cause of action was due to publication in another country, then as to that publication, the laws of that country would be given due effect.[36] Finally, the Court analyzed a plaintiff's potential damages and the ability to enforce any award. In their view, a plaintiff will only be awarded damages if it has a reputation in the place of publication,[37] and even if it were awarded damages, the value of

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32. *See* Dow Jones v. Gutnick, at 607–08; *see also* Ronald A. Brand, *Comparative* Forum Non Conveniens *and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 486 n.141 (2002) (observing that while Australian states have divergent *forum non conveniens* rules, they tend to produce similar results); *see also* Werley, *supra* note 11, at 221–23 (analyzing *forum non conveniens* issue and concluding that it was properly decided in *Dow Jones v. Gutnick* assuming the determination that publication occurred in Australia was correct).

33. *See* Dow Jones v. Gutnick, at 604 (addressing issues of how to prevent vexation to both parties and as to which substantive law to apply in a foreign jurisdiction); *see also* Bartlett, *supra* note 21, at 16 (listing issues of where the publication occurred and whether the Australian court was an appropriate forum); Akash Sachdeva & Anna Gamvros, *Free Speech in a Tangled Web:* Dow Jones v. Gutnick (addressing issues of *forum non conveniens*, reasonableness of a publisher's conduct, and standard for damages based on plaintiff's reputation), *at* www.hk-lawyer.com/2003-2/Feb03-cover.htm (last visited on Oct. 3, 2004).

34. *See* Dow Jones v. Gutnick, at 611 (noting that principles of res judicata, issue estoppel, and "Anshun" estoppel would be applied by Australian courts if a plaintiff brought suit in various jurisdictions prior to suit in Australia in an effort to prevent vexatious litigation and indicating that, to determine whether an Australian court is an appropriate forum, it must be determined whether that court can decide the entire controversy).

35. *See* Dow Jones v. Gutnick, at 600 (deciding that due consideration should be given to the legal basis of the publisher's conduct where such conduct occurred); *see also* Lange v. Austr. Broad. Corp. (1997) 189 C.L.R. 520, 574 (reiterating the rule in defamation law that defendant may show reasonable grounds for publication); Werley, *supra* note 11, at 230 (emphasizing the importance of reasonableness of conduct in defamation cases).

36. *See* Dow Jones v. Gutnick, at 609 (noting that the single publication rule utilized in the U.S. would be a law that the Australian court would follow); *see also* Combined Media Defamation Reform Group, *Submission in Response to "Outline of Possible National Defamation Law"* 29 (Mar. 2004) (stating that the place in which the cause of action arises is where the material is read), *available at* http://www.astra.org.au/content/pdf/Defamation SubmissionMay04.pdf (last visited on Oct. 4, 2004). *But cf.* Peter Coroneos, On-Line Opinion, *Think Global, Act Global: the* Gutnick *Decision and the Internet* (Dec. 19, 2002) (predicting an adverse outcome from *Gutnick* whereby all countries will impose restrictive rules, which could undermine the Australian rule on jurisdiction as to place of publication), *at* http://pandora.nla.gov/au/pan/10635/20030112/www.onlineopinion.com.au/2002/Dec02/Coroneos.htm.

37. *See* Dow Jones v. Gutnick, at 609 (noting that a plaintiff will receive an award of substantial damages only if he has a reputation in the place where the publication is made); *see also* Matthew Collins, *The Law of Defamation and the Internet*, *at* http://www.mattcollins.com.au/oupupdate8.htm (last visited on Oct. 3, 2004) (citing the High Court's statement that substantial damages are permissible only where plaintiff has a reputation in the place where the publication is made). *See generally* Chadha v. Dow Jones & Co., 1999 EMLR 724, 725 (Cal. Ct. App. 1999) (refusing to assert jurisdiction after determining the potential plaintiff had neither sufficient contacts nor a sufficient reputation to merit suit in England).

any judgment would be limited by the plaintiff's ability to enforce the award where the defendant has assets.[38]

C. Policies Underlying the Court's Decision

Besides the blackletter law, two undercurrents seemed to guide the path of the various opinions offered in connection with this litigation. It seems that the judges were concerned with the entrenchment of the United States as the forum for litigation involving Internet publication due to the American location of the vast majority of global Web servers.[39] Presumably, if suit had to be brought in the U.S., then those courts would grant the protections of the First Amendment, making it significantly more difficult for a plaintiff to recover damages. Several judges were also not impressed with the communication possibilities offered by the Internet.[40] Instead they seemed to view counsel's focus on the revolutionary nature of the Internet as mere posturing that obscured the real pith of the case: an Australian citizen's reputation was attacked and he wanted it vindicated in Australia.[41]

The Court reasoned that if they accepted the place of the upload as the relevant location and coupled that with the acceptance of the single publication rule, then publishers would impart information in such a way as to minimize their chances of liability, thereby allowing them to tarnish reputations with impunity.[42] If the contrary principle was accepted, however, making the place of download as the relevant location, the publishers' fear is that someone

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38. *See* Dow Jones v. Gutnick, at 609 (observing that a judgment value is dependent on whether the defendant has assets in the place where awarded damages); *see also Tech Law Journal Daily E-mail Alert* (Dec. 11, 2002) (stating that assets of a publisher within a certain nation can be seized so as to satisfy a monetary judgment), *at* http://www.techlawjournal.com/alert/2002/12/10.asp (last visited on Oct. 3, 2004).

39. *See* Gutnick v. Dow Jones & Co., 2001 V.S.C., at ¶ 73 (Sup. Ct. of Victoria, Aug. 28, 2001) (arguing that if jurisdiction was based upon where the information was made available to the Internet or where the "publisher does its business," then the U.S. would be the primary forum); *see also id.* at 641–42 (Kirby, J., concurring) (stating that the lower court acted properly in determining that the applicable jurisdiction was the U.S., notwithstanding the appellant's argument otherwise). *See generally* ClickZ Stats, *Population Explosion!* (Sept. 10, 2004) (providing statistics of Internet usage by country, which indicate that the U.S. has approximately 7,000 Internet service providers, whereas Australia has 571, thus justifying the concurring judge's apprehensions), *at* http://www.clickz.com/ stats/big_picture/geographics/article.php/151151.

40. Gutnick v. Dow Jones & Co., 2001 V.S.C., at ¶¶ 72–73 (observing that cyberspace's potentiality for communication is not significant); *see also* Dow Jones & Co. v. Gutnick, 210 C.L.R. at 605 (finding the issue of wide dissemination to have been already discussed with regard to radio, television, and printed material, and also finding that the Internet is no more expansive than satellite television broadcasting). *Compare* Gutnick v. Dow Jones & Co., 2001 V.S.C. at ¶¶ 74–75 (viewing the evidence as indicating that Dow Jones would have been able to erect a "firewall" that would block the words from reaching Victoria) *with* Dow Jones & Co. v. Gutnick, 210 C.L.R. at 618 (Kirby, J., dissenting) (finding the prevention of a website from being accessed in specific legal jurisdictions inefficacious and impossible) *and* at 631 (Kirby, J., dissenting) (pondering whether a rule fashioned for the Internet might be rapidly eclipsed by technological advancements).

41. Dow Jones & Co. v. Gutnick, 210 C.L.R., at 608 (stating that territorial connections are less relevant than the concern with reputation in rendering the decision and emphasizing that it is his reputation that Gutnick seeks to vindicate); *see also* Bartlett, *supra* note 21, at 16 (indicating the Court's attention toward the fact that Gutnick focused his claim on the damage sustained in the state of Victoria, as opposed to anywhere else).

42. Dow Jones v. Gutnick, at 605; *see also* Fitzgerald, *supra* note 12, at 596–97 (stating the court's reasoning for rejecting the single publication rule and place of publishing as determinative of the jurisdictional question).

could effectively forum-shop and pick the country with the lowest hurdles to recovery for defamation.[43] This in turn, it was argued, would lead to one of two equally undesirable outcomes: one, publishers would either block large geographical areas from information most relevant to those areas,[44] or two, publishers would be forced to adhere to the lowest common denominator because they would respect the defamation laws of every country.[45]

II. America's View: Jurisdiction Over Internet Defamation

Not only is there a disparity of approaches between nations, there are also different tests for determining jurisdiction based on Internet contacts within the United States. However, while the tests focus on different factors, they are harmonized somewhat by the proscriptions and protections offered by due process standards. Generally, this approach does not focus on the person affected, but instead focuses on the contacts of the person speaking with the forum in which the litigation is taking place. Needless to say this position stands in stark contrast to the position taken by the Australian High Court and which reflects the views of most of the world outside of the United States.[46]

A. *Calder v. Jones*[47]

Although not in the Internet context, an important case in the arena of multi-state defamation litigation is the unanimous decision by the U.S. Supreme Court in *Calder v. Jones*.[48] In 1979, the *National Enquirer*, a Florida corporation, made several disparaging and defamatory

43. Gutnick v. Dow Jones, at ¶¶ 16–17. *See* John Burrows, Review, *Media Law,* 2002 N.Z. L. REV. 217, 227–28 (noting and addressing the concern of forum shopping after the decision); *see also* Darling, *supra* note 17, at 376 (characterizing *Dow Jones v. Gutnick* as a forum-shopping case).

44. Gutnick v. Dow Jones, at ¶¶ 18; *see also* Rolph, *supra* note 10, at 272–73 (noting the defendant's argument that a finding of jurisdiction would lead to international publishers blocking access to Australian subscribers to avoid Australian jurisdiction); Werley, *supra* note 11, at 216 (noting that one of Dow Jones' arguments was that Australian jurisdiction would force it and other publishers to block communications to Australia to protect themselves).

45. Dow Jones v. Gutnick, at 598–99; *Gutnick v. Dow Jones*, at ¶¶ 18; *see also* Bruce Horowitz et al., *International Intellectual Property Rights,* 37 INT'L LAW. 473, 473 (2003) (noting criticism of the case in that Web publishers would have take defamation laws worldwide into account).

46. *See* Dan Tench, *Media: Media Law: Long Arm of the Internet: A Judgment in Australia May Mean Web Publishers Face Worldwide Legal Liability*, GUARDIAN (London), Dec. 16, 2004, at 10 (postulating that the *Gutnick* rationale would be persuasive in all countries that share the English common law tradition); *see also* Garnett, *supra* note 6, at 62 (noting that the case was decided on widely accepted precedent). *See generally* Cindy Chen, Comment, *United States and European Union Approaches to Internet Jurisdiction and Their Impact on E-Commerce*, 25 U. PA. J. INT'L BUS. L. 423, 431–43 (2004) (contrasting the American and European approaches to jurisdiction).

47. *See* Calder v. Jones, 465 U.S. 783 (1984); *see also* Diane S. Kaplan, *Paddling Up The Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 529–30 (stating facts of *Calder*); Rachael T. Krueger, Comment, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements*, 51 CATH. U. L. REV. 301, 321–22 (stating the *Calder* test and its application in Internet cases).

48. *See Calder*, at 783; *see also* Exon, *supra* note 4, at 34–36 (noting cases applying *Calder* to the Internet); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace,* 32 INT'L LAW. 1167, 1189–90 (1998) (applying *Calder* to an Internet perspective).

remarks about California resident Shirley Jones.[49] She sued in California and jurisdiction was initially upheld by the Court of Appeal on the basis of the *Enquirer*'s (hereinafter Petitioner) intent and success of causing injury to Jones in California.[50] Although the Court upheld jurisdiction, it held that knowledge that the article would have an effect in California was only part of the inquiry. Instead, the Court relied on the principles laid down in *International Shoe Co. v. Washington*, which are, in essence, that in order to satisfy the Fourteenth Amendment, a court has personal jurisdiction over a defendant only if that person has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[51] Furthermore, the Court relied on *Shaffer v. Heitner* to show the focus is on the "relationship among the defendant, the forum, and the litigation."[52]

The Court concluded jurisdiction would be proper because the "focal point both of the story and of the harm suffered" was in California.[53] In that regard, the Court looked to the various connections Petitioner had in the state of California in order to satisfy the minimum contacts requirement. The relevant considerations were that Petitioner had a circulation of 600,000 in California, Jones lived in and had her professional career centered in California,

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49. *See Calder*, at 784; *see also* Cynthia L. Counts & C. Amanda Martin, *Libel In Cyberspace: A Framework For Addressing Liability and Jurisdictional Issues In This New Frontier*, 59 ALB. L. REV. 1083, 1122–23 (noting statements in *Calder* at issue to be about Shirley Jones); *see also* Karin Mika & Aaron J. Reber, *Internet Jurisdictional Issues: Fundamental Fairness in a Virtual World*, 30 CREIGHTON L. REV. 1169, 1180 (noting that the article at issue defamed Shirley Jones).

50. *See Calder*, at 787 (citing the California Court of Appeal's holding); *see also* Jones v. Calder, 138 Cal. App. 3d 128, 137 (Cal. Ct. App. 1982) (reversing trial court on the grounds that it was fair and reasonable to subject defendants to jurisdiction in California, because harm to plaintiff was a direct result of their tortuous conduct). *See generally* Joe Hameline & Meighan McCrea, *Where Does It Hurt? Personal Jurisdiction for Internet-Based Intellectual Property Cases*, 11 METROPOLITAN CORP. COUNS. 8, 8 (2003) (providing the rationale to support the Court's upholding of jurisdiction).

51. *See Calder*, at 788 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)); *see also* Bassili v. Chu, 242 F. Supp. 2d 223, 229 (W.D.N.Y. 2002) (finding satisfaction of N.Y. C.P.L.R. based on use of website for advertisement and solicitation, coupled with evidence of business with New York customers, but that record did not provide enough information for a personal jurisdiction analysis); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 299, 301 (S.D.N.Y. 1996) (denying jurisdiction on a Missouri website that allegedly infringed upon a New York restaurant's trademark on both long-arm jurisdiction and failure to satisfy due process), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (affirming on the basis of long-arm jurisdiction alone, concluding that, since creation of the website with the "Blue Note" logo occurred out-of-state, the tort itself was committed out-of-state).

52. *See Calder*, at 788 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1945)); *see also Int'l Shoe Co.*, at 317 (concluding that "inquiry into the State's jurisdiction over a foreign corporation" depend on whether "'such contacts of the corporation with the [forum] state . . . make it reasonable . . . to require the corporation to defend the particular suit . . . brought there.'"); *see also* Hutson v. Fehr Bros., Inc., 584 F.2d 833, 836 (8th Cir. 1978) (applying *Shaffer*'s due process test for the exercise of personal jurisdiction over a foreign corporation).

53. *See* Calder v. Jones, at 789 (reasoning that defendants knew that plaintiff would bear the brunt of the harm in California); *see also* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1485 (9th Cir. 1993) (reaffirming the Court's holding in *Calder*); Gena M. Stinnett, Comment, *Ignorance is Bliss: A Comment on* Pavlovich v. Superior Court, 36 LOY. L.A. L. REV. 1733, 1739 (2003) (citing the holding in *Calder*, which was based on the determination that defendants expressly aimed their conduct at a California resident, knowing she would suffer harm there).

and the author of the story derived the information from California sources.[54] Viewing the facts as such, the Court reasoned that Petitioners expressly aimed their actions toward California and could therefore "reasonably anticipate being hauled into court there."[55]

B. *Keeton v. Hustler Magazine, Inc.*[56]

In this case, the plaintiff, a New York resident, sued Hustler Magazine, Inc. ("Hustler") for libel in five separate magazine issues. It appears that plaintiff, although having very limited contacts with New Hampshire, sued there to take advantage of a longer statute of limitations.[57] The Court decided, however, that such fact was irrelevant because defendant had "continuously and deliberately exploited the New Hampshire market, [and therefore] it must reasonably anticipate being hauled into court there in a libel action based on the contents of its magazine."[58] Furthermore, the court recognized that Hustler "chose to enter the New Hampshire

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54. *See Calder*, at 788–89 (describing the nature and context of the libelous article with respect to plaintiff's professional career); *see also* Hameline & McCrae, *supra* note 50, at 8 (explaining how plaintiff's personal and professional life was intimately tied to California, where defendants' defamatory article was printed); Mukasey, J., *Decision of Interest: No Personal Jurisdiction Over Owner/Manager Of Corporation Under Alter Ego Doctrine*, 231 N.Y.L.J. 21 (2004) (describing the venue in which defendant authors chose to sell their libelous story about plaintiff entertainer).

55. *See Core-Vent*, at 1486 (formulating the Ninth Circuit's *Calder* holding into a three-part test in which personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered in the forum state."); *see also* Cognigen Networks, Inc. v. Cognigen Corp., 174 F. Supp. 2d 1134, 1138 (D. Wash. 2001) (holding that defendant's actions did not rise to the level of wrongful conduct expressly aimed at plaintiff to make personal jurisdiction proper). *But see* Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 423–24 (2004) (acknowledging that some courts permit jurisdiction if a party merely knew that its conduct would reach the forum state, not on whether such party specifically intended for its conduct to reach the forum state).

56. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779–80 (1984) (holding that defendant's contacts were sufficient to uphold jurisdiction and that the state had a substantial interest in deterring harmful acts within its borders, even if such acts are aimed at nonresidents); *see also* Michael F. Sutton, Note, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 424 (2004) (noting that the "single publication rule," as cited in the case, may not be applicable in foreign jurisdictions); Michael I. Rudell, *Publisher, But Not Author, Subject to South Carolina Jurisdiction*, N.Y.L.J., Apr. 23, 2004, at col.1 (summarizing holding of case).

57. *See* Keeton v. Hustler, at 772 (detailing plaintiff's limited contacts with New Hampshire); *see also* Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 Fordham L. Rev. 2241, 2255 n.98 (1997) (noting that New Hampshire's longer statute of limitations was plaintiff's motive for choosing to sue defendant there); Joan E. Schaffner, *Federal Circuit "Choice of Law":* Erie *Through the Looking Glass*, 81 IOWA L. REV. 1173, 1192 n.134 (1996) (likening plaintiffs' interstate forum shopping to obtain a longer statute of limitations to other typical litigation strategies).

58. Keeton v. Hustler, 465 U.S. at 781; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stressing that a defendant's conduct and connection with a forum state increase his or her chances of being hauled into court in that forum); Hanson v. Denckla, 357 U.S. 235, 253 (1980) (asserting that a defendant has substantial contact with a forum when he "purposefully avails" himself of it and "invok[es] the benefits and protections" of its laws).

market [and] can be charged with knowledge of its laws," which included the "single publication rule."[59]

It is interesting to note that the Court upheld jurisdiction despite very limited contact of the defendants in the forum state (i.e., monthly sales of about 10,000 to 15,000 copies a month);[60] the overall tenor of the opinion was that Hustler had deliberately entered the forum and injured someone there, albeit in a very small way,[61] but nonetheless, it could be called to answer for that injury in that forum. This same sentiment was echoed by three judges on the Supreme Court about twenty years later.[62] In *Ashcroft*, the Court determined the Child Online Protection Act impermissibly impinged on free speech, but three Justices stated:

> The publishers burden [of abiding by community standards] does not change simply because it decides to distribute its material to every community in the Nation. . . . If a publisher wishes for its materials to be judged only in the standards of particular communities, then it need only take the

59. Keeton v. Hustler, at 779; *see* Faigin v. Kelly, 919 F. Supp. 526, 534 (N.H. 1996) (citing *Keeton v. Hustler*); *see also* RESTATEMENT (SECOND) OF TORTS: SINGLE AND MULTIPLE PUBLICATIONS § 577A(4)(b) (1977) (enumerating that damages sustained in all jurisdictions can be recovered in a single lawsuit brought by the injured party). *See generally* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 938 (2d ed. 1999) (explaining the single publication rule and its application to modern case law).

60. *See* Keeton v. Hustler, at 772 (expressing that Hustler Magazine's contacts with New Hampshire consisted of the monthly sale of approximately 10,000 to 15,000 copies of its publication); *see also* Precision Constr. Co. v. J. A. Slattery Co., 765 F.2d 114, 117 (8th Cir. 1985) (stating that the Supreme Court has upheld the jurisdiction even when the defendant's activities within the forum state were minimal); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (providing that a defendant may be subjected to an in personam judgment without violating due process requirements if he has "minimum contacts" with the forum state).

61. *K*eeton v. Hustler, at 777 (stating that "[t]he reputation of the libel victim may suffer harm even in a State in which he was hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however, small, at least unblemished."). *But see* Mallinckrodt Med., Inc. v. Sonus Pharm., Inc., 989 F. Supp. 265, 273 (D.C. 1998) (refusing to grant jurisdiction over defamation action because, among other things, there was no indication plaintiffs were injured in D.C. and plaintiffs could not sue for nationwide damages in D.C.); McFarlane v. Esquire Magazine, 74 F.3d 1296, 1300 (D.C. Cir. 1996) (holding that there is no basis for jurisdiction under the District of Columbia's personal jurisdiction statute if a defendant's contacts with the territory of the forum are limited and insufficient).

62. *See* Ashcroft v. ACLU, 535 U.S. 564, 583 (2002) (applying the Court's prevailing standards regarding personal jurisdiction to a defendant whose contacts with the forum state are via Internet); *see also* United States v. Dhingra, 371 F.3d 557, 564 (9th Cir. 2004) (claiming that attaining proper jurisdiction over a defendant who has perpetrated a tort or crime via Internet is not substantially hindered because of difficulties in ascertaining which community standards are applicable). *See generally* Sable Commun. of CA, Inc. v. FCC, 492 U.S. 115, 125–27 (1989) (positing that the application of community standards does not render a federal statute unconstitutional because of the obstruction this poses to a uniform standard of evaluation).

> simple step of utilizing a medium that enables it to target the release of its material into those communities.[63]

This view seems to favor the idea that a publisher should be responsible for its actions on the Internet, and if it is not prepared to do so, then it should not publish on the Internet at all, but choose a more selective forum. However, as another Justice pointed out later in the same opinion, the result of such a policy would be to decrease the amount of information on the Internet impermissibly.

C. *Zippo Manufacturing Co. v. Zippo Dot Com*[64]

The Western District of Pennsylvania has also offered a very important framework concerning when the operation of websites will satisfy the requisite minimum contacts and support personal jurisdiction.[65] Zippo Manufacturing (Manufacturing), a Pennsylvania corporation, sued Zippo Dot Com (Dot Com), a California corporation, for various trademark infringement claims in Pennsylvania arising out of a website utilized by Dot Com.[66] In its decision, *Zippo Manufacturing Co. v. Zippo Dot Com*, the court employed a "sliding scale" framework to analyze a defendant's connections with a particular forum.[67] The court indicated that "at one end of the spectrum are situations in which a defendant clearly does business over the Internet . . . [in which] the defendant enters into contracts with residents of a foreign jurisdiction that

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63. Ashcroft v. ACLU, at 583 (agreeing with Justices Thomas, Rehnquist, and Scalia) (internal citations omitted), *cert. granted*, 157 L.Ed. 2d 274 (U.S. 2003), *motion granted by* 157 L.Ed. 2d 741 (U.S. 2003), *aff'd*, 159 L.Ed. 2d 690 (U.S. 2004); *see, e.g.*, *Sable Commun.*, at 125–27 (demonstrating that obscene communications can be prohibited in some communities and not others without encountering any opposition under the Constitution). *But see* ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000) (realizing that Congress finds the application of community standards to the Internet controversial).

64. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (holding that the defendant's engagement of electronic commerce with Pennsylvania residents constituted purposeful availment for the purposes of jurisdiction); *see also* Toys "R" Us, Inc. v. Ste Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) (citing *Zippo* as a principal authority regarding jurisdictional claims involving the Internet).

65. *See Zippo*, at 1119; *see also* Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 478 (2004) (finding that *Zippo* is one of the most-cited district court cases).

66. *See Zippo*, at 1121–22 (announcing that the basis for the suit was trademark infringement); *see also* Benjamin C. Elacqua, *The Hague Runs into B2B: Why Restructuring the Hague Convention of Foreign Judgments in Civil and Commercial Matters to Deal with B2B Contracts is Long Overdue*, 3 J. HIGH TECH. L. 93, 100 (2004) (articulating that *Zippo* involved a domain name dispute between a Pennsylvania tobacco lighter manufacturer and a California-based Internet news service); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 882–83 (2004) (discussing how *Zippo* involved the issue of an Internet site infringing on the trademark of another company).

67. *See Zippo*, at 1124 (introducing the idea of a "sliding scale" to be used to determine personal jurisdiction); *see also* Arthur R. Miller, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 996 (2004) (commenting that the federal district judge in *Zippo* decided to look at websites on a spectrum, in order to determine jurisdiction based on the site's specific position on that spectrum); Werley, *supra* note 11, at 223 (reiterating that the court in *Zippo* held that a sliding scale should be used to classify websites as commercial and non-commercial, thus determining whether jurisdiction would be proper).

involve the knowing and repeated transmission of computer files over the Internet. . . ."[68] In those cases a court can properly exercise personal jurisdiction over the websites. On the other hand, personal jurisdiction is not proper where a "defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions."[69] Lastly, the court explained, between those edges of the spectrum lie the websites in which the "user can exchange information with the host computer."[70] The question of jurisdiction requires a determination of "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[71]

While the *Zippo* test seems to apply more to those websites that are commercial in nature, it has also been applied to defamation cases as well.[72] In *Realuyo v. Villa Abrille*,[73] despite the facts that defendant sold advertising space on the website to a New York advertising agency and

68. *See Zippo*, at 1124 (discussing the one end of the spectrum where the defendant is clearly doing business over the Internet); *see also* Deborah S. Coldwell et al., *Franchise Law*, 57 SMU L. REV. 1035, 1037 (2004) (explaining that at one extreme there are defendants who clearly do business over the Internet through contracts with other states' residents); Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, 63 (2004) (noting that at one end of the spectrum, there are defendants who form contracts with residents of foreign jurisdictions, thus clearly doing business over the Internet).

69. *See Zippo*, at 1124 (detailing the end of the spectrum where the defendant only posts information on the Internet); *see also* Note, *A "Category-Specific" Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law*, 117 HARV. L. REV. 1617, 1618 (2004) (emphasizing that over "passive sites," where information is merely provided but there is no interaction, jurisdiction is not proper); *see also* Anna R. Popov, Note, *Watering Down* Steele v. Bullova Watch Co. *to Reach E-Commerce Overseas: Analyzing the Lanham Act's Extraterritorial Reach Under International Law*, 77 S. CAL. L. REV. 705, 722–23 (2004) (declaring that jurisdiction is not proper over "passive" websites where information is merely posed that can be accessed by others in foreign jurisdictions).

70. *See Zippo*, at 1124 (outlining the middle of the spectrum where websites are interactive); *see also* Paul Goldstein et al., *Copyright's Long Arm: Enforcing U.S. Copyrights Abroad*, 24 LOY. L.A. ENT. L. REV. 45, 60 (2004) (revealing that the *Zippo* court struggled with the middle of the spectrum, where websites were interactive but did not quite conduct business); Dawson, *supra* note 18, at 652 (expressing that in the middle of the *Zippo* spectrum there are sites with which users can exchange information).

71. *See Zippo*, at 1124 (expressing that jurisdiction is determined by how much interactivity there is on a specific website, as well as the commerciality of the exchanged information); *see also* TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKLEY TECH. L.J. 519, 528–29 (2004) (showing that while *Zippo* enunciates a standard for jurisdiction over the middle of the sliding scale, there is no extrapolation of how much interactivity or commercialism is needed for jurisdiction, nor is there any indication of how interactivity and commercialism inter-relate); Christopher M. Porterfield, Note, *Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets*, 20 GA. ST. U. L. REV. 539, 554–55 (2003) (clarifying that at the middle of the spectrum, jurisdiction is determined based on how interactive the site is and how commercial the nature is of the information exchanged on the website).

72. *See* HY Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1160–61 (W.D. Wis. 2004) (deciding that the *Zippo* test should not be strictly adhered to and that, at best, the analysis presented in *Zippo* should be a factor to determine jurisdiction based on the standard bases); *see also* Borchers, *supra* note 65, at 489 (suggesting that courts disregard the *Zippo* framework when analyzing libel cases); Krueger, *supra* note 47, at 313–14 (remarking that despite the fact that *Zippo* was not a defamation case, its sliding scale test for jurisdiction on the Internet has subsequently been used in defamation cases).

73. *See* Realuyo v. Villa Abrille, No. 01 Civ. 10158, 2003 WL 21537754 (S.D.N.Y. 2003) (stating the facts of the case to involve alleged defamation published in a newspaper); *see also* JAMES P. DONOHUE, INTERNET LAW & PRACTICE § 9:27 (2004) (enunciating that in *Realuyo*, a plaintiff sued a defendant for alleged defamatory information posted on a website).

that 332 of 6,732 registered, but non-paying, users of the website lived in New York, the court dismissed plaintiff's defamation claim after concluding defendant's website did not satisfy the requirements for general jurisdiction nor were defendant's contacts sufficient to warrant specific or limited jurisdiction.[74] Relying on the framework set forth in *Citigroup Inc.*,[75] the court reasoned that the website was a passive website and the operation thereof did not rise to the level of a business transaction conferring specific jurisdiction.[76] Finally, the court further concluded that because there was no showing that the article was directed toward a New York audience, the defendant could not "reasonably expect to be hauled into New York based on the posting of an allegedly defamatory article" and, therefore, it would offend constitutional notions of fair play and substantial justice to maintain jurisdiction.[77]

Similarly, in *Best Van Lines, Inc. v. Walker*,[78] a disgruntled college student created a website to focus on allegedly unfair practices of moving companies, including the plaintiff's. Despite the facts that: (i) the defendant posted allegedly defamatory messages about a New York business, (ii) the message was in direct response to a visitor's question and (iii) the defendant requested donations from any and all people viewing the website, the court held that specific

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74. *Realuyo*, at *1–7. *See* Stein, *supra* note 55, at 424 n.54 (citing *Realuyo* as a case that required a specific intention to disseminate information in a forum for jurisdiction to be proper). *See generally* Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market*, 18 BERKLEY TECH. L.J. 1191, 1203 (2003) (maintaining that courts have difficulty applying the *Zippo* test to defamation cases on the Internet).

75. Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565–66 (S.D.N.Y. 2000) (holding that a website allowing for loan applications and on-line "chatting" with a representative was interactive enough to satisfy the New York "long-arm" jurisdiction statute). *See* Exon, *supra* note 4, at 18 (asserting that *Citigroup* fell in the grey area of the *Zippo* test, but ultimately the quality and nature of the activity involved allowed for specific personal jurisdiction); *see also* Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi in the Court of Next Resort*, 8 B.U. J. SCI. & TECH. L. 1, 3 n.6 (2002) (citing *Citigroup* as an example of examining an activity's level of commercial traffic and interaction to conclude if jurisdiction is appropriate).

76. *Realuyo*, at *7 (finding that the website was passive in that there was no interaction between the reader and the site). *See, e.g.,* Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (holding that defendant did not purposely avail himself to the benefits of New York jurisdiction simply by creating an Internet site that citizens of New York could potentially access); *see also* Roger J. Johns, Jr. & Anne Keaty, *Caught in the Web: Websites and Classic Principles of Long-Arm Jurisdiction in Trademark Infringement Cases*, 10 ALB. L.J. SCI. & TECH. 65, 109 (1999) (examining the Ninth Circuit's view of purposeful availment in terms of a passive website).

77. *Realuyo*, at *10–11 (concluding that the defendant could not expect being sued in New York, and that to allow such a suit would be unfair). *See*, *e.g.*, Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *48 (S.D.N.Y. Feb. 26, 1997) (holding that exercising personal jurisdiction in New York over a defendant who operated a website out of Philadelphia merely because citizens of New York could visit the site would offend traditional notions of fair play and result in the creation of nationwide jurisdiction over the Internet). *But see, e.g.*, Maritz Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333–34 (D. Mo., 1996) (determining that the quality and nature of defendant's activities, which included posting information on its website about a future mailing list, constituted a purposeful availment of the benefits of Missouri and, resultantly, assertion of personal jurisdiction over defendant did not contradict traditional notions of fair play).

78. Best Van Lines, Inc. v. Walker, No. 03 Civ. 6585, 2004 WL 964009, at *1 (S.D.N.Y. May 5, 2004). *See e.g.,* Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 728 (E.D. Pa. 1999) (determining that posting noncommercial messages about healthcare issues to listserves and USENET discussion groups did not amount to purposeful availment in the forum state). *But see, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (concluding that a minimum contacts test was satisfied by merely an Internet advertisement and a toll-free number for inquiries).

jurisdiction would be improper. The court found that the site did not focus specifically on New York businesses; that it was free and open to anyone who could access the Internet; that there were no advertisements that sought New York viewers; that the level of interactivity was not enough that merited the conclusion plaintiff "purposefully availed [himself] of the privilege of conducting activities in [New York]"; and that the claim did not rise out of the request for donations. These facts, taken in the aggregate, strongly pointed away from jurisdiction.[79]

It is not exactly clear how the positions taken in *Calder* and *Keeton* are harmonized with the *Zippo* test for determining jurisdiction, as the cases dealing with Internet defamation have never resolved the question.[80] In most cases the courts have analyzed the relevant contacts under the *Zippo* "purposeful availment" test and then under the *Calder* "effects" test. The Fifth Circuit recognized that although the *Zippo* test is not in conflict with *Calder*, it refused to answer "whether or not a '*Zippo*-passive' site could still give rise to personal jurisdiction under *Calder*. . . ."[81] The question remains how to reconcile these two tests, so as it stands now, litigants can make two separate jurisdictional arguments.

D. The Fourth and Fifth Circuits Throw Their Hats into the Defamation Ring

Recently, both the Fourth and Fifth Circuits interpreted and applied *Calder* to defamation taking place via the Internet. After analyzing the defendant's contacts with the forum, neither court found jurisdiction proper.

In *Young v. New Haven Advocate*,[82] two Connecticut newspapers, the *Advocate* and the *Courant*, posted articles discussing a policy of Connecticut's in which they would house their

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79. *Best Van Lines*, at *3–7 (holding that jurisdiction would have been improper). *See, e.g.,* Bailey v. Turbine Design, Inc, 86 F. Supp. 2d 790, 795 (D. Tenn. 2000) (concluding that although defendant posted a defamatory statement on his website, which could be viewed by anyone visiting the site, personal jurisdiction did not exist in Tennessee because defendant did not purposely avail himself to the forum). *But see*, *e.g.,* Blumenthal v. Drudge, 992 F. Supp. 44, 56–57 (D.D.C. 1998) (finding that defendant did not maintain a passive website because, *inter alia*, he solicited donations from visitors, including citizens from the forum, and personal jurisdiction was proper).

80. S*ee, e.g.,* Wagner v. Miskin, 660 N.W.2d 593, 598 (N.D. 2003) (acknowledging that some courts apply the *Calder* test and some apply the *Zippo* test); *see also, e.g.*, Pavlovich v. Santa Clara, 127 Cal. Rptr. 2d 329, 274–76 (Cal. 2002) (applying both the *Zippo* and *Calder* test to reject personal jurisdiction); *see also* Matthew E. Babcock et al., *Internet Jurisdiction, Choice of Law Issues* (organizing the Internet defamation cases into three separate jurisdiction analyses: the first group of cases belonging to the *Zippo* "totality of contacts" test, the second under the *Calder* "effects" test, and the third under the "deliberate and continuous" approach), *available at* http://www.ldrc.com/Cyberspace/Internet Jurisdiction and Choice of Law Issues.pdf (last visited Oct. 12, 2004).

81. Revell v. Lidov, 317 F.3d 467, 472 n.30 (5th Cir. 2002). *See* Nguyen, *supra* note 71, at 531–32 (asserting that the two tests work together in that courts first use the technologically specific *Zippo* test to rank the website's level of activity and apply the *Calder* technology-neutral exam after determining the website to fall in the interactive range). *But see* Geist, *supra* note 26, at 1371–72 (noting a shift away from the *Zippo* sliding scale toward the *Calder* effects test).

82. *See* Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

prisoners in Virginian institutions.[83] Plaintiff, a Virginia prison warden, took offense at some statements in the article and sued for defamation in Virginia.[84] Initially, the District Court denied the newspaper's motion to dismiss, finding that satisfaction of the Virginia long-arm statute, i.e., injury to a Virginia plaintiff, coupled with sufficient minimum contacts via the defendants' Internet activities, met the necessary jurisdictional requirements.[85]

The Circuit Court, however, disagreed, and determined a mere Internet presence is insufficient to merit specific jurisdiction.[86] In accordance with *Calder*, the Fourth Circuit acknowledged that to confer jurisdiction, whether the "defendant expressly aimed or directed its conduct to the forum state" is the relevant question.[87] In the current situation, the court concluded the plaintiff must show that the defendant's website "manifest[ed] an intent to target and focus on the Virginia readers."[88]

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83. *Id.* at 259 (discussing details of the policy to send inmates to Virginia institutions); *see also Revell v. Lidov*, at 474–75 (stating Connecticut's transfer policy). *See generally* Beth Hamilton, *500 State Inmates Virginia-Bound; Transfer to Relieve Prison Overcrowding*, THE HARTFORD COURANT, Oct. 21, 1999, *available at* 1999 WL 30060560 (outlining the origins of the transfer policy).

84. *See Y*oung v. New Haven Advocate, at 259 (noting the reason Young brought a defamation suit was perceived offensive statements made against him); *see also* Nora Jones, *Personal Jurisdiction Issues Not Approved For Review*, THE DAILY RECORD OF ROCHESTER, May 22, 2003 (finding the Virginia warden sued the two Connecticut newspapers for alleged defamatory statements published on the Internet). *See generally* Michele Jacklin, *Virginia Warden Mistakes Criticism for Libel*, THE HARTFORD COURANT, May 28, 2000 (discussing details of the statements published about Young).

85. *See* Young v. New Haven Advocate, at 262 (noting the District Court found jurisdiction appropriate because the newspapers should have been aware of the fact that any injury caused to Young would occur in Virginia); *see also* Young v. New Haven Advocate, 184 F. Supp. 2d 498 (W.D. Va. 2001), *rev'd*, *Young*, 315 F.3d 256 (4th Cir. 2002) (holding personal jurisdiction proper under the long-arm statute because the defendants' acts "constituted an act leading to an injury to the plaintiff in Virginia").

86. *See* Young v. New Haven Advocate, 315 F.3d at 263–64 (holding that the website alone did not extend personal jurisdiction over the out-of-state defendants); *see also* James R. Pielemeier, *Choice of Law for Multistate Defamation—the State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55 (2003) (stating the Circuit Court reversed on the issue of jurisdiction because the articles were not intended to reach a Virginia audience). *See generally* Susan Nauss Exon, *Personal Jurisdiction: Lost in Cyberspace?*, 8 COMP. L. REV. & TECH. J. 21 (2003) (finding that *Young v. New Haven Advocate* stands for the premise that personal jurisdiction cannot be sustained if newspapers and websites are not targeted to those out-of-state residents).

87. *See* Young v. New Haven Advocate, at 262 (noting the relevant importance of whether a defendant directs conduct toward the forum); *see also* Calder v. Jones, 465 U.S. 783, 788–91 (1984) (holding that jurisdiction is dependent on intent of affecting or causing harm to the jurisdiction). *See generally* Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 397–98 (4th Cir. 2003) (stating that jurisdiction may be found when a nonresident defendant intentionally directs tortious conduct toward the forum).

88. *See* Young v. New Haven Advocate, at 263 (identifying intent as an important element); *see also* Best Van Lines, Inc. v. Walker, No. 03-CV-6585, 2004 U.S. Dist. LEXIS 7830, at *12 (S.D.N.Y. May 4, 2004) (restating that defendants must manifest an intent toward the nonresident plaintiff to sustain specific jurisdiction). *See generally* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) (indicating that no jurisdiction could be found unless defendants target or focus tortious conduct against the forum state).

The websites in question targeted a local audience by focusing on the reach of the papers within the local market and allowing local merchants to advertise.[89] Specifically, the court noted that the *Courant* provided access to local weather and traffic with links to the University of Connecticut and the Connecticut state government and that the *Advocate* website apparently just featured stories dealing with New Haven.[90] As for the article itself, Young was mentioned in relation to his role as warden of a prison with allegedly harsh conditions and a statement was made concerning Young's collection of Confederate war memorabilia in his office.[91] Furthermore, the thrust of the article was not on defaming Young, but focused on the Connecticut prisoner transfer policy, how it affected Connecticut prisoners and their families, and advocated a public debate.[92] Since the newspapers did not target Virginia readers, the court found the newspapers could not "anticipate being hauled into court in Virginia," and concluded that the district court had erred by exercising jurisdiction.[93]

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89. *See* Young v. New Haven Advocate, at 263 (concluding the defendants' newspapers targeted local audiences because of the nexus with local markets and classified advertisements); *see also* Judge Lynch, *Decision of Interest; United States District Court, Southern New York; No Personal Jurisdiction Over Iowa Defendant Who Runs Site to Provide Consumer Advocacy*, N.Y.L.J., May 14, 2004 at 27 (opining that, although the injury would be felt in Virginia, the court found the site was not sufficiently directed at Virginia because of its local nature). *See generally* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (finding passive websites merely posting information do not direct tortious activity toward a forum).

90. *See* Young v. New Haven Advocate, at 260 (maintaining that the *Advocate*'s website contained information pertaining to the New Haven area and the *Courant*'s website provided information about local weather, links to the University of Connecticut, and links to Connecticut state government sites); *see also Court Throws Out Warden's Libel Suit*, N.Y. TIMES, Dec. 15, 2002, at 46 (reporting that the majority opinion considered the two newspapers' websites and articles to be aimed at Connecticut residents). *See generally,* Nora Jones, *'Minimum Contacts' Jurisdiction Not Met in Online Newspaper Case*, THE DAILY RECORD OF ROCHESTER, Jan. 2, 2003 (mentioning the court's conclusion that although the websites for the two newspapers could be accessed anywhere, none of the content was directed toward a Virginia audience).

91. *See* Young v. New Haven Advocate, at 263 (establishing that the article in question stated that Young was the warden of the prison and that he had Civil War memorabilia in his office); *see also* Frank Green, *Home-Field Advantage in Landmark Suit?; Connecticut Papers Would Face Suit in Virginia*, RICHMOND TIMES DISPATCH, Sept. 9, 2001, at A-1 (stating that the Connecticut newspapers reported about Young's collection of Civil War memorabilia); Laurence Hammack, *Out-of-State Papers Fight Libel Suit; 4th U.S. Circuit Court of Appeals Will Hear Arguments Monday in Richmond*, ROANOKE TIMES & WORLD NEWS, June 2, 2002, at B1 (commenting on the *Courant*'s report about Young's collection of Civil War memorabilia).

92. *See* Young v. New Haven Advocate, at 263–64 (concluding that the article focused on the prisoner transfer policy, its effect on prisoners and their families, and did so in a way that encouraged public debate over the soundness of the policy); *see also* Carole Bass, *The Warden Loses,* NEW HAVEN ADVOCATE, Dec. 19, 2002 (quoting the majority opinion's finding that the article focused on the prisoner transfer policy, its effect on the prisoners and their families, and the article's ability to generate public debate on the topic) *available at* http://www.newmassmedia.com/nac.phtml?code=new&db=nac_fea&ref=23246 (last visited Oct. 1, 2003); Bruce W. Sanford et al., *Libel Online; Internet Presence Should Not Broaden Exposure*, PRESSTIME, April, 2003, at 26 (positing that the challenged articles focused on the impact of the prisoner transfer policy within the state of Connecticut).

93. *See* Young v. New Haven Advocate, at 264 (remarking that the newspapers could not have reasonably expected to be hauled into court in Virginia to answer for the content of the articles); *see also* Debbi Mack, *Virginia Court Dismisses Internet Libel Case*, CORPORATE LEGAL TIMES (London), April, 2003, at 66 (discussing that because the newspapers did not intend to reach a Virginia audience, they could not reasonably expect to be hauled into court in Virginia); Pam Spikes & Roy Whitehead, *Determining Internet Jurisdiction; How Far Can Courts Reach*, THE CPA JOURNAL (New York City), July 1, 2003, no. 7, vol. 73, p. 25 (presenting that because the focal point of the article was Connecticut and not Virginia, the newspapers could not have expected to be hauled into court in Virginia).

The Fifth Circuit reached a similar conclusion in *Revell v. Lidov.*[94] In this case, the defendant posted an article on Columbia University's School of Journalism website,[95] regarding the plaintiff's alleged involvement in a cover-up conspiracy of the Pan Am Flight 103 terrorist bombing.[96] In this situation, the plaintiff asserted the Court had general and/or specific jurisdiction over Lidov and Columbia University.

For a court in the Fifth Circuit to confer general personal jurisdiction, a plaintiff must prove the defendant had "substantial, continuous, and systematic" contacts in the forum.[97] The Court recognized the operation of a website is a continuous presence everywhere in the world, but it held that the contacts cited by the plaintiff were not "substantial" enough.[98] Also, while a foreign defendant may have repeated contacts with a forum via a website, a factor in determining the *Zippo* test, it did not translate well to the inquiry of general jurisdiction because while the contacts may be *with* the forum state, they are not *in* the forum state.[99] In this case, substantial contacts with the forum were found wanting as the only real connection the Columbia

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94. *See* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) (dismissing defamation claim for lack of personal jurisdiction arising out of an article posted on an Internet bulletin board); *see also* Borchers, *supra* note 65, at 485 (expressing that like *Young*, the court in *Revell* focused its decision on the specific aspects of the article and publication). *See generally,* Jones, *supra* note 84 (illustrating the similarities between the *Young* and *Revell* decisions).

95. *See Texas Federal Court Lacks Jurisdiction Over Ex-FBI Agent's Libel Suit*, THE ENTERTAINMENT LITIGATION REPORTER, Feb. 23, 2003 (explaining that Lidov, who had no connection to Columbia, posted the article on the bulletin board of the Columbia School of Journalism's website); *see also Intellectual Property Court Watch*, THE INTELLECTUAL PROPERTY STRATEGIST, April, 2001, vol. 7, no. 6, p. 8 (commenting that Lidov's article was posted on the bulletin board of Columbia School of Journalism's website); TEXAS LAWYER, January 6, 2003, vol. 18, no. 45, p. 3 (noting that Columbia University hosted the bulletin board upon which Lidov posted his article).

96. *See Revell v. Lidov*, at 496 (indicating that Lidov wrote an article that accused Revell of complicity in the conspiracy and cover-up of the Pan Am Flight 103 terrorist bombing); *see also* James George & Anna Teller, *Annual Survey of Texas Law: Article: Conflict of Law*, 57 SMU L. REV. 719, 733 (2004) (asserting that Lidov knew about the Pan Am 103 terrorist attack before it happened).

97. Revell v. Lidov, at 471 (stating that even repeated contacts with forum residents may not constitute substantial, continuous, and systematic contacts with the forum state); *see also* Cent. Freight Lines, Inc. v. APA Transp. Corp., 322 F.3d 376, 381 (5th Cir. 2003) (specifying that contacts within the forum state must be "substantial, continuous, and systematic" in order for the exercise of general jurisdiction to be proper).

98. Revell v. Lidov, at 471 (positing that while the maintenance of a website creates a continuous presence everywhere in the world, it is not "substantial" enough for general jurisdiction); *see also* Mink v. AAAA Dev., L.L.C., 190 F.3d 333, 336 (5th Cir. 1999) (asserting that the establishment of a "passive" website, one that merely "advertises" on the Internet, is insufficient contact within the forum state to support the exercise of general jurisdiction); Bush v. Tidewater Marine Alaska, Inc., No. 1:97CV656, 1998 WL 560048, at *4 n.3 (E.D. Tex. Apr. 16, 1998) (stating that the existence of a website, without other contact within the forum state, is insufficient to confer general jurisdiction).

99. Revell v. Lidov, at 471 (stating that the sliding scale test of *Mink* doesn't work well for the general jurisdiction inquiry in the context of a website because the website may be doing business *with* Texas, but not *in* Texas); *see also* Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1124–25 (9th Cir. 2002) (asserting that doing business *with* California is not sufficient contact to confer general jurisdiction, while doing business *in* California is because it "approximates physical presence within the state's borders"). *See generally* Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 717 (5th Cir. 1999) (drawing a distinction, for the purpose of determining whether general jurisdiction is proper, between doing business "with" Texas and doing business "in" Texas).

website had with Texas were the 17 subscription orders by Texas residents in 2000 and the 18 orders for the first two 2001 issues.[100]

As for the question of specific jurisdiction, the court posited the question whether the cause of action arose out of the maintenance of an Internet bulletin board.[101] Viewing the bulletin board as interactive because visitors could send information to the website and receive information from it, the court then analyzed it in light of the *Calder* test.[102] In this regard, the court found several fatal distinctions between the current case and the facts in *Calder*. The article contained no reference to Texas nor did it refer to any activities by Revell in Texas. The article was not directed to readers there differently than readers in other states, and lastly, Texas was not the focal point of the article or harm suffered.[103] The court then contrasted the facts of *Calder* and concluded plaintiff's residence and suffering of harm in the forum would not, by themselves, support jurisdiction.[104] After reviewing several cases in other jurisdictions, the court recognized the article's harm would be felt wherever the plaintiff resided but maintained,

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100. Revell v. Lidov, at 471 n.26 (noting that there were 17 subscriptions by Texas residents in 2000, and 18 subscriptions in the first two issues of 2001). *See generally* Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 401 (4th Cir. 2003) (holding that a single donation conducted online was insufficient contact to confer general jurisdiction).

101. Revell v. Lidov, at 472 (noting that when determining specific jurisdiction, the court will look only to the contact out of which the cause of action arises; in this case the contact was the maintenance of an Internet bulletin board); *see also* Atlantigas Corp. v. Nisource, Inc., 290 F. Supp. 2d 34, 51 (D.D.C. 2003) (stating that plaintiff based its general jurisdiction claim on the ground that defendant operated an electronic bulletin board that residents of the District of Columbia can and do use); *see also* Mallinckrodt Med., Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265, 272 (D.D.C. 1998) (stating that plaintiffs based their general jurisdiction claim on the ground that defendant posted information on an AOL electronic bulletin board which was accessible to 200,000 District of Columbia residents).

102. Revell v. Lidov, at 472 (stating that since the website visitor may participate in an open forum hosted by the website, it is proper to analyze this interactivity with respect to *Calder*). *See generally* Young v. New Haven Advocate, 315 F.3d 256, 262 (4th Cir. 2002) (stating that *Calder* has relevance in the context of a personal jurisdiction inquiry in a libel suit); *see* Spacey v. Burgar, 207 F. Supp. 2d 1037, 1045 (C.D. Cal. 2002) (holding that since defendants have not "purposefully availed" themselves of the privilege of doing business in California, it is proper to apply the *Calder* "effects doctrine").

103. Revell v. Lidov, at 473 (stating that the article contains no reference to Texas, does not refer to the Texas activities of Revell, and was not directed at Texas readers, and that Texas was not the focal point of the article or the harm suffered). *See generally* Rodriguez Salgado v. Les Nouvelles Esthetiques, 218 F. Supp. 2d 203, 211 (D.P.R. 2002) (distinguishing the case from *Calder* on the grounds that, *inter alia*, only 20 of defendant's magazines entered Puerto Rico monthly as compared with the 600,000 that entered monthly into the forum state in *Calder*).

104. *See* Revell v. Lidov, at 473 (stating that the plaintiff's residence in the forum and the suffering of harm there were alone not sufficient to support jurisdiction); *see also* Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 870 (5th Cir. 2001) (expressing that a plaintiff's residence in the forum is not enough to establish jurisdiction and would be beyond the limits established for specific jurisdiction). *See generally* Stuart v. Spademan, 772 F.2d 1185, 1189 (5th Cir. 1985) (outlining the principles required for personal jurisdiction over a nonresident defendant in a diversity action).

"we look to the geographical focus of the article, not the bite of the defamation, the blackness of the calumny, or who provoked the fight."[105]

E. Other American Cases

The ideas governing jurisdiction over Internet activities have been the subject of a great deal of case law in the United States, either in the contexts of defamation,[106] copyright/trademark infringements,[107] or other commercial torts.[108] Most circuits have rendered decisions that comport with the above analysis,[109] although, as mentioned earlier, no court has determined

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105. *See* Revell v. Lidov, at 476 (expressing that the court takes into account the geographical focus of the article); *see also* Borchers, *supra* note 65, at 485 (demonstrating that the court takes into account the geographical focus of the defendant's article to determine whether references were made to the plaintiff's activities in the forum state); Nguyen, *supra* note 71, at 532–33 (asserting that the courts take into account the intended effect of the defendant's purposeful acts toward the forum state).

106. *See, e.g.,* Revell v. Lidov, at 467 (demonstrating a defamation case based on Internet activity); Medinah Mining, Inc. v. Amunategui, 237 F. Supp. 2d 1132 (D. Nev. 2002) (finding passive website in which information was simply posted was not "expressly aimed" at forum, thereby making jurisdiction inappropriate); Hammer v. Trendl, CV-02-2462, 2003 U.S. Dist. LEXIS 623, at *13–15 (E.D.N.Y. Jan. 18, 2003) (concluding that putting allegedly defamatory book reviews on a website designed only for Internet users to view and not interact with does not support jurisdiction); Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790 (W.D. Tenn. 2000) (denying jurisdiction over a website that was "wholly passive" and was there only to be viewed and where there was no indication the website targeted the forum). *See generally* Babcock et al., *supra* note 80, (providing a comprehensive review of American Internet defamation cases).

107. *See, e.g.,* Toys "R" Us, Inc. v. Step Two S.A., 318 F.3d 446 (3d Cir. 2003); *see* Cybersell v. Cybersell, 130 F.3d 414 (9th Cir.1997); *see also* MGM Studios Inc. v. Grokster Ltd., 243 F. Supp. 2d 1073 (C.D. Ca. 2003) (asserting jurisdiction over defendant's website that allowed the download of software after a registration process, utilized geospecific advertising, and through which about 2 million people in the forum jurisdiction joined); Quality Improvement Consultants, Inc. v. Williams, Civ. No. 02-3994, 2003 U.S. Dist. LEXIS 2705, at *16–19 (D. Minn. Feb. 24, 2003) (refusing to confer jurisdiction over a website that advertised its services and offered publications for sale).

108. *See, e.g.*, Student Advantage, Inc. v. Int'l Student Exchange Cards, Inc., 00 Civ. 1971, 2000 U.S. Dist. LEXIS 13138, at *11 (S.D.N.Y. Sept. 12, 2000) (finding satisfaction of New York's long-arm statute and conferring personal jurisdiction based on website that allowed the exchange of information and the purchase of defendant's product); *see also* Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 634–35 (2003) (demonstrating that the forum in which the tort occurred may result in jurisdiction over the alleged tortfeasor). *See generally* Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565 (2000) (outlining the spectrum of cases that show whether defendant's actions over the Internet justify exerting jurisdiction over defendants).

109. *See, e.g.*, ALS Scan Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002); *see also* Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890–91 (6th Cir. 2002) (determining the issue of "purposeful availment" based on the *Zippo* framework); *see also* Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999) (showing that a court applied the *Calder* test in its analysis for jurisdiction).

how the two tests relate to one another. Recently, the Supreme Court denied certiorari to the Ninth Circuit and denied the opportunity to add clarity to the situation.[110]

F. Broader Issues

1. Enforcement

While the concept of whether an American court should enforce foreign judgments rendered against American actors in which constitutional protections were not given to such actors is not new,[111] the increase of the use of the Internet will continue to bring this issue to the forefront. Two recent district court decisions have analyzed this issue in the context of the Internet, and their treatment and analysis provide a valuable understanding of the current issues.

a. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*[112]

Yahoo! is an Internet service provider maintaining various websites throughout the world.[113] It allows anyone to search the Internet, use e-mail, set up personal Web pages, engage in auction sites, shop, and enter into online clubs or chat rooms.[114] In this case, several offensive Nazi and Third Reich objects and books were made available for sale to anyone in the

110. *See* Northwest Healthcare Alliance, Inc. v. Healthgrades.com, Inc., 50 Fed. Appx. 339, 340–41, 2002 WL 31246123 (9th Cir. 2002) (unpublished opinion), *cert. denied*, 02-1250, 2003 U.S. LEXIS 3267 (2003) (utilizing the *Calder* "effects" test to find jurisdiction was appropriate over a website that offered ratings of Washington home health care providers); *see also* ALAN WRIGHT & ARTHUR R. MILLER, WRIGHT & MILLER TREATIES, 4A FED. PRAC. & PROC. CIV.3d § 1073.1 (2002) (asserting that the *Calder* jurisdictional test applied to defendants' allegedly tortious Internet activity). *See generally* Noonan v. The Winston Co., 135 F.3d 85, 90 (1998) (showing the application of the *Calder* test to assert jurisdiction over a defendant that published an allegedly defamatory photograph).

111. *See* JOHN B. MORRIS, JR. ET AL., 2 INTERNET LAW AND PRACTICE § 24:41 (West 2004) (stating that American courts are confronted with adverse foreign judgments but the Supreme Court would not recognize a foreign judgment that violated a constitutional right); *see also* Sutton, *supra* note 56, at 431 (demonstrating foreign judgments adverse to constitutional protections will not be enforced domestically in the United States). *See generally* Elissa A. Okoniewski, Comment, Yahoo!, Inc. v. Licra: *The French Challenge to Free Expression on the Internet*, 18 AM. U. INT'L L. REV. 295, 296–97 (2002) (showing that the *Yahoo!* case is an example of international disputes involving Americans over issues that are constitutionally protected in the United States but not in the foreign country).

112. 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004); *see also* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 413–14 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003) (regarding the ability of a London court to assert jurisdiction over an American publisher).

113. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1183 (N.D. Cal. 2001) (describing the Yahoo! corporation and its subsidiaries around the world), *rev'd*, 379 F.3d 1120 (9th Cir. 2004); *see also* Louise Kehoe, *Yahoo! Launches India Site*, FIN. TIMES (London), June 30, 2000, at 18 (announcing the launch of a Yahoo! website in India); Chen May Yee, *Yahoo! Tweaks Web Sites to Fit Asia's Cultures*, WALL ST. J., Mar. 6, 2001, at B11 (asserting that Yahoo! is a worldwide company with twenty-four portals in twelve languages).

114. *See Yahoo!*, at 1184 (giving examples of the ways in which computer users interact with the Yahoo! service); *see also* L. R. Shannon, *Travel Advisory; Cyberscout,* N.Y. TIMES, Sept. 20, 1998, § 5, at 3 (listing the types of services available on Yahoo); Jon Swartz, *Yahoo! Profits Jump, Beating Expectations*, S.F. CHRON., Apr. 8, 1999, at B1 (enumerating options available to Yahoo! users).

world via Yahoo's auction services.[115] Defendants, however, did not approve of such objects and attempted to compel Yahoo! to remove the material from its website by informally requesting Yahoo! to remove the offending objects from its website and then bringing suit before the Tribunal de Grande Instance de Paris (hereinafter "French Court").[116] The French Court determined approximately 1,000 Nazi and Third-Reich-related objects were being offered for sale on Yahoo!'s website in violation of French criminal law. As such, the court ordered Yahoo! to take several steps which were designed to prevent any French citizen from accessing any sites containing Nazi objects, relics, etc. for sale; reprints, extractions, or quotes from *Mein Kampf* or the *Protocols of the Elders of Zion*; index headings entitled "negationists"; or hypertexts linking the Holocaust with "negationists" available to the French Republic.[117] In addition, Yahoo! was mandated to put forth a legend stating that searching Yahoo! might lead French citizens to sites that contain material prohibited by section R645-1 and which could lead to legal action against the user.[118] To ensure compliance, the court imposed a fine of 100,000 euros for each day Yahoo! did not meet the requirements. Naturally, Yahoo! appealed, arguing it was technologically impossible to meet the French Court's demands. However, after hearing expert opinion, the court affirmed its earlier order and issued another one instructing Yahoo! to comply with the earlier order within three months or be subject to a penalty of 100,000 francs (US$13,300) a day for non-compliance.[119]

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115. *See Yahoo!*, at 1183–84 (illustrating the types of Nazi paraphernalia available through Yahoo's auction services); *see also* Pierre-Antoine Souchard, *France Calls for Net Zoning; Judge Orders Yahoo! to Restrict Access to Site Deemed Racist*, WASH. POST, Nov. 21, 2000, at E15 (reporting that Yahoo! auction pages allow consumers to bid on Nazi items); Angela Doland, *French Challenge Yahoo! on Web Sale of Nazi Items*, COM. APPEAL (Memphis, Tenn.), July 25, 2000, at B10 (asserting that over 1,000 Nazi items were available at auction on the Yahoo! website).

116. *See Yahoo!*, at 1183–84 (detailing how the defendants first sent Yahoo! a "cease and desist" letter before filing suit in the French court; *see also* Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 531–32 (2002) (discussing the procedural history of the case); Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 391 (2003) (explaining the French finding of jurisdiction).

117. *See Yahoo!*, at 1184–85 (recounting the findings and order of the French court); *see also* Greenberg, *supra* note 74, at 1206–07 (detailing the steps required by the French court order); Okoniewski, *supra* note 111, at 314–15 (examining the requirements of the French court order).

118. *See Yahoo!*, at 1184–85 (indicating that the French court ordered Yahoo! to post a warning about the possible presence of material prohibited by section R645-1 on its French site); *see also* Earle & Madek, *supra* note 13, at 230 (relating the warning that Yahoo! was mandated to display on its French site); Julie L. Henn, Note, *Targeting Transnational Internet Content Regulation,* 21 B.U. INT'L L.J. 157, 168 (2003) (explaining the warning required of Yahoo! by the French court).

119. *See Yahoo!*, at 1185 (observing that although Yahoo! appealed the fine imposed on it by the lower court, a higher court affirmed the earlier order); *see also* Katherine S. Williams, *Child-Pornography and Regulation of the Internet in the United Kingdom: The Impact on Fundamental Rights and International Relations*, 41 BRANDEIS L.J. 463, 501 (2003) (asserting that Yahoo! was ordered to either comply with the court order or face a large penalty); Pamela G. Smith, Comment, *Free Speech on the World Wide Web: A Comparison Between French and United States Policy with a Focus on* UEJF v. Yahoo! Inc., 21 PENN ST. INT'L L. REV. 319, 333 (2003) (conveying the amount of the penalty imposed on Yahoo! by the French court).

In an attempt to comply with the French Court, Yahoo! amended their auction policy[120] and removed the *Protocols of the Elders of Zion*, but still allowed certain Nazi- and Third Reich-related items for sale in addition to preventing access to sites either apologizing for Nazism or contesting Nazi crimes.[121] Yahoo! argued the only way to comply with the order would be to remove all Nazi-related material from its website because it lacked the technological capability to restrict access for French citizens while allowing it for everyone else.[122] In the action before the California district court, Yahoo! maintained this order would impermissibly offend their First Amendment rights and asked for a declaratory judgment rendering the French order non-cognizable nor enforceable under U.S. law in order to prevent defendants from attaching Yahoo!'s assets in order to satisfy the penalties.[123]

The District Court acknowledged France's sovereign right to institute and enforce policies as it sees fit within its borders, but questioned whether it could "regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation."[124] In order to render a declaratory judgment, however, the court needed to satisfy the Declaratory Judgment Act (DJA), which requires a showing of a "substantial controversy, between parties having adverse legal interests, [and] of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[125]

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120. *See Yahoo!*, at 1185 (stating Yahoo's amended policy)*; see also* Okoniewski, *supra* note 111, at 316 (noting that Yahoo! now prohibits the sale of items promoting hate or violence); Alan Gathright, *Yahoo Challenges French Ruling; Some See Sale of Nazi Items as Speech Issue,* S.F. CHRON., Dec. 23, 2000, at A22 (reporting on Yahoo!'s contemplation of policy change).

121. *See Yahoo!*, at 1185–86; *see also* Evan Scheffel, Note, Yahoo! Inc. v. La Ligue Contra Le Racisme et L'Antisemitism: *Court Refuses to Enforce French Order Attempting to Regulate Speech Occurring Simultaneously in the U.S. and in France*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 549, 552–53 (stating that Yahoo! removed all displays violating French law, except for a few auction items); Rachel Konrad, *U.S. Court Upholds French Ban on Yahoo Sale of Nazi Memorabilia*, THE JERUSALEM POST, Aug, 25, 2004, at 6 (stating that Nazi memorabilia is still sold on Yahoo!'s American website).

122. *See Yahoo!*, at 1185–86; *see also* Dan McDougall, *Lord Robertson Case Unravels Tangled Web of Libel Laws,* THE SCOTSMAN, Aug. 12, 2003, at 12 (stating that Yahoo! has in fact removed Nazi memorabilia from its site altogether). *See generally* Anick Jesdanun, *Not Quite Worldwide Web; Geolocation: Technology That Tracks Users' Whereabouts Is Being Used Increasingly to Target Advertising as well as Restrict Access on the Information Superhighway,* THE BALT. SUN, July 15, 2004, at 8D (noting that the French court considered geolocation as a way to prevent French users from being able to purchase Nazi materials while allowing Yahoo! to keep it on the site).

123. *Yahoo!*, at 1186. *See* David Radin, *Yahoo! Auction is Right to Ban Nazi Goods*, PITTSBURGH POST-GAZETTE (Pennsylvania), Jan. 11, 2001, at F3 (stating that Yahoo! also sought the declaratory judgment on the argument that it was not subject to French jurisdiction); *see also* Medb Ruane, *A New Highway for Old Hatreds,* THE IRISH TIMES, Jan. 18, 2002, at 14.

124. *Yahoo!*, at 1186. *See* Okoniewski, *supra* note 111, at 324 (stating that the U.S. decision was simple due to the clear violation of Yahoo!'s First Amendment rights); *see also* Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model,* 56 FED. COMM. L.J. 587, 640 (2004) (stating that the U.S. court questioned whether governments would be able to restrict Internet content by citizens of other countries).

125. *Yahoo!*, at 1187 (quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941)). *See* Declaratory Judgment Act, 28 U.S.C. § 2201 (2004) (stating that a declaratory judgment may be issued when an actual controversy exists between the parties); *see also* Okoniewski, *supra* note 111, at 318 (stating that the U.S. court found an actual controversy because Yahoo! could benefit from the declaratory judgment).

The first issue was whether there was an "actual controversy" to satisfy the requirement. The gist of the defendant's argument was that there were too many contingencies to enforcement of the French order and, therefore, there was no dispute at the present moment.[126] The court countered, however, by recognizing that because of the existence of contingencies, Yahoo! would always be under the threat of litigation, which is what the DJA was designed to prevent.[127]

As for the requirement of a "real and immediate" threat, the court first noted the French order was a viewpoint-based regulation that "instruct[ed] Yahoo! to undertake efforts that [would] impermissibly chill and perhaps even censor protected speech."[128] Furthermore, the mandate for Yahoo! to take serious remedial measures removing anything remotely relating to Nazi or Third Reich materials was too imprecise to withstand strict scrutiny under the First Amendment.[129] In the court's eyes, the threat of losing First Amendment protections, even for minimal periods of time, constituted an irreparable injury.[130] Aggregating this thought with the threat of suit by the defendants against Yahoo!'s present and ongoing conduct, and the abil-

126. *Yahoo!*, at 1188–89 (specifically, the defendants argued Yahoo! had an appeal before the French Court which could nullify the Order and that they viewed Yahoo!'s actions substantially complied and therefore they had no present interest in taking legal action against Yahoo!). *See* Scheffel, *supra* note 121, at 554–55 (listing LYCRA's arguments against the finding of an actual controversy); *see also* Greenberg, *supra* note 74, at 1231–32 (stating that the defendants argued, among other things, that possibility of future harm does not create an actual controversy).

127. *See Yahoo!*, at 1188 (expressing that since Yahoo! was not involved in any relevant appellate proceeding at the time, the French Court could institute retroactive penalties if Yahoo! initiated penalty enforcement proceedings. At this time, Yahoo! also had no method to ensure that it was even in substantial compliance with the French Court's ruling); *see also* Silberman, *supra* note 6, at 348–49 (maintaining that Yahoo! Inc. faced difficulties associated with contingencies in its recent litigation in the French Court). *See generally* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 321 (2002) (remarking about the historical impact of contingencies on nation-states and their relation to present-day cases).

128. *See Yahoo!*, at 1189–90 (referring to the analysis put forth in Board of Airport Commissions v. Jews for Jesus, 482 U.S. 569, 569 (1987) and Gooding v. Wilson, 405 U.S. 518, 518 (1971)); *see also* Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1, 60 (2004) (proclaiming that the French Court's imposition of censorship effectively prevents access to these materials and is harmful to free speech in countries where this material is permissible); Jeremy N. Geltzer, Comment, *The New Pirates of the Caribbean: How Data Havens Can Provide Safe Harbors on the Internet Beyond Governmental Reach*, 10 SW. J. L. & TRADE AM. 433, 441 (2004) (recognizing that even if Yahoo! has the technology to comply with the French order, the usage of this technology may be an unconstitutional impediment to free speech).

129. *See Yahoo!*, at 1189 (expressing that the decree by the French court regarding the Nazi memorabilia is not precise enough in its scope to be supported by the U.S. courts); *see also* Sakura Mizuno, *When Free Speech and the Internet Collide: Yahoo!-Nazi-Paraphernalia Case*, 10 CURRENTS: INT'L TRADE L.J. 56, 57 (2001) (clarifying that *Yahoo!* wanted the petition dismissed because the impossible obligations imposed would negatively affect the freedom of speech); Okoniewski, *supra* note 111, at 316–17 (illustrating that the French judgment in *Yahoo!* was neither recognizable nor enforceable under the laws of the United States).

130. *See Yahoo!*, at 1189 (referencing Elrod v. Burns, 427 U.S. 347, 373 (1976) (citing New York Times Co. v. United States, 403 U.S. 713, 713 (1971)); *see also* Smith, *supra* note 119, at 320 (acknowledging the Court's seriousness of not wanting to enforce a French order that would impede the rights of the First Amendment). *See generally* P.J. Huffstutter, *California Yahoo! Not Bound by French Law Internet: Judge Says First Amendment Bars Foreign Court from Regulating Firm's Speech*, L.A. TIMES, Nov. 8, 2001, *available at* 2001 WL 28926990 (commenting that to ensure the freedom of speech, the effects of court decisions must be viewed beyond the U.S.'s own judiciary).

ity of the French Court to impose retroactive penalties, the court determined this controversy satisfied the "real and immediate" threat requirement.[131]

Lastly, the court discussed whether the principle of comity[132] would require it to deny the plaintiff's motion for declaring the French order unenforceable and void in the United States. The general rule is that United States courts will enforce foreign decrees, with the exception that enforcement is not warranted if doing so would be "prejudicial or contrary to the country's interests."[133] Referring back to its earlier analysis, the court concluded enforcement in this case would be contrary to the First Amendment and would also serve to chill protected speech, and, therefore, "the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."[134]

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131. *See Yahoo!*, at 1190–91 (distinguishing Yahoo! from Int'l Soc. for Krishna Consciousness of CA, Inc. v. City of Los Angeles, 611 F. Supp. 315, 320 (C.D. Ca. 1984) and Salvation Army v. Department of Community Affairs, 919 F.2d 183, 183 (3d Cir. 1990); *see also* Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 185 (2004) (commenting that the government will only limit the freedom of speech when there is a clear and present danger of immediate violence).

132. *See* Dow Jones & Co. v. Harrods, 237 F. Supp. 2d 394, 444 (2002) (referring to Hilton v. Guyot, 159 U.S. 113, 164 (1895) that stated that the Supreme Court's definition of international comity includes regard to international duty and convenience, to the rights of citizens, and to the rights of others protected by the law before a foreign act can be recognized as binding in the United States), *aff'd*, 346 F.3d 357 (2nd Cir. 2003)*; see also* Caitlin T. Murphy, Comment, *International Law and the Internet: An Ill-Suited Match Case Note on UEJF & LICRA v. Yahoo! Inc.*, 25 HASTINGS INT'L & COMP. L. REV. 405, 405 (2002) (informing that the First Amendment outweighs obligations related to the principle of comity). *See generally* Shekel Masoud, Comment, *The Offshore Quandary: The Impact of Domestic Regulation on Licensed Offshore Gambling Companies*, 25 WHITTIER L. REV. 989, 1003 (2004) (discussing that the U.S. court acknowledged the principle of comity when it refused to enforce the French Court's order).

133. *See Yahoo!*, at 1192 (stating that the United States Courts usually recognize foreign judgments, as noted in Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971); *see also* Greenberg, *supra* note 74, at 1191 (expressing that the *Yahoo!* court wanted to assert that the French ruling was a violation of the U.S.'s interest in First Amendment rights); Mark D. Rosen, *Should Un-American Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 791 (2004) (recognizing that the U.S. will not enforce judgments that go against the interests of the First Amendment).

134. *See Yahoo!*, at 1192–93 (recognizing that recognized body of law dealing with Internet speech, an appropriate treaty, or legislation could serve to alter this conclusion); *see also* Metesuvitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (refusing to enforce a foreign libel judgment because to do so would violate the defendant's constitutional rights of free speech).

It should be noted, however, that although the general belief is that no U.S. court would enforce a judgment for a decision based on principles contrary to our Constitution,[135] it is still an open question, as there is no Supreme Court precedent on point.[136]

b. *Dow Jones & Co., Inc. v. Harrods, Ltd.*[137]

Here, what started out as a joke has led to bi-continental litigation and a subtle battle of judicial nationalism. In a bold stance, Dow Jones attempted to preempt the decision of the English court system by requesting the Southern District of New York to issue an injunction prohibiting the defendants from continuing litigation in England or initiating proceedings in any other global forum.[138] By requesting the court to enjoin actions across the globe, Dow Jones almost realized the fears contemplated by the judges in *Gutnick*, that is, for Internet publishers to hide behind the protective walls of the First Amendment after they hurled defamatory remarks across the seas.

In an attempt to draw people to its revamped website, Harrods, Ltd. issued a press release on March 30, 2002 in which it was announced that Mohamed Al Fayed, Harrods' chairman and the other defendant in this action, would announce the following day future plans, includ-

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135. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987) (stating a U.S. court may not recognize a judgment rendered by a court without compatible due process procedures or if the judgment is based upon principles "repugnant to the public policy of the United States"); *see also* Jason Krause, *Casting a Wide 'Net: Search Engines Yahoo and Google Tussle with Foreign Courts over Content*, 88 A.B.A. J. 20, November 2002 (citing Yahoo! attorney Mary Wirth's belief that any judgment rendered in France would be unenforceable). *See generally* Sheldon Shapiro, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. FED. 208, § 5 (2004) (stating that a foreign judgment that is contrary to public policy will be denied extraterritorial effect in a federal district court).

136. *See Libel Without Frontiers Shakes the Net*, BUS. POST, Dec. 15, 2002 (noting that as no Supreme Court precedent exists, it is unclear whether or not a U.S. court would enforce a foreign judgment contrary to constitutional principles); *see also* Rosen, *supra* note 133, at 785 (arguing that U.S. courts may constitutionally enforce foreign judgments in conflict with American constitutional law); *cf.* August, *supra* note 116, at 567 (questioning whether the Supreme Court would continue to enforce forum-selection clauses in international contracts in light of "present day realities" of cyber-space and Internet jurisdiction issues).

137. 237 F. Supp. 2d 394 (S.D.N.Y. 2002) (reporting action for declaratory judgment by Harrods against Dow Jones arising from article printed in the *Wall Street Journal*). *See Floating Joker*, TIMES (London), June 12, 2002 (describing Harrods bringing suit against Dow Jones for libel); *see also The Newspaper, The Shopkeeper and the April Fool that Went Horribly Wrong*, INDEPENDENT ON SUNDAY (London), June 16, 2002, at 6 (noting suit by Harrods against the *Wall Street Journal* and its owners, Dow Jones and Co).

138. *See* Dow Jones v. Harrods, at 403 (stating that Dow Jones requested an injunction to prevent litigation in England because of the perceived threat on its continued publishing of the challenged article and the high costs it would incur in the suit), *aff'd*, 346 F.3d 357 (2nd Cir. 2003); *see also* John Fellas, *Choice of Law in International Litigation*, INT'L BUS. LITIG. & ARB. 2003 at 475 (acknowledging that the Southern District refused to "grant an antisuit injunction enjoining Harrods from bringing a defamation action against Dow Jones in London"); Felicity Barringer, *Release was a Spoof, But the Suit is Real*, N.Y. TIMES, June 10, 2002, at C8 (stating that Dow Jones wanted a judge to rule that Harrods had no case under American law so that Dow Jones could maintain its "home-field advantage").

ing information about "a first-come-first-served share option offer."[139] On April 1, 2002, i.e., April Fool's Day, the announcement posted on the website indicated Al Fayed decided to "float" Harrods by "building a ship version of the store to be moored in London on the embankment of the Thames River."[140]

Dow Jones, however, took the initial announcement at metaphorical value and published an article reporting that Harrods would announce its plans to publicly list its stock on its website, WSJ.com, and in the print editions issued in the United States.[141] Upon realizing it was all an April Fool's joke, Dow Jones published a correction in the *Wall Street Journal* ("*WSJ*") the next day. On April 5, 2002, the *WSJ* tried to counter by publishing a story of its own; unfortunately, the *WSJ*'s attempt at humor was not as funny. The *WSJ* published an article entitled, "The Enron of Britain?", which stated in the very first line: "If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure."[142]

Infuriated by the connection between Harrods and Enron and the resulting damage done to their reputation, Harrods began to informally inquire and then demand Dow Jones publish an apology or be subject to a defamation action in the United Kingdom.[143] Finally, Harrods requested "'pre-action disclosure' concerning the circulation of the *WSJ*'s United States edition in the United Kingdom, the number of subscribers to its online edition in the United Kingdom

139. *See* Dow Jones v. Harrods, at 400 (reporting that Harrods described in a press release its future plans and invited journalists seeking further information to contact "Loof Lirpa" at Harrods but that "Loof Lirpa" is really April Fool spelled backward); *see also* Barringer, *supra* note 138, at C8 (indicating that Al Fayed of Harrod's intended an April Fool's joke with the press release); Alan Hamilton, *April Fool Is no Laughing Matter*, TIMES (London), Feb. 17, 2004, at 4 (discussing Harrods' "first-come, first-serve" share option offer).

140. *See* Dow Jones v. Harrods, at 400 (stating that the press release offered shares in Harrods' new "floating venture" and offered a share certificate for those who registered by noon on the First of April); *see also* Duncan Lamont, *Let the Judges Do the Jokes: The History of the Humorous Libel Defence is Littered with Costly Defeats*, GUARDIAN (London), June 9, 2003, at 10 (informing of Harrods' "plan" to launch a floating shop in a canal boat); Dan Milmo, *Harrods Humbled: Mohamed Al Fayed Loses Libel Case*, GUARDIAN (London), Feb. 18, 2004, at 19 (announcing that a Harrods' store would be floated on a canal boat).

141. *See* Dow Jones v. Harrods, at 400 (commenting that Dow Jones interpreted the announcement to mean that Harrods intend to list its stock publicly, as the phrase "to float shares" is another way of terming a public offering of stock); *see also* Hamilton, *supra* note 139, at 4 (describing how the *Wall Street Journal* fell "hook, line, and sinker" for Harrods' fake press release). *See generally* BLACK'S LAW DICTIONARY 653 (7th ed. 1999) (defining "to float" as to "issue a security for sale on the market" and a "float" as the amount of a corporation's shares that are available for trading on the securities market).

142. *See* Dow Jones v. Harrods, at 400 (explaining that Dow Jones published the announcement on its WSJ.com website before confirming the veracity of the statement)*; see also* Vincent Chirico, *International Litigation,* 37 INT'L LAW. 507 (2003) (explaining that Dow Jones went along with the prank by publishing the Enron reference); Barringer, *supra* note 138, at C8 (discussing how the *Journal* missed the clues that the article was part of an April Fool's prank).

143. *See* Dow Jones v. Harrods, at 401 (describing Harrods' response to the article, its belief that its reputation was damaged and its demand for an apology); *see also* Barringer, *supra* note 138, at C8 (describing how Harrods demanded an apology and threatened a defamation action); Mark Hamblett, *Judge Refuses to Block Harrods Libel Suit,* THE LEGAL INTELLIGENCER, Oct. 22, 2002, at 4 (explaining that Harrods meant to file a defamation suit in the United Kingdom).

and worldwide and the number of 'hits' received on WSJ.com since April 5, 2002."[144] Instead of responding with disclosure, Dow Jones commenced an action in District Court seeking to enjoin Harrods and Al Fayed from maintaining suit.[145] In turn, Harrods, although not Al Fayed, instituted an action in the High Court of Justice in London for damages resulting from libel and for an injunction against the publication of the April 5 article.[146]

Dow Jones argued that this action would continue in England[147] and it would be forced to incur the "enormous" expense of litigating the issue there, temporarily remove writers and editors from their jobs, presumably because they would be testifying in the case, and it could potentially incur liability based on its continued publication of the April 5 article.[148] The argument continued that this result stood in stark contrast to the situation where if the same claim were brought in the United States, it would be summarily dismissed under both federal and state constitutions for being an opinion that could not be proven false.[149] The correct conclusion, according to Dow Jones, was to declare any libel claim based on the April 5 article to be insufficient as a matter of law and to issue an injunction against Harrods or Al Fayed from pur-

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144. *See* Dow Jones v. Harrods, at 402 (describing how in preparation for a defamation suit in the U.K., Harrods demanded information about the circulation of the *Wall Street Journal* in the U.K. and the United States, as well as the number of hits on WSJ.com since April 5, 2002); *see also Discovery, Inspection and Interrogatories*, HALSBURY'S LAWS OF ENGLAND (March 2003) (explaining that under under CPR 31.16(3)(d), a pre-action order for the disclosure of documents is allowed to help dispose fairly of proceedings in the U.K.); *WSJ.com Adds Extensive Asia/Pacific, Latin American and European Market Data; Subscribers Get Current Plus Expanded Perspectives on Companies in Key Markets Worldwide,* BUSINESS WIRE, Jul. 25, 2000 (describing the widespread reach of WSJ.com, and the potential reach of a damaging article).

145. *See* Dow Jones v. Harrods, at 402 (explaining that instead of complying with the request, Dow Jones commenced a suit to enjoin Harrods from commencing a suit); *see also* Hamblett, *supra* note 143, at 4 (explaining that Dow Jones made the request to prevent a costly legal battle in the U.K.); *cf.* Judiciary and Judicial Procedure, 28 U.S.C.S. § 2201 (2004) (explaining that a declaratory judgment serves as a means of declaring the rights of the party seeking a remedy).

146. *See* Dow Jones v. Harrods, at 402 (explaining that Harrod's filed an injunction in a London court to prevent further publication of the article); *see also* Ayelet Ben-Ezer and Ariel Bendor, *The Constitution and Conflict of Law Treaties: Upgrading the International Comity,* 29 N.C. J. INT'L L. & COM REG. 1, 4–5 (2003) (discussing the role that international law and relations have in the approach nations take when conflicts arise between their laws); *cf.* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 915 (1984) (explaining that parties often attempt to use injunctions to prevent an adversary from pursuing a remedy in an international dispute).

147. *See* Dow Jones v. Harrods, at 403 (explaining the potential difficulties of facing trial in London). S*ee generally* Matusevitch v. Telnikoff, 877 F. Supp. 1, 9–10 (D.D.C. 1995) (describing some of the differences between libel laws in the United States and the U.K.).

148. *See* Dow Jones v. Harrods, at 403 (explaining the difficulties Dow Jones would face from the diversion of resources). *See generally* Douglas W. Vick and Linda MacPherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation,* 49 FED. COMM. L.J. 621, 624–28 (explaining the defamation cause of action in the U.K.). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987) (describing the grounds under which a person may face adjudication in a foreign state).

149. *See* Dow Jones v. Harrods, at 402 (maintaining that the claims would be dismissed in both jurisdictions because the statements are simply opinions that cannot be proven false); *see also* Milkovich v. Lorraine Journal Co. et al., 497 U.S. 1, 18–21 (1990) (holding that statements on matters of public concern must be provable as false to be actionable where a media defendant is involved.

suing the litigation in England or anywhere else in the world.[150] To the contrary, Harrods argued that a declaratory judgment is not proper when the underlying issue lies in tort; Dow Jones was attempting to preemptive forum-shop against Harrods, and because no "actual controversy" existed as contemplated by the DJA.[151]

Within the DJA, three issues presented themselves to the court with regard to "whether the action described in the pleadings: (1) raises an 'actual controversy'; (2) falls within the scope of cases for which the DJA was intended, and (3) presents circumstances sufficiently compelling to warrant exercise of the Court's discretion to grant or deny the relief requested."[152]

The test to determine whether there exists an "actual controversy" requires analysis into whether the facts alleged show there is a substantial controversy between parties with adverse legal positions and of such immediate nature and reality as to warrant a declaratory judgment.[153] Delving further into the framework to determine whether sufficient immediacy and reality exists, the court must answer the question whether the suit for declaratory relief relates to liability already accrued or the occurrence of the threatened risk, as opposed to these eventualities remaining a mere possibility.[154]

In support of its argument that an "actual controversy" existed, Dow Jones asserted it would be forced to defend an action and could be found liable in a forum whose decision

150. *See* Dow Jones v. Harrods, at 402 (asserting that the defamation claim was non-actionable); *see also* Feinberg et. al., *Decision of Interest: Court Rejects Argument that District Court Should Have Balanced Factors Differently*, N.Y.L.J., Nov. 3, 2003 (noting that Dow Jones brought the action seeking a declaration that the story was not libelous as a matter of law); Brief for Appellant, Dow Jones & Co. v. Harrods Ltd, 346 F.3d 357 (2d Cir. 2003) (No. 02 Civ. 3979) (noting in the statement of the case that in *Dow Jones'* original action, appellants asked for a declaratory judgment and an injunction barring defendant from seeking relief in any other jurisdiction).

151. *See* Dow Jones & Co. v. Harrods Ltd., 237 F. Supp. 2d 394, 403–04 (S.D.N.Y. 2002) (noting *Harrod's* three-pronged challenge to the court asserting subject matter jurisdiction); *see also* Defendant's Memorandum of Law in Support of Motion to Dismiss, Dow Jones & Co. v. Harrods Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002) (No. 02 Civ. 3979) (noting that among Harrod's arguments are the tort argument, the anticipatory filing argument, and the "actual controversy" argument). *See generally* Declaratory Judgment Act, 28 U.S.C.A. § 2201 (2004) (providing that the court has the power to give declaratory judgments in cases of an actual controversy).

152. *See* Dow Jones v. Harrods, at 405 *(*fleshing out the purpose and benefits of the Declaratory Judgment Act procedure and remedy); *see also id*. at 405 (noting that the issues involved are threefold as described above). *But see* Nat'l Railroad Passenger Corp. v. Penn. Pub. Utility Comm'n., 342 F. 3d 242, 258 (3d Cir. 2003) (noting a five-factor test in reviewing a district court's exercise of jurisdiction under the DJA).

153. *See* Dow Jones v. Harrods, at 406 (recognizing that the difference between an actual controversy and a hypothetical question is a matter of degree); *see also* Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (indicating that the test is whether a substantial controversy exists between parties having adverse legal interests, "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) (noting that where there is a concrete case of immediate and definitive determination, the court may exercise jurisdiction).

154. *See* Dow Jones v. Harrods, at 407 (finding that sufficient immediacy is not present where the threat may never come to pass); *see also* CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3532 (2d. ed. Supp. 2004) (asserting that the central concern in ripeness cases is that the future events may not occur at all).

would be unenforceable in United States courts.[155] The court, however, disagreed by concluding that even if it was conceded that an English judgment would be unenforceable in the United States, there were too many contingencies and too indefinite a point in the future to satisfy the qualifications of the "actual controversy" standard.[156]

Alternatively, Dow Jones argued the burden it would incur defending an allegedly frivolous lawsuit in a foreign jurisdiction would adversely affect its First Amendment rights and that this heightened constitutional issue merited a lower threshold for finding an actionable controversy.[157] Viewing the relevant Supreme Court precedent, the court maintained Dow Jones' allegations of harm, both past and future, were not "sufficiently concrete, objective or specific to support a finding of an actual controversy justifying the extraordinary relief Dow Jones seeks."[158]

Despite being invited by Dow Jones to "seize the opportunity to reinforce and enlarge the First Amendment protections American publishers enjoy so as to bar preemptively potential liability for any alleged defamation injury their commercial activities conducted in this country and transmitted through the worldwide web may cause in foreign jurisdictions," the Court was unable to find any legal basis for asserting such authority.[159]

As for the cases cited by Dow Jones to support such an expansive view of federal power, the court distinguished them both and found them inapplicable to the case at hand. The dis-

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155. *See* Dow Jones v. Harrods, at 407 (asserting that when the actual controversy standard is applied, Dow Jones' argument is not accepted by the court)*; see also* First Amended Complaint for Declaratory Judgment and Injunction at #38, Dow Jones & Co. v. Harrod's Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002) (No. 02 Civ. 3979) (alleging that if *Dow Jones* were forced to try this case in England, it would be costly and would result in a greater chance of liability due to Britain's less protective stance on free speech). *See generally* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (asserting that judgments will be unenforceable despite comity if the foreign judgment is repugnant to the nations' laws).

156. *See* Dow Jones v. Harrods, at 408–09 (discussing that the mere prospect of an adverse ruling does not satisfy the actual controversy test). *But see* Christine Duh, *Cyberlaw: A. Internet Jurisdiction: 2. International:* Yahoo! Inc. v. LICRA, 17 BERKELEY TECH. L.J., 359, 372 (2002) (noting that in *Yahoo*! the court exercised jurisdiction despite the fact that the defendant might never seek recognition of the judgment within the United States).

157. Dow Jones v. Harrods, at 409 (citing Zwickler v. Koota, 389 U.S. 241 (1967) (discussing plaintiff's plea to lower the threshold of proof of an actual controversy). *See* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) (stating parties must prove there is a controversy before relief may be granted); *see also* New York Times v. Sullivan, 376 U.S. 254, 303 (1964) (examining which party should carry the burden of proof).

158. Dow Jones v. Harrods, at 410 (citing Young v. Harris, 401 U.S. 37 (1971) (proposing that the fear of possible future criminal prosecution or even actually defending a criminal proceeding did not lead to a sufficient "chill" of First Amendment rights that warranted federal intervention). *See* Laird, Secretary of Defense, et al. v. Tatum et al., 408 U.S. 1, 14 (1972) (emphasizing that threat of future harm is not enough to prove an immediate controversy); *see also* Maryland Cas. Co. v. Pacific Coal & Oil Co. et al., 312 U.S. 270, 273 (1941) (clarifying that the court must decide whether there is a controversy justifying the relief sought by the plaintiff).

159. Dow Jones v. Harrods, at 411. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987) (establishing guidelines for proper adjudication to be followed by the states); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 cmt. a (1987) (commenting that a state may not exercise its authority, within the realm of international law, to enforce a law when it does not have jurisdiction).

tinguishing characteristics of *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L' Antisemitisme*[160] were that the effects of the French ruling were concrete, the order mandated Yahoo! to alter its content in America, the penalties for noncompliance could only be enforced in the U.S., and the court was only asked to find the French ruling unenforceable in this country, as opposed to in every foreign jurisdiction.[161] In the court's view, issuing declaration would affect purely American activities and would not "implicate . . . extra-judicial forays and intrusions into international affairs."[162]

The second case, *Farrell Lines Inc. v. Columbus Cello-Polly Corp.*,[163] was found inapplicable because in that case, the American plaintiff petitioned the court to give effect to choice of law and forum clauses set forth in its contract, which the defendant tried to disregard by bringing suit in Italy and imposing Italian law.[164] In addition to the defendant's attempt to specifically evade United States jurisdiction, there was a present controversy revolving around the applica-

160. Yahoo!, Inc., v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Ca. 2001) (indicating that plaintiff sought a declaration from the court that the First Amendment precludes enforcement of the French order within the United States), *rev'd on other grounds,* 2004 U.S. App. LEXIS 17869 (9th Cir. 2004). *See* August, *supra* note 116, at 555–56 (incorporating this French-American case by summarizing that the American company requested a declaratory judgment, ordering the French Court's decision unenforceable in the U.S.); *see also* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 663 (2003) (referencing *Yahoo!* in regard to First Amendment rights in the U.S.).

161. Dow Jones v. Harrods, at 413–14 (examining the distinct characteristics of the case: the French ruling was concrete, it mandated change to the website's content in America with specific enforcement within the U.S. and the relief sought was only to apply in the U.S.). *See* Scheffel, *supra* note 121, at 551–53 (2003) (reciting the facts of the *Yahoo!, Inc*. case); *see also* Rinat Hadas, Comment, *International Internet Jurisdiction: Whose Law is Right?:* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1182, 15 FLA. J. INT'L L. 299, 308–09 (2002) (discussing the court's decision and the U.S.'s discretion on what foreign laws it will enforce).

162. Dow Jones v. Harrods, at 414 (stating the court's opinion in regard to enforcing the French court's order). *See* 28 U.S.C.S. § 2201 (2004) (stating that after a party proves the existence of an actual controversy, then he may seek a declaratory judgment from the U.S. court system, which will have effect of a final judgment and shall be reviewed as such). *See generally* Henn, *supra* note 118, at 167 (suggesting an international standard for Internet content that may help guide countries when selecting the appropriate jurisdiction to bring suit).

163. Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118 (S.D.N.Y. 1997) (reviewing the court's assessment of choice-of-law and forum clauses within the parties' contract), *aff'd*, 161 F.3d 115 (2d Cir. 1998). *See* Silva Run Worldwide Ltd. v. Gaming Lottery Corp., 53 Fed. Appx. 597, 598 (2d Cir. 2002) (stating that once a judgment has been entered, a more lenient standard will be applied in deciding whether an anti-foreign suit injunction should be applied). S*ee generally* Mastercard International Inc. v. Argencard Sociedad Anonima, 2002 U.S. Dist. LEXIS 4625, 34 (S.D.N.Y. 2002) (concluding that the License Agreement did not contain a forum selection clause, therefore it was unnecessary to decide whether such a clause would warrant an anti-foreign injunction).

164. *Farrell Lines*, at 123 (explaining that after the defendant brought suit in Italy, the plaintiff sought an injunction prohibiting the defendants from proceeding with the Italian litigation). *See* General Electric Co. v. Deutz AG, 129 F. Supp. 2d 776, 789 (W.D. Pa. 2000) (examining the *Farrell Lines* case and the injunction sought by the plaintiff); *see also* Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79, 106 (1999) (distinguishing the Farrell Lines decision of denying the defendant's motion to stay the action pending resolution of the Italian court).

bility of certain contract terms; the court was able to fully dispose of the case because much of the underlying dispute was conceded.[165]

Instead, the court likened the present dispute to that in *Basic v. Fitzroy Eng'g, Ltd.*,[166] in which a presumably American corporation asked an American court to issue a declaratory judgment against New Zealand proceedings as contrary to American public policy and therefore unenforceable.[167] Considering the same reasons, the *Basic* court found it would be unable to issue such a declaration. The court thought a judgment against Basic in the New Zealand court was too much of a contingency so as to satisfy the actual controversy requirement, and by issuing a "worthless" declaration, which the New Zealand court would probably completely disregard, the purposes of the DJA would not be met.[168]

Similarly, the court expressed concern that there would be no reason for other national courts to pay any mind to a declaratory ruling in favor of Dow Jones,[169] and, in addition, the

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165. *See* Dow Jones v. Harrods, at 414–15 (explaining the circumstances surrounding the *Dow Jones'* case); *see also* National Union Fire Ins. Co. v. Int'l Wire Group, Inc., 2003 WL 21277114, *5 (S.D.N.Y. 2003) (affirming the decision in *Dow Jones*, that the Declaratory Judgment Act should not be used in instances where the wrongful conduct has already been determined); Hamilton Bank, N.A. v. Kookmin Bank, 999 F. Supp. 586, 589 (S.D.NY. 1998) (explaining that the defendant's concessions in *Farrell Lines* allowed the court to dispose of the case).

166. *See* Basic v. Fitzroy Eng'g, Ltd., 949 F. Supp. 1333 (N.D. Ill. 1996) (noting that it went against American policy to issue a declaratory judgment to rescue an American corporation from sanctions in foreign courts); *see also* Exxon Research & Eng'g Co. v. Indust. Risk Insurers, 341 N.J. Super. 489, 513, 775 A.2d 601, 615–16 (App.Div. 2001) (affirming the right of sovereign nations to adjudicate issues brought before their courts); Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (noting that for public policy considerations, and whenever fair, United States courts defer to the rulings of foreign courts).

167. *See* Dow Jones v. Harrods, at 416–17 (S.D.N.Y. 2002) (likening the proceedings in *Dow Jones* to those in *Basic*), *aff'd*, 346 F.3d 357 (2d Cir. 2003); *see also* Paraschos v. YBM Magnex Int'l, Inc., 130 F. Supp. 2d 642, 645, 2000 U.S. Dist. LEXIS 21382, *14 (E.D. Pa. 2000) (noting that the United States often defers to laws and regulations of foreign countries in the interest of international duty and convenience); Hilton v. Guyot, 159 U.S. 113, 163–64, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895) (stating the definition of "comity" which the courts have relied upon for the past century).

168. *See* Dow Jones v. Harrods, at 416–17 (explaining that even if the court found the judgment in New Zealand to be contrary to American public policy, such a finding would be worthless and unenforceable); *see also* Bentley v. Providian Fin. Corp., 2003 WL 22234700, *5 (S.D.N.Y. 2003) (explaining the purpose and rationale of conducting a Declaratory Judgment Act analysis); In re Adelphia Communications Corp., 307 B.R. 432, 438 (Bankr. S.D.N.Y. 2004) (examining the standard for determining whether or not there is still an immediate controversy at hand).

169. *See* Dow Jones v. Harrods, at 438–41 (noting that even if the court found the judgment in New Zealand to be contrary to American public policy, such a finding would be worthless and unenforceable); *see also* Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 864 (4th Cir. 2001) (citing Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 244 (1991)) (noting that foreign nations have no legal obligation to follow rulings of American courts, especially when those courts are lacking jurisdiction); Commodore Int'l Ltd. v. Transpacific Co. Ltd. (In re Commodore Int'l, Ltd.), 2000 U.S. Dist. Lexis 9790, *8 (S.D.N.Y. 2000) (citing Maxwell Commun. Corp. PPLC by Homan v. Societe Generale (In re Maxwell Commun. Corp. PLC), 93 F.3d 1036, 1046–48 (2d Cir. 1996) (quoting Societe Nationale Industrielle Aerospatiale v. District Court, 482 U.S. 522, 543–44 (1987))) (stating that the primary objective of comity is reaching an equitable solution).

very attempt to assert extraterritorial jurisdiction would be viewed with scorn and distaste.[170] Furthermore, the court acknowledged Harrods had a legitimate basis for suing in English court and pointed out that Dow Jones may have subjected themselves to jurisdiction in England by potentially having "sufficient presence or conduct[ing] substantial business activities" in the U.K. or by virtue of publishing an article that would have a "substantial, direct and foreseeable effect within the United Kingdom. . . ."[171]

Lastly, the court addressed the issue of international comity, in which courts will usually enforce the judgments of foreign courts. It was counseled by Supreme Court doctrine that advises American courts to defer to foreign courts where both courts have proper jurisdiction over related disputes absent special circumstances.[172] Those special circumstances could include a situation to prevent the "irreparable miscarriage of justice." An American court can issue an injunction to prevent suit in another jurisdiction, but those circumstances were not present here where injury occurred in the forum and that forum's laws applied.[173]

In the end, the court conceded that there was no "satisfactory answer" to the harms proposed by Dow Jones, but it refused to exercise its discretion for the reasons cited above. Dow Jones will have to wait until the English court renders a judgment contrary to American policies in which case it can then have its day in court to challenge the enforcement of such judgment.[174]

2. Criminal Proceedings

Despite its prevalence in the civil law forum, this issue also arises in the context of criminal proceedings. In this regard, four cases are of note, although none deal with defamation over

170. *See* Dow Jones v. Harrods, at 438–41 (explaining once again, that such a judgment would be seen as an act of disrespect and general disregard for the rulings of foreign courts); *see also* McCook Metals L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 256 (N.D. Ill. 2000) (explaining that comity acts as a general courtesy, which foreign countries are expected to abide by).

171. *See* Dow Jones v. Harrods, at 424 (noting that Dow Jones had subjected itself to the jurisdiction of the English courts).

172. *Id.* at 444–45 (explaining that deference to foreign courts in appropriate cases advances the principle advanced by the doctrine of international comity); *see also* Nancy Nelson, Forum Non-Conveniens*, Comity, Antisuit Injunctions and Parallel Proceedings*, 90 AM. SOC'Y INT'L L. PROC. 62, 63 (1996) (discussing the development and application of the concept of comity in the United States). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) (listing the conditions that should be met in order for a judgment to be recognized in the United States).

173. Dow Jones v. Harrods, at 444–45 (quoting Laker Airways Ltd. v. Sabena, 731 F.2d 909, 927 (D.C. Cir. 1984)). *See generally* Michael D. Schimek, Comment, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV. 499, 515 (1993) (emphasizing that a court should only grant an anti-suit injunction in "compelling circumstances," where one of four issues listed arises).

174. Dow Jones v. Harrods, at 446–47 (indicating that the doctrine of international comity is limited to the extent that the foreign judgment conflicts with or undermines domestic interests). *See* Gannon v. Payne, 706 S.W.2d 304, 307 (1986) (noting that courts have issued anti-suit injunctions in order to protect their jurisdiction or protect significant public policies of another nation). *See generally* VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 15:15 (2004) (providing two specific situations where anti-suit injunctions will be issued to protect fundamental U.S. policies).

the Internet. They are merely mentioned to illustrate the larger problem arising when various legal systems are brought into direct conflict via the Internet.

In 2000, an Italian appellate court utilized similar logic to that used in *Gutnick*, but in the criminal defamation context.[175] Although it was unclear whether the defendants were Italian or foreign, the court based its jurisdiction over them on a provision of Italian penal law stating that an offense is deemed to be committed "when the action or omission of the event ensuing from it has taken place. . . ."[176] Therefore, when people in Italy viewed the defamatory postings the offense was complete and the Italian court could properly exercise jurisdiction.[177]

Similarly, the German Supreme Court held Frederick Toben criminally liable for posting pro-Nazi and Holocaust denial information on a website accessible in Germany.[178] In this case, the website was based out of Australia, and Toben was an Australian citizen.[179] He was arrested while distributing pro-Nazi pamphlets in Germany and sentenced to ten months in prison, but

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175. *See* Italian Court of Cassation Judgment No. 4741, Nov. 17–Dec 17, 2000 (holding that even when the offense is initiated abroad, but its effects or consequences are felt on Italian territory, the Italian state is entitled to investigate and punish) *at* http://www.cdt.org/speech/international/001227italiandecision.pdf (last visited Oct. 3, 2004). *See generally* Wendy Perdue, *Personal Jurisdiction in the Internet Age: Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction,* 98 NW. U. L. REV 455, 462 (2004) (comparing the United States' jurisdictional practices to that of most other countries which, unlike the United States, find that effects or harm within the country is a sufficient basis for jurisdiction); Denis T. Rice, *Problems in Running a Global Internet Business: Complying with Laws of Other Countries*, 797 PRACTICING L. INST. 11, 86 (2004) (noting that the German Supreme Court has held that any Web publisher is liable for any pro-Nazi or Holocaust denial on pages that can be accessed from Germany even if the publisher is not in Germany).

176. *See* Italian Court of Cassation Judgment No. 4741, Nov. 170–Dec 17, 2000 (referencing Article 6, paragraph 2 of the Italian penal code), *at* http://www.cdt.org/speech/international/001227italiandecision.pdf (last visited Oct. 3, 2004). *See generally* Silberman, *supra* note 6, at 358 (discussing the differences in jurisdictional standards between the U.S. and European countries, the latter of which focuses on the nexus between the forum and the events in question instead of the relationship between forum and defendant); Katherine Birmingham Wilmore & Louise Ellen Teitz, *International Legal Developments in Review: 2001*, 36 INT'L LAW. 423, 425 (2002) (acknowledging the likely rise in litigation because of concurrent jurisdiction conflicts).

177. *See* Italian Court of Cassation Judgment No. 4741, Nov. 17–Dec. 17, 2000 (explaining that defamation is an offence that is perpetrated when the injurious statement is viewed by a third party), *at* http://www.cdt.org/speech/international/001227italiandecision.pdf (last visited Oct. 3, 2004). *See generally* Case C-256/00, Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH, 1 ALL ER 521 (2004) (Eng.) (discussing art. 5(3) of the Brussels Convention and its implication on determining the "place at which the harmful event occurred"); Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention,* 24 BROOK. J. INT'L L. 125, 146 (1998) (explaining the current ECJ rule for determining jurisdiction in tort cases).

178. *See* Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany,* 12 J. TRANSNAT'L L. & POL'Y 253, 263 (2003) (explaining that Germany's legislation banning hate communications applies to material on the Internet regardless of origin). *See generally* Center for Democracy and Technology, *Exercise of Jurisdiction by Foreign Courts Seen in Other Cases*, CDT Policy Post 7.06(3) (July 11, 2001) (reporting two decisions from European courts holding websites in other countries liable for content), *available at* http://www.cdt.org/ publications/pposts2001.shtml (last visited Oct. 4, 2004.

179. *See* Timofeeva, *supra* note 178, at 263 (acknowledging that Frederick Toben was an Australian citizen who was born in Germany); *see also* Walter C. Dauterman, Jr., Comment, *Internet Regulation: Foreign Actors and Local Harms—at the Crossroads of Pornography, Hate Speech, and Freedom of Expression*, 28 N.C. J. INT'L L. & COM. REG. 177, 181 (2002) (asserting that Frederick Toben, although born in Germany, was an Australian national).

made it back to Australia after serving eight months and paying a fine.[180] He was later forced by an Australian court to remove the offending information from his website,[181] which apparently has ended Germany's attempt to extradite and retry him.

In another German case, the general manager of an Internet service provider ("ISP") was held criminally liable for the illegal postings made by CompuServe customers despite his attempts to block them.[182] CompuServe officer Felix Somm, a French national, was charged and convicted of distributing pornography because German users obtained child pornography from American servers using CompuServe.[183] After initially blocking 282 newsgroups to all four million subscribers in 147 countries,[184] CompuServe offered customers software that

180. *See* Roger Cohen, *World Briefings*, N.Y. TIMES, Nov. 12, 1999, at A6 (noting that Frederick Toben was found guilty of slander in Germany for denying that Nazis killed millions of Jews during the Holocaust); *see also* Trevor Marshallsea, *Toben Still Expected to Face Trial*, AAP NEWSFEED, Aug. 2, 2001 (acknowledging that, in deciding to prosecute Toben, Germany's Federal Court overturned a lower court decision not to prosecute); *see also* Yehuda Poch, *Diaspora in Brief*, JERUSALEM POST, Nov. 15, 1999, at 6 (stating that Frederick Toben was sentenced by a German judge to 10 months in prison for publishing Holocaust denials).

181. *See* Michael Freund, *Diaspora Digest: A Review of the Jewish World*, JERUSALEM POST, July 15, 2003, at 4 (concluding that an Australian federal court ordered Frederick Toben to remove from his website material supporting the notion that the Holocaust did not occur); *see also* Stephen Sheldon, *Rising Anti-Semitism Reported in Australia*, UNITED PRESS INTERNATIONAL, Nov. 26, 2002 (reporting that an Australian court ordered Frederick Toben to stop publishing offensive material on the Internet); *Washington Internet Daily*, Sept. 18, 2002 (describing the Australian court's belief that the Internet postings could have endangered Jewish Australians).

182. *See* People v. Somm Amtsgericht, Munich (detailing the court's determination that Somm was criminally liable for the Internet postings of CompuServe customers), English translation at http://www.cyber-rights.org/isps/somm-dec.htm (last visited May 12, 2003); *see also* Michael D. Birnhack & Jacob H. Rowbottom, *Do Children Have the Same First Amendment Rights as Adults?: Shielding the Children: The European Way*, 79 CHI.-KENT L. REV. 175, 208–09 (2004) (describing how Felix Somm, the chief executive of CompuServe, Germany, was convicted by a German court of assisting in the dissemination of material harmful to minors when illegal material was posted on the Internet using CompuServe); Edmund L. Andrews, *Germany Charges CompuServe Manager*, N.Y. TIMES, April 19, 1997, at D19 (recognizing that Felix Somm was indicted on charges of trafficking pornography even though he had no part in producing the pornography).

183. *See* Bertrand Benoit, *Land of Laptops and Lederhosen: After a Cautious Start, Germany's Wealthy Consumers and Entrepreneurs Have Embraced E-Commerce and the Internet with a Vengeance, Says Bertrand Benoit*, FIN. TIMES (London), Feb. 17, 2000, at 17 (noting that Felix Somm was convicted of failing to block access to pornographic websites, but the judgment was later quashed); *see also* Alan Cowell, *Head of German Web Sentenced for Pornography*, N.Y. TIMES, May 29, 1998, at A3 (reporting that Felix Somm's conviction in Germany marked the first time in that country that the manager of an ISP had been held legally responsible for images reached through its service); Hans-Werner Moritz, *Pornography Prosecution in Germany Rattles ISPs*, NAT'L L.J., Dec. 14, 1998 at B7 (noting that the conviction put Mr. Somm on probation for two years and fined him about $59,00).

184. *See* Lothar Determann, *Case Update: German Compuserve Director Acquitted on Appeal*, 23 HASTINGS INT'L & COMP. L. REV. 109, 111 (1999) (stating that CompuServe blocked the newsgroups at the request of the Munich District Attorney); *see also* Mark S. Kende, *Frontiers of Law: The Internet and Cyberspace: Yahoo!: National Borders in Cyberspace and Their Impact on International Lawyers*, 32 N.M. L. REV. 1, 5 (2002) (asserting that CompuServe blocked its sites worldwide because it lacked technology that would have allowed it to block only German sites); Julien Mailland, Note, *Freedom of Speech, the Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. INT'L L. & POL. 1179, 1201 (2001) (alleging that CompuServe did not have the technology to block its German customers from chat groups and thus, had to ban the groups worldwide).

would allow them to filter their own content.[185] Although the court found Somm guilty, a German appeals court subsequently overturned the conviction.[186] The appeals court ruled that Somm could never prohibit all objectionable content from reaching German users because they would be able to access other servers even if he did take the extremely drastic step of blocking all German access to those newsgroups.[187] Furthermore, the court ruled the 1997 German Internet Laws shielded Somm from liability because he represented CompuServe, which acted as a hosting access provider.[188]

Another disturbing case in which a national court imposed liability on a non-national defendant took place in Zimbabwe. In this case, Andrew Meldrum, an American journalist who resided in Zimbabwe for about twenty years, published a false story in the *Guardian* about a brutal, politically motivated murder.[189] Although the *Guardian* is published in hard copy in the U.K., it was accessible in Zimbabwe via the Internet.[190] The government tried to prosecute for the false story under its harsh press laws by arguing the article was published in Zimbabwe

185. *See* Birnhack & Rowbottom, *supra* note 182, at 217 (acknowledging that, according to various studies, filtering software is not 100 percent effective in blocking objectionable content); *see also* Mailland, *supra* note 184, at 1201 (suggesting that the use of filtering software can be an effective way to control content); *see also* Elizabeth M. Shea, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 180–83 (1999) (noting that individual computer users or entire networks can filter offensive content).

186. *See* August, *supra* note 116, 537 (detailing the German law and explaining why Somm's conviction was overturned); *see also* Birnhack & Rowbottom, *supra* note 182, at 208 (recalling the overturn of the 1999 Somm conviction); *see also* Determann, *supra* note 184, at 112 (indicating that the Munich Court of Appeals exempt Mr. Somm from criminal liability by overturning the lower court's decision).

187. *See* Dauterman Jr., *supra* note 179, at 199–200 (explaining that German users threatened to switch to a different service provider if their access to the newsgroups was not restored); *see also* Determann, *supra* note 184, at 113 (stating that CompuServe could not block specific information from the public, posted by its parent companies); Mark Konkel, *Internet Indecency, International Censorship, and Service Providers' Liability*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 453, 459 (2000) (finding that users were prepared to switch to another service provider to obtain the full access to newsgroups that they were denied by CompuServe).

188. *See* Determann, *supra* note 184, at 118 (affirming that pursuant to the 1997 German Internet laws the legislature stated that a provider with knowledge of illegal activity could still be exempt from liability); *see also* Daniel J. Gervais, *Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 VAND. J. TRANSNAT'L L. 1363, 1381 (2001) (distinguishing between content providers, access providers, and service providers and showing that service providers are rarely liable); *Information Technology, Internet and New Media*, MARTINDALE-HUBBELL, GERMANY: LAW DIGEST OF THE FEDERAL REPUBLIC OF GERMANY (2004) (defining the 1997 German Internet Laws under Teledienstgesetz and Mediendienst-Staatsvertrag and explaining that suppliers to third parties will not be responsible if they did not select or modify the transmission).

189. *See* Wimmer, *supra* note 30, at 7–10 (citing several cases in which U.S. courts would not apply foreign libel laws or enforce libel judgments because of the conflicts with U.S. public policy); *see also* Garnett, *supra* note 6, at 74 (describing the arrest of Andrew Meldrum, an American journalist, for publishing a false article in *The Guardian*, which was then posted on the Internet); Geltzer, *supra* note 128, at 437–38 (reporting the criminal charges of Andrew Meldrum, a journalist working for the British newspaper *The Guardian*).

190. *See* Wimmer, *supra* note 30, at 7–10 (stating *The Guardian* can be accessed on the Internet). *See generally* Richard S. Lubliner, Comment, *The Sky Is Not Falling: Why The Human Rights Act of 1998 Will Not Radically Affect English Freedom Of Expression Law,* 16 EMORY INT'L L. REV. 263, 288 (2002) (stating that *The Guardian* is published in England but its availability is widespread); Brian P. Werkley, Note and Comment, *Aussie Rules: Universal Jurisdiction Over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 232 (2004) (noting that *The Guardian* is available in Zimbabwe if it is downloaded from the web).

because that is where Meldrum sent it to the *Guardian*.[191] On the other hand, the defense argued that Zimbabwe was going beyond its jurisdiction by prosecuting Meldrum because a Zimbabwe officer downloaded the article on the Internet.[192] In July 2003, a magistrate judge acquitted Meldrum, but did it more as a political move and did not decide the broader question as to whether the Zimbabwe courts could properly exercise jurisdiction.[193]

3. Internet Service Provider ("ISP") Liability

Another uncertainty with regard to Internet publishing is whether the person defamed can sue the Internet service provider in addition to the author, or in lieu of the author, if the author has insufficient assets or his or her identity is unknown. Much like the issues already discussed, the solution to this question is on a country-by-country and case-by-case basis.[194] Unfortunately, only a handful of countries have addressed this issue and so due to the lack of available case law and legislative activity, the analysis of this area will be limited primarily to what has occurred in the United States and Britain.[195]

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191. *See* Chris McGreal, *Trial of Guardian Journalist Adjourned*, GUARDIAN, June 19, 2002, available at http://www.guardian.co.uk/Archive/Article/0,4273,446424,00.html (arguing that the article was published in Zimbabwe); *see also* Basildon Peta, *Mugabe Threatens To Seize Assets Of British Charities Donations*, THE INDEPENDENT (London), July 13. 2002, at 14 (discussing the tough new media laws and Meldrum's counter-argument to the government and that the place of publication is Zimbabwe). *See generally* Peta Thornycroft, *Zimbabwe Reporter's Expulsion Suspended,* THE DAILY TELEGRAPH (London), July 18, 2002 at 15 (commenting that Meldrum was being prosecuted by the government under Mugabe's new "draconian" media laws for publishing a false story).

192. *See* McGreal, *supra* note 191, at 2 (explaining the view of the Meldrum's lawyer that the police in Zimbabwe were really responsible for bringing the article into the country, and not the journalists, and contemplating that it may not be within Zimbabwe's jurisdiction). *But see* Owen Bowcott, *Guardian Journalist Awaits Verdict In Harare Trial Over Report On Web,* GUARDIAN (London), July 13, 2002 at 2 (arguing that the court does have jurisdiction over the article because it is published on the Web and is available in Zimbabwe).

193. *See* Geoffrey Robertson, *The Internet on Trial*, WALL ST. J., July 18, 2002, at A12 (explaining that the basis for jurisdiction depended upon where the website story was published); *see also* Michael Geist, *Web Decision Extends Long Arm of Ontario Law*, TORONTO STAR, Feb. 16, 2004, at C02 (discussing the recent trend of courts to apply the targeting test, which asks if the online conduct in question was targeted toward the locale attempting to assert jurisdiction).

194. *See* Lucy H. Holmes, *Making Waves In Statutory Safe Harbors: Reevaluating Internet Service Providers' Liability for Third-Party Content and Copyright Infringement,* 7 ROGER WILLIAMS U. L. REV. 215, 232–33 (2001) (stating that the World Intellectual Property Organization Treaties did not impose liability on ISP providers, instead leaving this determination to the individual countries); *see also* Sterling, *supra* note 3, at 328 (remarking that the United States does not hold ISP providers liable for the content of defamatory statements, in contrast to other countries that have imposed such liability statutorily). *See generally* Negin Salimipour, Notes and Comments, *The Challenge of Regulating Hate and Offensive Speech on the Internet*, 8 SW. J. L. & TRADE AM. 395 (2001) (opining that the Internet should be regulated by universal standards in order to avoid international legal disputes).

195. *See* Christopher Paul Boam, *The Internet, Information and the Culture of Regulatory Change: A Modern Renaissance*, 9 COMMLAW CONSPECTUS 175, 190 (2001) (noting that while laws governing the Internet have been well established through case law and statutes in the United States, this area of law remains unsettled for most other countries); *see also* Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 229–30 (2002) (citing Lefebure v. Lacambre, CA Paris, 14e ch. A, Feb. 10, 1999, J.C.P. 1999, II, 10101, note F. Olivier & E. Barbry, a decision in which the Cour d'Appel of Paris ordered an ISP to pay damages to a model for violation of privacy by a website operator); Sterling, *supra* note 3, at 341–47 (providing comprehensive analysis of the relative positions of Japan, Australia, and Singapore with regard to ISP liability).

A helpful definition of what an ISP is can be found in *Columbia Insurance Co. v. Seeslandy*,[196] where the court put forth this synopsis:

> ISPs provide two basic services to their clients: access and presence. Access services consist of an account through which the client can access the Internet and e-mail. A presence account generally includes hard drive space that permits the client to have a web page or file transfer site. Persons who wish to run a site at their own domain, rather than at the domain of their service provider, can either make the significant investment in computer hardware, networking hardware, and high-speed access necessary to make their domains available on the Internet or can rent space and services from a service provider. This latter alternative, which is analogous to renting from a landlord who makes available offices in an office complex, is called domain housing.[197]

Based on findings that the Internet represents both an enormous educational and informational asset[198] and offers a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,"[199] coupled with the United States government's desire to promote the continued development of the Internet and like services,[200] Congress deemed interactive computer services not to be publishers of information "provided by another information content provider."[201] Therefore, since the stat-

196. Columbia Ins. Co. v. Seescandy, 185 F.R.D. 573, 578 n.1 (N.D. Cal. 1999) (establishing the role of an ISP by defining "access" and "presence"). *See* 17 U.S.C.S. § 512(k)(1)–(2) (2004) (offering an alternative definition of a "service provider"); *see also* Stacey Berger, *The Use of the Internet to "Share" Copyrighted Material and its Effect on Copyright Law*, 3 J. LEGAL ADVOC. & PRAC. 92, 102 (2001) (emphasizing that 17 U.S.C.S. § 512 requires transmissions to travel through the ISP's system for the ISP to qualify as a service provider).

197. *See* Gucci Am., Inc. v. Hall & Assoc., 135 F. Supp. 2d 409, 411 n.4 (S.D.N.Y. 2001) (quoting *Columbia Ins. Co. v. Seescandy*); *see also Web Hosting Reseller Program—How It Works*, *at* http://resellers.herwebhost.com/details.html (illustrating the similarity of renting apartment space and Internet space).

198. Communications and Decency Act of 1996, 47 U.S.C. § 230(a)(1)–(3) (2004) (stating that "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad of avenues for intellectual activity"). *See* Pamela O'Kane Foster, *Lobbying On The Internet And The Internal Revenue Code's Regulation Of Charitable Organizations*, 43 N.Y.L. SCH. L. REV. 567, 584 (1999) (reiterating the congressional statements on the advantages the Internet provides); *see also* Jennifer L. Kostyu, Comment, *Copyright Infringement On The Internet: Determining The Liability Of Internet Service Providers*, 48 CATH. U. L. REV. 1237, 1249 (1999) (assessing the findings of Congress concerning the impact and benefits of the Internet).

199. *See* 47 U.S.C. § 230(a)(1)–(3) (setting forth Congress' conclusions about the value of the Internet); *see* Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 566 (2001) (holding that the Internet offers opportunities for development not otherwise available); *see also* Prometheus Radio Project v. Fed. Communications Comm'n, 373 F.3d 372, 439 (3d Cir. 2004) (finding the unique qualities of the Internet provide an enormous breadth of information as well as an outlet for individual expression).

200. *See* 47 U.S.C. § 230(b)(1) (establishing the promotion of the Internet as the official policy of the United States); *see also* Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting that the purpose of section 230 is to sustain the communication of the Internet with as little government interference as possible); Sarah K. Jezairian, Note, *Lost in the Virtual Mall: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?* 42 ARIZ. L. REV. 965, 984–985 (2000) (reiterating that it is the policy of the United States to promote the development of the Internet).

201. *See* 47 U.S.C. § 230(c)(1) (declaring that Internet service providers shall be protected from treatment as the publisher of information provided by a third party); *see also* Zeran v. America Online, Inc., 129 F.3d 327, 329–30 (4th Cir. 1997) (referring to the immunity from publisher's liability granted to Internet service providers).

ute's passage, ISPs in the United States have been generally free from liability for most offensive materials appearing via their technology, even if they exercise editorial control.[202] It is interesting to note that while the Senate contemplated a very narrow defense,[203] courts have followed the policy reasons of the House, which wanted to encourage ISPs to monitor their content without fearing liability for objectionable material they did not create.[204] Furthermore, if ISPs could be held liable for the content posted by millions of customers, "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect."[205] Although not previously noted, imposing liability on ISPs could have another unwanted effect. Instead of dealing with an unwanted suit, ISPs would rather remove the offending material, regardless of the material's truth.[206]

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202. *See* Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003) (finding AOL's negligence relating to its "monitoring, screening, and deletion of content from its network" did not incur liability due to section 230's proscriptions); *see also* Ben Ezra, Weinstein, & Co. Inc. v. America Online, Inc., 206 F.3d 980, 985–86 (10th Cir. 2000) (refusing to impose liability on AOL after finding its slight alteration of plaintiff's stock information did not rise to the level of deeming AOL the "creator" of the defamatory statements); Zeran v. America Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997) (setting the standard for the lack of ISP liability after determining section 230 immunized AOL from suit despite its failure to promptly remove defamatory statements, refusing to post a retraction and failing to screen for other defamatory messages); Carafano v. Metrosplash, Inc., 207 F. Supp. 2d 1055, 1066–67 (C.D. Cal. 2002) (explaining that defendant "created" the objectionable material and could not avail itself of the section 230 protections because it utilized a questionnaire for its customers). *But see* Gucci America, Inc. v. Hall & Assocs., 135 F. Supp. 2d 409 (S.D.N.Y. 2001) (concluding section 230(e)(2) precluded defendant from taking advantage of the protections of section 230 when the plaintiff notified Mindspring twice that one of Mindspring's subscribers was using their services to infringe upon plaintiff's trademark rights).

203. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway,* 49 FED. COMM. L.J. 51, 59 (1996) (commenting that the original draft of the Communications Decency Act did not include many defenses); *see also* Mary Kay Finn, Karen Lahey, & David Redle, *Policies Underlying Congressional Approval of Civil and Criminal Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act of 1996—Should E-Buyers Beware?* 31 U. TOL. L. REV. 347, 360 (2000) (quoting 141 Cong. Rec. 1995, S8345 in which Senator Coats, an author of the section 230 defense, said, "[the § 230 defense] is not a defense for any person or entity that provides anything more than solely providing access.").

204. *See* Ben Ezra, Weinstein v. America Online, at 986 (referring to the congressional record where Representative Barton stated that the purpose of section 230 was to give Internet service providers, "a reasonable way to . . . help them self-regulate themselves without penalty of law"); *see also* Blumenthal v. Drudge, 992 F. Supp. 44, 51–52 (D.D.C. 1998) (noting that the immunity from defamation liability provided for in the Communications Decency Act was intended to encourage Internet service providers to police themselves). *See generally* Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKLEY TECH. L.J. 401, 402 (2002) (stating that courts have embraced a broad interpretation of the immunity granted to Internet service providers).

205. *See* Batzel v. Smith, 333 F.3d 1018, 1039 (9th Cir., 2003) (noting that if Internet service providers did not have immunity, their fear of liability would have a "chilling effect" on free speech); *see also* Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (recognizing the impossibility of trying to scan millions of messages for potential sources of liability and acknowledging that an attempt to do so would unjustly impede free speech); Finn et al., *supra* note 203, at 361–62 (indicating that some senators were concerned that the lack of immunity would chill the development and use of the Internet).

206. *See* Robert Verkaik, *Libel Laws Used to Curb Web Protests,* THE INDEP. (London), Dec. 18, 2002, at 7 (reporting that "[b]ig businesses are using Britain's libel laws to shut down websites set up by disgruntled customers or protest groups."); *see also* Annemarie Pantazis, Note, Zeran v. America Online, Inc*.: Insulating Internet Service Providers from Defamation Liability,* 34 WAKE FOREST L. REV. 531, 550 (1996) (noting that in the absence of immunity, Internet service providers may be forced to make a choice that would violate the First Amendment rights of those whose content is non-defamatory); Sterling, *supra* note 3, at 334–35 (explaining that if Internet service providers were liable for defamation, it would likely result in the deterrence of speech that is non-defamatory).

In England, ISPs are in a much more precarious position because, among other things, proving editorial control, or lack thereof, is the defendant's burden rather than the plaintiff's burden. Liability for offensive statements made by others is the standard unless the "innocent dissemination" defense is determined to be applicable.[207] This defense applies only to those who are not the author, editor, or publisher and who took "reasonable care in relation to publication of the defamatory statement and neither knew or had reason to believe that it was causing or contributing to the publication of that statement."[208] The leading case on this issue is *Godfrey v. Demon Internet, Ltd.*,[209] in which the plaintiff was defamed on a newsgroup hosted by the defendant via its worldwide computer network.[210] First, Judge Moreland decided that every transmittal of a defamatory posting to a customer should be deemed a publication to that customer, thereby potentially incurring liability upon the ISP.[211] The court then evaluated whether Demon could take advantage of the innocent dissemination defense of the Defamation Act of 1996.[212] Unfortunately, the defendant's knowledge of the defamation and its refusal to "obliterate" the message was enough to deprive it of the innocent dissemination protections.[213]

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207. *See* Alain Gardrat, *Another Look at European Internet Law,* 7 MEDIA L. & POL'Y 27, 31 (1998) (indication that the United Kingdom's Defamation Act of 1996 provides a new defense, called innocent dissemination, to Internet service providers); *see also* Vick & MacPherson, *supra* note 148, at 649 (noting that in Britain, the burden of proof is on the defendant). *See generally* Yaman Akdeniz, Case Analysis*: Laurence Godfrey v. Demon Internet Limited*, J. CIV. LIB. 260–267 (1999), *at* http://www.cyber-rights.org/reports/demon.htm. (discussing the 1996 Defamation Act in England).

208. *See* Niri Shanmuganathan, *Libel Online: An Update*, 152 NEW L.J. 1040, 1040 (2002) (explaining that a defense is available to ISPs from the Defamation Act of 1996); *see also* Defamation Act, 1996, c. 31, § 1 (Eng.) (providing the statutory definition of a possible defense in defamation proceedings); Birnhack & Rowbottom, *supra* note 182, at 208–209 (discussing unavailability of the defense because defendant ISP had notice of the posting from plaintiff).

209. *See* Godfrey v. Demon Internet Ltd., 2001 Q.B. 201, 212 (holding that defendant ISP was liable for publishing a defamatory posting and no defense was available to them); *see also* Noriko Kawawa, *Comparative Studies on the Law of Tort Relating to Liability for Injury Caused by Information in Traditional and in Electronic Form: England and the United States*, 12 ALB. L.J. SCI. & TECH. 493, 603 (2002) (distinguishing publisher's liability in England from liability in the United States); Hughes, *supra* note 116, at 383–84 (citing *Godfrey* for the conclusion that a United Kingdom ISP could be liable under English defamation law if it had been advised of the alleged defamation).

210. *See* Godfrey v. Demon Internet, at 204–05 (explaining that the Usenet system is employed by Internet users to place postings in forums known as newsgroups); *see also* Katie Hafner, *James T. Ellis, 45, a Developer of Internet Discussion Network*, N.Y. TIMES, July 1, 2001, § 1 (Nat'l Desk), at 28 (defining Usenet as a widely distributed messaging system which fosters communication among thousands of discussion groups).

211. *See* Godfrey v. Demon Internet, at 208–09 (positing that transmission of a defamatory posting is a publication of that posting to a customer); *see also* Amber Melville-Brown, *Media Law—Internet Service Providers and Legal Liability*, 97 LAW SOCIETY'S GAZETTE 21, 37 (2000) (stating that a posting accessed in the U.K. may lead to libel action in the U.K. courts); Adam Cannon, *Internet Libel: Who is Responsible*?, 150 NEW L.J. 90, 90 (2000) (emphasizing that storage of material on a news server is a choice by the ISP and made the ISP more than a mere owner of an electronic device through which postings were transmitted).

212. *See* Godfrey v. Demon Internet, at 206 (maintaining that the ISP's knowledge of the defamatory posting and choice not to remove it prevents them from using the innocent dissemination defense); *see also* Defamation Act, 1996, c. 31, § 1 (Eng.) (defining the elements necessary to use the innocent dissemination defense).

213. *See* Godfrey v. Demon Internet, at 209 (asserting that defendants could have obliterated the postings since they knew the postings were stored on the server); *see also* Jennifer McDermott, *Limiting Libel—The Defamation Bill and Its Links with the Woolf Reforms*, 93 LAW SOCIETY'S GAZETTE 7, 22 (1996) (claiming that an ISP who exercises no control is more likely to have a defense than one who exercises some, but insufficient control); John Warchus, *Litigator's View; John Warcus on Internet Defamation and Its Repercussions*, THE LAWYER, May 31, 1999, at 22 (stating that in *Godfrey v. Demon Internet*, Demon Internet was not allowed to use the defense of innocent dissemination especially since Demon refused to remove the item after the claimant's request).

III. What Rule(s) Should Answer the Jurisdictional Riddle?

As it stands now, the Internet acts as an encyclopedia, the yellow pages, a soapbox, a meeting place, and a mall. The information available through the Internet and the speed by which one can access it are altering the way modern society lives. Furthermore, a person can send a message to someone thousands of miles away, much like the telephone, as if the person was right next-door. Much like television or radio, it is possible to reach an extremely broad and diverse group with one transmission. The Internet combines those three mediums by allowing any person with access to a server to input his or her own information and reach a global audience as if the or she was in every country, standing right next to the speaker, and with an incredibly low cost to the speaker. Unfortunately, it goes without saying that a good amount of speech is neither noble nor honorable in any medium and, therefore, disputes can and do arise.[214] Furthermore and almost equally unfortunate, uncertainty reigns with regard to issues of jurisdiction over content placed on the Internet.

As it stands now, two rules generally govern courts' jurisdiction over Internet speakers. Although there are certain differences, the primary American standard is one comporting with our due process standards and focusing on the speaker's contacts with the forum, the speaker's affirmative intent to interact with people located in that jurisdiction, or knowledge that the information posted will have an effect in a certain area. On the other hand, the Australian rule simply looks at where the injury occurred, or in the case of defamation, where the victim's reputation was tarnished.

The fear professed by some about the adoption of the Australian rule directly relates to how the Internet can be accessed by anyone anywhere and, therefore, how people can be injured anywhere regardless of what the publisher intended or contemplated.[215] Following the premise that someone can be injured anywhere is the idea that laws and rules of the chosen locality would then govern the dispute. Therefore, it is very conceivable that an injured party would assert its claim in a jurisdiction with the lowest bar to recovery, or the party could even use the threat of such suit and the resultant litigation fees to effectively bar such speech from occurring.[216] Some contemplate this will increase the relative costs of speech, as a speaker must

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214. *See* Norah Vincent, *Commentary: Putting the Brakes on Blowhard 'Bloggers'*, L.A. TIMES, December 19, 2002, at B17 (recognizing that some speech published on the Internet is the careless, mad and sometimes vengeful ravings of half-wits); *see also* Nick Holmes, *Nothing but the Truth*, THE LAWYER, June 20, 1995, at 9 (explaining how the Internet is a global communications medium); *Making the Net Work for You*, THE LAWYER, April 2, 1996, at 16 (commenting that the Internet allows access to an increasingly relevant global network of on-line information sources).

215. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984) (recognizing that a person's reputation, however small it can be in a given location, can still be injured and could therefore lead to a claim for damages); *see also* Counts & Martin, *supra* note 49, at 1121 (discussing the proper scope of jurisdiction as defined in *Keeton*); Pielemeier, *supra* note 86, at 96–103 (questioning whether the majority in *Keeton* was correct in believing that longer statutes of limitation were the better rule of law).

216. *See* Roger Maynard & Frances Gibb, *Web Libel Actions Can Be Brought Worldwide*, TIMES (London), December 11, 2002, at 12 (expressing fear about the repercussions of the *Gutnick* decision); *see also* Garnett, *supra* note 6, at 68–77 (discussing the possible effect of the *Gutnick* decision on Internet speech worldwide); *see also* Werley, *supra* note 11, at 230–32 (concluding that adoption of a bright-line rule espousing the place of publication as the proper forum does not solve the conflict of laws problem).

account for the laws of every jurisdiction in the world in an attempt to comply with them all, in addition to continually monitoring one's speech to ensure continued compliance. This increase in the cost will then adversely affect the amount of available information, because instead of paying such a high price to speak, people will choose not to speak.[217] Society would then lose out on much valuable information that would otherwise be available to educate, inform, and promote democratic ideals.[218]

On the other hand, as some American courts have demonstrated, it is possible that harm of a judgment in a foreign jurisdiction might represent more of a proverbial bark than a bite. Whereas American values zealously oppose any infringement upon the right of free speech, most other nations try to shield those injured and award fewer protections to speakers within their borders. The vast majority of decisions concerning speech rendered against Americans abroad, therefore, would conflict with our freedoms. Since comity is generally regarded as something that *should* be done for various judicial and political reasons, and not something that *must* be done, if bedrock principles would be nullified by accepting the foreign judgment, then comity will not be awarded.[219] In such a situation and in an ironic twist, geography and territorial sovereignty once again reign supreme, because even if someone were to win a court judgment, it may be worth the paper it is written on and little else. In other words, if you cannot enforce the collection of damages against the 'wrong' person's assets or force the foreign state to implement its police powers to ensure compliance with the proscriptions or mandates of an injunction, then your judgment becomes a paper tiger. Although not uncommon in the litigation world, a successful plaintiff may be on a continuous search for assets to seize to be made whole.

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217. *See* Nick Higham, *Libel Actions Speak Louder Than Internet Deregulation*, MARKETING WEEK, Dec. 19, 2002, at 15 (emphasizing that the effect of potential liability in every country through the "blizzard of litigation" could undermine the reputation of even the most legitimate publishers); *see also* Tench, *supra* note 46, at 10 (arguing potential liability in every jurisdiction would have an "unreasonable chilling effect on internet [sic] publication."); Kevin Thorpe, *Will the UK's Libel Laws Stop Free Speech on the World Wide Web?*, TIMES (London), Jan. 7, 2003, at 3 (showing that the comments of *Popbitch*, a celebrity gossip e-magazine, hollowly congratulating themselves on not being sued into oblivion, implies that in addition to choosing not to speak, publishers will be forced not to speak).

218. *See* Dow Jones & Co. v. Gutnick, (2002) H.C.A. 56 (63-64) (emphasizing the important role the Internet plays in "enhancement of human knowledge, and the beneficial contribution to human freedom and access to information about the world's peoples and their diverse lives and viewpoints that the Internet makes available," and stressing the need for facilitating this flow of information and not trying to inhibit it); *see also Libel on the Internet*, THE PROVIDENCE JOURNAL (R. I.), Jan. 22, 2003 at B-06 (arguing that under the Australian rule "the most repressive nations would determine the content of the Internet, rendering the World Wide Web must less useful."); Austl. Broad. Corp. v. Lenah Game Meats Pty Ltd. (2001) 76 A.L.I.R. 1, 55 (explaining that "marketplace of ideas" requires an opportunity for people to share them by entering them into a public domain and any restrictions placed on such domain deny people this opportunity).

219. *See., e.g.*, Matusevitch v. Telnikoff, 77 F. Supp. 1, 9 (D.D.C. 1995) (declining to enforce British libel judgment because British libel standards "deprive the plaintiff of his constitutional rights"); *see* Yahoo!, Del. Corp. v. La Ligue Contre Le Racisme et L'Antisemitisme Corp., 169 F. Supp. 2d 1881, 1886–92 (N.D. Cal. 2001) (explaining that although judgment of the French judiciary will not be enforced in America, because it goes against the First Amendment, it is "entitled to great deference as an articulation of French law"), *rev'd*, 379 F.3d 1120 (9th Cir. Cal. 2004); *see also* Bachchan v. India Abroad Publ'n Inc., 154 Misc. 2d 228, 235 (explaining that the difference in the legal principles of two nations will make enforcement of judgment issued by another country contrary to the standards of the country where enforcement is sought).

This problem has not gone unnoticed, as leaders of the world have been trying for approximately a decade to negotiate a treaty giving due credit to the relative values each country has assigned to the policies of promoting speech and protecting reputations, etc. A possible detraction to any successful compromise is the potential that these values will become useless in light of technology advancements promoting anonymity, and thereby remove any hope to enforcement because of the inherent difficulties in suing unknown people. Also rapidly developing is the software that can determine the geographical location of a computer by its Internet protocol address, which would allow a publisher to block certain areas from receiving certain information. However, while this would allow publishers to better protect themselves from liability in foreign jurisdictions, they would still be responsible for knowing the laws of every country to which they transmitted information. Furthermore, most publishers would probably simply prevent questionable information from reaching areas rather than risk potential liability.[220] This, in practice, would in turn prevent unknown amounts of worthwhile information from reaching vast numbers of people.

On the other hand, the American rule can make it more difficult for an individual to recover in the area in which the damage to reputation has occurred. The plaintiff will have to prove jurisdiction complies first with the applicable state's jurisdiction laws and with due process, i.e., that the defendant purposefully "reached out" to the forum-state by either making an interactive website or knowing the effects would take place in the forum-state. Needless to say, the litigation fees associated with going to a jurisdiction far away are not inexpensive and for an individual they will probably be high enough to effectively bar suit. Thus, a presumably innocent individual is left with little recourse against an unprovoked attack against the only commodity that takes a lifetime to build, i.e., his or her reputation.

So what are the options for those publishing information online? Well, they can decide not to get into this whole quagmire and decide not to publish on the Internet. They can publish with impunity and if foreign proceedings are instituted, they can completely disregard them if they have no assets abroad and hope the judgment cannot be enforced in their home country. Or, on the other side of the spectrum, publishers can also attempt to comply with the speech laws in every country in which someone can access the Internet.

Unfortunately, none of these options are appealing. Although the first one would decrease the amount of "bad" information available on the Internet, it would also decrease the amount of "good" information. The second would allow the threat of a foreign civil judgment to hang

220. *See* Dow Jones v. Gutnick, (2002) H.C.A. 56 (63-64) (emphasizing that it is practically impossible to control the dissemination of material posted on the Internet to particular geographic regions. Thus, "it makes it virtually impossible, or prohibitively difficult, cumbersome and costly, to prevent the content of a given website from being accessed in specific legal jurisdictions"); *see also* Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 587 (2002) (stressing that asking Internet publishers to restrict dissemination of materials to a particular region would be asking too much), *aff'd*, 217 F.3d 162 (3d Cir. Pa. 2000).

over the publisher's head or, as some cases demonstrate, the specter of possible jail terms.[221] The third option's drawback is that it would be extraordinarily costly and time-consuming, if not outright impossible, to comply with the laws of 180 nations.

On a more macro scale, it is possible a global set of standards for information published on the Internet will be agreed to, but the chances of that are slim to none.[222] In all probability, at no point in the near future will a country concede its laws or render them inferior to an international standard that did not equate with their current law and values. For example, in America, any treaty that compromised our freedom of speech rights, even just for information on the Internet, would undoubtedly be hit with heavy constitutional attack. Any treaty would also have the unfortunate side effect of creating a double standard; one set of rules for information published via the Internet and the other for newspapers, television, and radio.

On the other hand, the Internet Corporation for Assigned Names and Numbers ("ICANN") offers hope for Internet uniformity. The ICANN is a non-profit international entity responsible for maintaining uniformity of the "Internet's domain name system and its unique identifiers."[223] Furthermore, ICANN has no allegiance to any one government and it does not make policy, but instead receives input from governments and from various other constituents from around the globe to help shape and form policy in a self-described "bottom-up" process.[224] Although this institution concerns itself with the nuts and bolts of the Internet and not with setting the laws and rules governing its content, the principles behind it should be very influential in developing a similar entity for that exact purpose. Perhaps the answer does not lie in formal negotiations between governments, but instead in principles of common usage with the understanding that compromise helps everyone in the long run. With a set of uniform

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221. *See, e.g.,* Williams, *supra* note 119, at 502 (explaining that a French national was arrested in London for the construction of the Internet porn site in France that could be accessed anywhere in the world); *see* August*, supra* note 116, at 573 (warning the individuals who post information on the Internet to be careful with choosing their destination, because they can be prosecuted for posting information that is legal in their country, but not in the country they plan on visiting).

222. *See* Brian Fitzgerald, *Jurisdiction and the Internet*, 157 (Lawbok Co. 2004) (explaining that this idea is not without its proponents, however, as several authors have advocated that very idea); *see also* Jacqueline Lipton, *Protecting Valuable Commercial Information in the Digital Age: Law, Policy and Practice*, 6 J. TECH. L. & POL'Y 2 (2001) (emphasizing a view that creating a global system of Internet laws might be too difficult and expensive, and pointing out that maybe the regulation of the Internet should be left to market forces); Greenberg, supra note 74, at 1257 (pointing out the absence of international system of laws governing Internet actions and the difficulty of establishing such laws).

223. *See* Internet Corporation for Assigned Names and Numbers (showing an official site of ICANN) *at* http://www.icann.org (last visited on Sept. 18, 2004); *see also* Michael Froomkin, *ICANN and Antitrust,* 19 OHIO ST. J. DISP. RESOL. 1167 (2004) (showing that ICANN is a non-profit organization appointed by the government); *see also* Berman, *supra* note 127, at 369 (listing ICANN as one of the bodies of regulatory framework created to influence the international law).

224. *See* Steven J. Coran, Note, *The Anticybersquatting Consumer Protection Act's in Rem Provision: Making American Trademark Law the Law of the Internet?* 30 HOFSTRA L. REV. 169, 174 (2001) (showing that ICANN was created to promote the development of Internet policy and "encourage diverse and international participation in the technical management of the Internet"); *see also* Kim G. Von Arx, Comment, *ICANN—Now and Then: ICANN's Reform and Its Problems*, 2003 DUKE L. & TECH. REV. 7 (2003) (explaining that as the result of the need for the management of the domain name system, the U.S. created ICANN).

standards and principles, the Internet can continue to expand rather than be limited by the narrow territorial and jurisdictional rules.

IV. Conclusion

Why should a person or entity be unable to resort to local courts to protect their reputation because the information was not directed to the plaintiff's home state, or the website did not have a sufficient level of interactivity to make jurisdiction appropriate? Then again, how much worthwhile speech and valuable information is prevented if someone does not publish for fear of worldwide liability?

At this time there is no easy conclusion for the issues presented by the Internet. Indeed, the area of law involving the Internet is only in its adolescence so every subsequent decision has a profound impact on its development.[225] While some scholars believe old-fashioned principles can readily transfer to this new medium, I disagree; but I concede that for the time being, that methodology is going to be the only available option. At some point, the Internet is going to require a uniform set of principles, so that those who merge onto the information superhighway have an idea of what the speed limit is, so to speak. There is no higher authority, however, to determine who is right and who is wrong or at least to compromise the different positions, but rather there are at least 180 authorities with the potential for 180 different rules. Since an over-arching treaty may not be feasible, perhaps the answer lies in the agreement of those using the Internet under the banner of an entity similar to the ICANN. If more restrictive rules are to govern what is allowed on the Internet, however, the fear is that the Internet will be safe only for the sale of goods and services and for no other speech. With an unprecedented amount of educational and cultural information available at the click of a button, it would be a tragedy to let the discretions of a few ruin opportunities for the many.

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225. *See The World Wide West, Scheming buccaneers, muddled lawmakers, harsh justice—Internet publishing*, GUARDIAN at pg. 40 (remarking increased regulation is the downside of the Internet's maturation). *See generally* Audra Thompson, Note, *Got Napster? From a Nationwide Problem to a Worldwide Issue*, 26 T. MARSHALL L. REV. 79, 104 (2000) (explaining that the control of an international matter, such as the Internet, cannot be accomplished by implementing national laws and emphasizing the need for a separate international system of laws).

Obtaining Information from English Banks for Use in Foreign Civil Proceedings: The Banker's Duty of Confidentiality

By Matteo* and Chiara Zambelli**

The duty of confidentiality that a bank owes to its customer is said to be a cornerstone in the success of a banking system, as it lies at the heart of the banker-customer relationship.[1] Although the autonomy of the individual and his right to privacy should be highly protected,[2] confidentiality often acts as a cover for wrongdoing, often on an international scale.[3] Commonly, drug barons, international fraudsters and terrorist groups use the banking system to

1. *See* Jennifer Mencken, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems,* 21 B.C. INT'L & COMP. L. REV. 461, 468 (1998) (tracing the historical developments of the implied confidentiality agreement between banks and their customers); *see also* Dr. John Breslin, *Privacy—the Civil Liberties Issue*, 14 DICK. J. INT'L 455, 457 (1996) (discussing the significance of confidentiality, which arises the moment the bank-customer relationship is established); Elizabeth Andrew, *Customer Care and Banking Law: Part 2*, LAW SOCIETY'S GAZETTE, Sept. 14, 1998, at 26 (explaining that from the very beginning, confidentiality was an essential part of the bank-customer relationship).

2. *See* Michael L. Closen, Trevor J. Orsinger & Bradley A. Ullrick, *Notarial Records and the Preservation of the Expectation of Privacy,* 35 U.S.F. L. REV. 159, 165 (2001) (establishing the importance of the fundamental institution of privacy); *see also* Jodi Berlin Ganz, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts,* 20 FORDHAM INT'L L.J. 1306, 1317 (1997) (focusing primarily on Switzerland's inheritance laws, the author explains that privacy was a fundamental element in the development of banking); Matthew Kleiman, *The Right to Financial Privacy Versus Computerized Enforcement: A New Fight in an Old Battle,* 86 NW. U. L. REV. 1169, 1169 (1992) (analyzing the significance of privacy rights from common law to the Constitution of the United States).

3. *See* Loutchansky v. Times Newspapers Ltd., [2002] EWHC 2490 (Q.B. 2002) (noting allegations that Russian mafia members have used New York banks to launder illegal funds); *see also* Lisa Barbot, *Money Laundering: An International Challenge,* 3 TUL. J. INT'L & COMP. L. 161, 164 (1995) (remarking in great detail about the role bank secrecy plays in facilitating money laundering, which subsequently plays numerous roles in international crime); Laura Maroldy, *Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers Is Not the Answer*, 66 NOTRE DAME L. REV. 863, 867 (1991) (detailing how bank secrecy laws enable criminal organizations to use financial institutions to launder money).

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transfer money around the world.[4] The duty of confidentiality has been one reason why this has, to a certain extent, gone unnoticed due to its inability to be penetrated.[5]

Thus it appears evident that, in a responsible financial center, the law will have to strike a difficult balance between the legitimate interest of banks' customers to have their confidential information guarded and the public interest that requires responsible cooperation with law enforcement agencies both domestically and internationally.[6]

It seems inevitable that, in the aftermath of September 11, 2001 and the recent atrocities all over the world, the balance will move in the direction of disclosure to attempt to combat terrorists and to stop their funding.[7]

However, in a banking or fiduciary context the primary rule is that the information is confidential and remains confidential unless there are exceedingly good reasons, specified in law, authorizing disclosure.[8]

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4. *See* Kathleen Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L L. & BUS. 263, 267 (2003) (discussing the various forms of money laundering, the difficulty of catching money launderers, and recent legislation aimed at facilitating their capture); *see also* Duncan Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C.J. INT'L L. & COMP. REG. 437, 437 (1994) (analyzing the connection between international banking and the drug trafficking industry, which launders $100 billion each year in the United States alone); Rebecca Peters, *Money Laundering and Its Current Status In Switzerland: New Disincentives For Financial Tourism*, 11 NW. J. INT'L L. & BUS. 104, 108 (1990) (discussing the criminal world's reliance on their ability to launder money and thus hide illegal funds).

5. *See* Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 320 (2003) (arguing that because terrorist funds often originate in legitimate sources, authorities can rarely detect their final destination); *see also* Keith Fisher, *In Rem Alternatives to Extradition for Money Laundering*, 25 LOY. L.A. INT'L & COMP. L. REV. 409, 420 (2003) (emphasizing the difficulties in catching money launderers).

6. *See* Turner v. Royal Bank of Scotland, 1 All E.R. 1057 (2001) (arguing that while the bank owed Mr. Turner an implied duty of confidentiality, that did not prevent the bank from disclosing information when there was a duty to the public); *see also* Bradley Runyon, *Money Laundering: New Legislation and New Regulations, But Is It Enough?,* 3 N.C. BANKING INST. 337, 337 (1999) (emphasizing the importance of finding an equitable balance between privacy and public interest); Michael Levi, *Policing Banking Transactions—U.K. Bank Secrecy in a Global Market Place*, NEW LAW JOURNAL, Sept. 13, 1991, at 1222 (analyzing recurring tensions between calls for disclosure of bank records and demands for the right to privacy).

7. *See* Bruce Zagaris, Symposium, *International Money Laundering: From Latin America to Asia, Who Pays?: The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123, 131 (2004) (discussing the post-9/11 trend in the United States to encourage disclosure both domestically and abroad of terrorist banking activity); *see also* Breslin, *supra* note 1, at 463 (arguing that the right to privacy may often succumb to the rights of innocent victims to be protected).

8. *See* Insurance Co. v. Lloyd's Syndicate, 1 Lloyd's Rep. 272 (1994) (stressing that within the duty of confidence, banks may disclose information if to withhold it would prejudice the bank or third parties); *see also* Barclays Bank v. Taylor, 1 W.L.R. 1066 (1989) (reiterating that the duty of confidentiality is not absolute and listing the four qualifications for disclosure from *Tournier*); Mencken, *supra* note 1, at 475 (discussing the role of bank secrecy laws and the limited instances where they can be circumvented).

I. The Duty of Confidentiality in England

The duty of confidentiality that a bank owes to its customer has been firmly rooted in the English law by the seminal decision of the Court of Appeals in 1923 in *Tournier*.[9] Although never statutorily confirmed, *Tournier* placed an obligation on banks that went beyond what had previously been considered a "moral" obligation and enforced it with legal weight.[10]

In this particular case a bank disclosed to its depositor's employer that the depositor had made overdrafts to his account and payments to a bookmaker's account.[11] The employer fired the depositor, who sued the bank.[12] The Court of Appeal established that it is an implied term of the banker/customer contract that bankers owe their customers a duty to keep the depositor's financial condition confidential and that, in this particular case, this duty had been breached.[13] Lord Justice Scrutton said that he had "no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account or transactions related thereto of his customer, except in certain circumstances."[14] He also said that the duty of confidentiality extends to communications concerning a customer that a bank receives from a third party if received "in the character of banker."[15]

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9. Tournier v. National Provincial and Union Bank of England 1 K.B. 461 (C.A. 1924) (establishing a legal duty owed by banks to their customers). *See* Colin Passmore, *Banks and Subpoenas*, NEW LAW JOURNAL, Jan. 27, 1995, at 89 (discussing the *Robertson* case, where the bank produced a depositor's bank statements at trial without his consent); *see also* Dr. Richard Lawson, *The Legal Aspects of the New Code*, NEW LAW JOURNAL, March 13, 1992, at 346 (stressing that the *Tournier* case formed the foundation of banker-customer confidentiality).

10. *Tournier*, 1 K.B. at 461 (cementing the notion that the duty owed by banks to their customers was more than a mere moral duty); *see also* Derek Wheatley, *A Wind of Change for Bankers*, NEW LAW JOURNAL, May 1, 1992 at 607 (commenting on the landmark decision in *Tournier*, officially defining the practice of confidentiality).

11. *Tournier*, 1 K.B. at 461. *See* Norwich Pharmacal Co. v. Customs & Excise Commissioners, [1974] A.C. 133 (House of Lords) (holding that when banks receive information in confidence, it should be held sacrosanct).

12. *Tournier*, 1 K.B. at 461. *See* Urs Martin Lauchli, *Swiss Bank Secrecy With Comparative Aspects to the American Approach,* 42 ST. LOUIS L.J. 865, 878 (1998) (examining primarily Swiss and American banking laws, this articles touches upon their foundation in the leading English case *Tournier*); *see also* Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Bank Secrecy*, 22 INT'L LAW. 69, 69 (1998) (emphasizing the importance of the *Tournier* decision in helping to define and develop bank secrecy law).

13. *Tournier*, 1 K.B. at 461. *See* Lewis T. Evans & Neil C. Quigley, *Shareholder Liability Regimes, Principal-Agent Relationships, and Banking Industry Performance,* 38 J. LAW & ECON. 497, 500 (1995) (discussing the potential fiscal benefits of disclosure by banks); *see also Scottish Banking Law Bulletin,* FINANCE & CREDIT LAW, Sept. 1999 (discussing the importance of *Tournier* in the development of banker-customer relations).

14. *Tournier*, 1 K.B. at 480 (acknowledging that the duty of confidentiality and its potential breach are implied terms in the bank-customer contract). *See generally* Owen J. Morgan, Comment, *The Public Duty Exception in Tournier—Getting There the Hard Way in New Zealand*, 9(6) J. INT'L BANKING L. 241, 243 (1994) (explaining the policy behind the public interest exception specifically in instances of fraud or crime); Thomas C. Russler & Steven H. Epstein, *Disclosure of Customer Information to Third Parties: When Is the Bank Liable?*, 111 BANKING L.J. 258, 272 (1994) (discussing circumstances that may lead a bank to ignore its duty of confidentiality).

15. *Tournier*, 1 K.B. at 474 (explaining that the extent of the duty of confidentiality varies according to the nature of the relationship between the parties). *See* Fayyad Alqudah, *Banks' Duty of Confidentiality in the Wake of Computerised Banking*, 10(2) J. INT'L BANKING L. 50, 50 (1995) (indicating that the duty of confidentiality extends to information obtained from third parties). *See generally* Roy M. Goode, *The Banker's Duty of Confidentiality*, MAY J. BUS. L. 269, 270 (1989) (defining confidential information as that acquired by a bank in the course of the banker-customer relationship).

Although never statutorily confirmed, this case placed an obligation on banks that went beyond what had previously been considered a "moral" obligation and enforced it with some legal weight.[16]

The *Tournier* decision was subsequently affirmed by the Court of Appeal in 1989 in *Lipkin Gorman v. Karpnal*.[17] Further the U.K. Banking Act 1987 (s.39) and the U.K. Banking Code 2003 (para. 11.1) were phrased to embrace the principle of confidentiality established in *Tournier*.[18] In addition, the Human Rights Act 1998 has strengthened the duty of confidentiality since the courts may now have to pay greater attention to the right of privacy of the individual.[19]

However, it was established in *Tournier* itself that the duty is qualified rather than absolute:[20] "it is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualifications, and to indicate its limit . . . the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer."[21]

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16. *See* Breslin, *supra* note 1, at 457 (emphasizing that the breach of this duty will result in a valid cause of action). *See generally* Alfred H. Silvertown, *Bankers Duty of Confidentiality*, 7(5) INT. BANK. L. 72, 72 (1988) (identifying *Tournier* as the case that established that the duty owed by a banker to his customer is a legal one based on contract principles); Mencken, *supra* note 1, at 475 (citing *Tournier* as the case establishing the common law principles for banker-client relationships in the U.S.).

17. Lipkin Gorman v. Karpnal, 1 W.L.R. 1340 (C.A. 1989) (affirming that the principles established in *Tournier* still stand). *See* Turner v. Royal Bank of Scotland, 143 S.J. L.B. 123 (C.A. 1999) (citing to *Lipkin Gorman* as a prior case in which the court upheld the *Tournier* principles); *see also* Denis Petkovic, Comment, *The Banker as Constructive Trustee*, 4(2) J. INT'L BANKING L. 88, 90 (1989) (noting the court's reliance on *Tournier* when deciding *Lipkin Gorman v. Karpnal*).

18. Banking Act, Ch. 22 (1987) (Eng.) (providing regulations for the course of the banking business). *See generally* Financial Services and Markets Act, Pt. 1 (2000) (Eng.) (repealing the Banking Act of 1987); Price Waterhouse v. BCCI Holdings, [1992] B.C.L.C. 583 (Ch. 1992) (noting that under the Banking Act confidentiality must yield to public interest).

19. Human Rights Act, 1998, c. 42, art. 8, sched. 1 (Eng.) (providing that "everyone has the right to respect for his private and family life, his home and his correspondence."). *See* A. Arora, *The Human Rights Act 1998 Some Implications for Commercial Law and Practice,* FIN. & CREDIT L., March 2001, (discussing the impact several provisions of the Convention will have on the rules of confidentiality in the banker/customer relationship). *But see* United States v. Miller, 425 U.S. 435, 439–43 (1976) (holding that a depositor has no legitimate expectation of privacy in his bank records and has no standing under the Fourteenth Amendment to challenge their seizure).

20. *Tournier*, 1 K.B. at 471 (finding that the duty of confidentiality is qualified rather than absolute). *See also* Christofi v. Barclays Bank, 1 W.L.R. 1245 (Ch. 1998) (asserting that a banker's implied duty of confidentiality is a qualified obligation).

21. *Tournier*, 1 K.B. at 473 (establishing the four categories that permit exceptions to the legal duty of confidentiality). *See* Eckman v. Midland Bank Ltd., 1973 Q.B. 519, 525 (stating the four exceptions established under *Tournier*); *see also* In re State of Norway's Application, 1987 Q.B. 433, 448 (C.A. 1987) (listing the "four heads" of qualification for the contractual duty of confidentiality).

The rule requiring these four qualifications was reaffirmed by the Court of Appeal in 1989 in *Barclays Bank plc v. Taylor*,[22] where it was held that their true effect is not to excuse a breach of duty but to delimit the extent of the duty itself.[23]

For the purpose of this article we will examine the first of the qualifications to the general rule in *Tournier*, namely compulsion by law.

It has been observed that at the time of *Tournier*, examples of compulsion by law were unusual.[24] Since 1924 jurisprudence has moved on considerably and there are now various exceptions to the principle of confidentiality in civil matters where the law compels disclosure.[25]

It is therefore an established principle that a bank will not breach its duty of confidentiality when disclosure is required by court proceedings.[26] This is because the duty of confidence is a contractual duty and any contractual term is illegal and unenforceable when it runs contrary to a legal obligation.[27]

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22. Barclay's Bank v. Taylor, 1 W.L.R. 1066 (C.A. 1989) (holding there was no breach of the banks' duty of confidence because the disclosure was made under compulsion of law as permitted by one of the exceptions established in *Tournier). See generally* A. Nico Oelofse, Comment, *South Africa: Bills of Exchange—Cheques—Bank's Duty of Secrecy*, 6(7) J. INT'L BANKING L. 120, 120 (1991) (finding that the bank was justified in disclosing because the disclosure was required to protect the interests of the bank); John B. O'Keeffe, Comment, *Banker-Customer: Confidentiality*, 14(9) J. INT'L BANKING L. 80, 81 (1999) (reiterating that a bank's duty of confidentiality is established and affirmed by *Tournier*).

23. *See generally* Christofi v. Barclays Bank, 1 W.L.R. 1245 (Ch. 1998) (citing *Tournier* for its discussion of the qualification of the duty of a bank to its customer); Elizabeth Bowes, *None of Your Business*, 9(3) COMPUTER & TELECOMM. L. REV. 87, 88 (2003) (listing the four qualifications to the duty of confidentiality as factors to consider when determining the scope of that duty); Joan Wadsley, Comment, *Banks' Confidentiality: A Much Reduced Duty*, 106 LAW Q. REV. 204, 205 (1990) (discussing the limits provided by *Tournier* and the developments of the four qualifications).

24. *See* BANKING SERVICES: LAW AND PRACTICE, 1989 [Cm. 622]; *see also* Wadsley, *supra* note 23, at 205 (stating that at the time of *Tournier* situations of compulsion by law were not common). *See generally* Gabrielle Turner, *Confidentiality,* IT LAW TODAY, Jan. 2000, at 8.1(2) (2000) (referring to the changes in the analysis of the third exception due to the change of the times).

25. *See* Wadsley, *supra* note 23, at 205 (noting that several statutes have been enacted to further develop/delimit the *Tournier* exceptions). *See generally* Howard Johnson, *Confidentiality Diminishing,* 13(9) INT'L BANKING & FIN. L. 98 (1995) (discussing the changes in the application of the exceptions as seen in enacted statutes); G. Philip Rutledge, *Bank Secrecy Laws: An American Perspective,* 14 DICK. J. INT'L L. 601, 603 (1996) (indicating that several U.S. federal laws have built upon the exceptions of *Tournier*).

26. *See* Robertson v. Canadian Imperial Bank of Commerce, 1 W.L.R. 1493, 343 (P.C. 1995) (explaining that a bank responding to a subpoena is acting under compulsion of law and that action falls within the exception); *see also* Barclays Bank v. Taylor, 1 W.L.R. 1066 (C.A. 1989) (stating that a bank acting under court order is not breaching its duty); Simon Crawford, *Keeping It to Themselves: Bank Privacy Towards 2000*, 29 OTTAWA L. REV. 425, 432 (1997) (noting that the underlying premise for compulsion of law is that the banker-customer contract is subject to the general law).

27. *See* Parry-Jones v. Law Society, 1 Ch. 1 (C.A. 1969) (indicating that a solicitor is required to disclose if required by law); *see also* Smorgon v. Australia and New Zealand Banking Group Ltd., 134 C.L.R. 475, 489–90 (1976) (stating that the breach of the duty of confidentiality is permitted when required by the law of the land). *See generally* Crawford, *supra* note 26, at 435 (providing that the contractual duty of confidentiality can be overridden when it goes against the law of the land).

In practice, however, an English bank, faced with disclosure required by law, is not in an easy position, as it faces the possibility that in complying with its legal obligations it may breach its duty of confidentiality to its customer.[28] Moreover, specific problems arise when disclosure of information, located in the U.K., is requested or compelled by foreign courts since an element of extraterritoriality is involved.[29]

In order to obtain information from English banks to be used in foreign civil proceedings two methods are commonly used: letters rogatory and subpoenas.[30]

II. Letters Rogatory

Letters rogatory, or letters of request (as they are called in England),[31] are the medium whereby a foreign court requests evidence to the court in the place where the records are main-

28. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., 1 All E.R. 653 (Ch. 1986) (describing the difficult choice banks face when confronted with court requests for customer documents and the duty of confidentiality that is owed to bank customers); *see also* Raymond Hughes, *Bankers Must Give Evidence in Norwegian Tax Case, Lords Rule*, FIN. TIMES, Feb. 21, 1989, at I13 (explaining that two English bankers did not want to breach their duty of confidentiality to a customer by giving a Norwegian court evidence concerning customers); David Lascelles, *Finance and the Family; End of the Secret Service*, FIN. TIMES, Dec. 15, 1990, at IV (noting that it is difficult for English banks to balance their duty of confidentiality to customers with their need to satisfy court requests for information).

29. *See* Thomas W. Dunfee & Aryeh S. Friedman, *The Extraterritorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883, 895 (1984) (stating that extraterritoriality can create tension between nations); *see also* Steven Loble, *Jurisdiction and Evidence—An English Perspective*, 4 ILSA J. INT'L & COMP. L. 489, 507 (1998) (noting that cases dealing with extraterritoriality often concern the production of evidence for foreign proceedings); Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1340 (1995) (claiming that extraterritorial discovery requests can be problematic because they tend to intrude on the sovereignty of other countries).

30. *See* Ryan J. Earl, Note, *Tightening Judicial Standards for Granting Foreign Discovery Requests*, 1993 BYU L. REV. 343, 344 (1993) (noting that letters rogatory are simple and popular methods for obtaining information); *see also* Mark K. Gyandoh, Note, *Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice?*, 15 TEMP. INT'L & COMP. L.J. 81, 95 (2001) (stating that the use of letters rogatory is one method of obtaining information from foreign banks). *See generally* Laker Airways Ltd. v. Pan American World Airways, 607 F. Supp. 324, 325 (S.D.N.Y. 1985) (commenting that subpoenas had been served on two English banks at their New York offices requiring them to produce documents held in London relating to transactions that took place in the United Kingdom).

31. *See* Civil Procedure Rules 1999, Rule 34.13 (1) and (2); Practice Direction 34, paragraph 5.1; *see also* Loble, *supra* note 29, at 502 (acknowledging that letters rogatory are referred to in England as "letters of request"). *See generally* Robert C. O'Brien, *Compelling the Production of Evidence by Nonparties in England under the Hague Convention*, 24 SYRACUSE J. INT'L L. & COM. 77, 79 (1997) (recognizing that United States litigants must send a letter of request to obtain evidence from nonparties in England).

tained to assist the administration of justice in the foreign country.[32] The purpose of letters rogatory is to obtain information without directly or indirectly infringing the sovereignty of the country where the records are located.[33]

The use of such letters is regulated by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.[34] The obligations accepted by the United Kingdom under that Convention are treaty obligations.[35] Accordingly, for them to become part of English law, legislation was needed.[36] That is to be found in the Evidence (Proceedings in

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32. *See* Nadia de Araujo, *Dispute Resolution in Mercosul: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25, 41 (2001) (noting that a letter rogatory sent to Brazil by an Argentine plaintiff requested judicial assistance from a Brazilian court); *see also* Gyandoh, *supra* note 30, at 84–85 (defining letters rogatory as a "medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country"); John Murray Brown, *SFO Seeks Access to Nadir Banks*, FIN. TIMES, June 19, 1993, at 4 (explaining that the U.K. requested Turkish assistance concerning the investigation of a Turkish citizen under the terms of a letter rogatory).

33. *See* Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 228 (1999–2000) (explaining that service of process from one country to another without the use of a letter rogatory would infringe on the latter country's sovereignty); *see also* Amy Jeanne Conway, Note, *In Re Request for Judicial Assistance from the Federative Republic of Brazil: A Blow to International Judicial Assistance*, 41 CATH. U. L. REV. 545, 547 (1992) (noting that a judicial request from one country to another requesting performance of an act, if done without a letter rogatory, would violate that country's sovereignty); Peter Metis, Note, *International Judicial Assistance: Does 28 U.S.C. 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L.J. 332, 340 (1994) (indicating that letters rogatory help induce international cooperation).

34. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, 23 U.S.T. 2555 (announcing regulations for the use of letters rogatory). *See* Jennifer S. Bales, *Initiating and Responding to Discovery in Transnational Litigation: Procedures and Challenges*, 66 TENN. L. REV. 765, 768–70 (1999) (outlining Hague Convention procedures for the use of letters rogatory); *see also* Jacob Dolinger & Carmen Tiburcio, *The Forum Law Rule in International Litigation—Which Procedural Law Governs Proceedings to Be Performed in Foreign Jurisdictions:* Lex Fori *or* Lex Diligentiae*?*, 33 TEX. INT'L L.J. 425, 435–36 (1998) (illustrating procedures by which countries must request evidence from abroad).

35. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, 23 U.S.T. 2555 (listing obligations imposed by the treaty on signatory countries). *See* Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgements in the United Kingdom and Germany*, 18 S. ILL. U. L.J. 517, 519 (1994) (remarking that the United Kingdom is a signatory of the Hague Convention treaty). *See generally* O'Brien, *supra* note 31, at 79 (proclaiming that England is a party to the Hague Convention treaty and thus is bound by certain procedures pertaining to the taking of evidence abroad).

36. *See* Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. 3 W.L.R. 430 (A.C. 1978) (stressing that the Evidence Act of 1975 was passed in order to implement the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters in the United Kingdom); *see also* Attorney-Gen. for Can. v. Attorney-Gen. for Ontario, [1937] A.C. 326, 347 (asserting that implementation of the United Kingdom's treaty obligations is a function of the legislature); The Right Honourable the Lord Templeman, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: Europe: Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 467 (1991) (recognizing that Parliament controls the effectiveness of treaties entered into by the United Kingdom).

Other Jurisdictions) Act 1975.[37] The Act enables the courts of the United Kingdom to give effect to a request issued by a court in a country outside the United Kingdom, subject to certain conditions.[38] Firstly, the United Kingdom opted, in accordance with s.23 of the Convention, not to execute letters rogatory issued for the purpose of obtaining pre-trial discovery of documents (Civil Procedure Rules 31.21.5).[39] Secondly, pursuant to s.2(4)(b) of the 1975 Act, the English court shall not require a person to produce any documents other than the particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession custody or power.[40] Finally the English court will not allow fishing expeditions; in *Rio Tinto Zinc Corporation v. British Westinghouse Electric Corporation*, the House of Lords held that a request phrased in vague terms (such as "any memoranda, correspondence or other documents relating thereto") was not acceptable, although the court was prepared to edit the request.[41]

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37. *See* Michael Penny, *Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT'L ARB. 249, 250 (2001) (affirming that the Evidence Act of 1975 allows British courts to order evidence produced when it is requested by foreign countries or courts within the United Kingdom); *see also* Y. Daphne Coelho-Adam, Note, *Fishing for the Smoking Gun: The Need for British Courts to Grant American-Style Extraterritorial Discovery Requests in U.S. Industry-Wide Tort Actions*, 33 VAND. J. TRANSNAT'L L. 1223, 1250 (2000) (explaining that legislation was needed in the United Kingdom to implement the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters); Levarda, *supra* note 29, at 1379 (commenting that the United Kingdom passed the Evidence Act of 1975 in order to ratify the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters).

38. *See* O'Brien, *supra* note 31, at 90–91 (announcing that English courts can honor requests for information from foreign courts because of the Evidence Act of 1975); *see also* Penny, *supra* note 37, at 250 (declaring that the Evidence Act of 1975 allows courts in the United Kingdom to comply with evidence requests from courts in foreign countries); Alan Cane, *U.S. Court's Request for Documents Refused*, FIN. TIMES, Mar. 7, 1985, at 12 (reporting that the Evidence Act of 1975 allows British courts to give effect to Letters of Request).

39. *See* Dolinger et al., *supra* note 34, at 436 (explaining that at the Hague Convention all parties except the United States, Israel, and Czechoslovakia declared they would not execute Letters of Request for the purpose of obtaining pre-trial discovery); *see also* George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the* Aerospatiale *Decision*, 63 TUL. L. REV. 525, 527 (1989) (asserting that under the terms of the Hague Convention, parties may declare that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery documents). *See generally* Donald C. Dowling, Jr., *Forum Shopping and Other Reflections Involving U.S. and European Businesses*, 7 PACE INT'L L. REV. 465, 472 (1995) (describing how the United States offers more expansive pre-trial discovery procedures than other countries).

40. *See* Coelho-Adam, *supra* note 37, at 1250 (explaining that Section 2 prohibits British courts from granting requests for a person "to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power," or to produce any such documents); *see also* Levarda, *supra* note 29, at 1381–82 (noting that the court in *Rio Tinto Zinc Corp.*, a prominent British case on extraterritoriality, sustained rigid specificity requirements on foreign discovery requests). *See generally* Karen Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT'L L. 297, 299 (1996) (concluding that countries other than the United States limit the scope of discovery).

41. Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., 2 W.L.R. 81 (House of Lords 1978) (stating that requests that are not particular will not be satisfied). *See* Genira Trade & Fin. Inc. v. Refco Capital Markets Ltd., E.W.C.A. Civ. 1733 (C.A. 2001) (requiring requests of documents to be particular and clearly indicated); *see also* United States v. Philip Morris Inc., 2 All E.R. 204 (Q.B. 2002) (explaining that English courts permit vague requests to be solved by using the blue pencil approach).

Accordingly, if the request is effective and it conforms to English law, there is no duty on the bank to take action in support of the confidentiality of its client's affairs by resisting the making of an access order and by informing the client that such an order was being sought.[42]

In *Re State of Norway's Application*, a Norwegian court asked the English High Court to examine two witnesses residing in the United Kingdom who could give evidence relating to proceedings regarding an appeal against a retrospective tax assessment.[43] It was argued that the court was unable to apply for a letter rogatory because the request offended the rule against enforcement of foreign revenue judgments.[44] However, the Court of Appeal held that the English courts would be sympathetic to the attempts of foreign revenue services to prevent fraud and to collect evidence.[45]

Potentially, therefore, an English court using the 1975 Act could override the duty of confidentiality in relation to foreign tax matters.[46] However, any such request by a foreign court must be focused.[47] In this specific instance, it was held that the terms of the request were so wide that they were designed to elicit information that might lead to the obtaining of evidence rather than to establish allegations of fact that had been raised bona fide with adequate particu-

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42. *See* Barclay's Bank v. Taylor, 1 W.L.R. 1066 (C.A. 1989) (qualifying the duty of confidentiality without making it absolute); *see also* Adham v. Bank of Credit & Commerce Int'l SA, 2 B.C.L.C. 581 (Ch. 1995) (arguing that no basis exists to imply a duty of confidentiality on the banker with respect to disclosure to litigators); *see also* Fennoscandia Ltd. v. Clarke, 1 All E.R. 365 (C.A. 1999) (reiterating the Court of Appeal's holding in *Barclay's Bank* that a bank does not have a duty to disclose the information about access orders to its customers).

43. In re State of Norway's Application, 1 All E.R. 746 (Q.B. 1989) (explaining the procedure for obtaining evidence for retrospective tax assessments). *See* Wadman v. Dick, 3 F.C.R. 9 (C.A. 1998) (expressing the procedure for making requests to foreign authorities to obtain evidence in cases of retrospective tax assessment).

44. *Norway's Application*, 1 All E.R. at 746 (restating the public policy that courts will not enforce revenue judgments from foreign jurisdictions). *See* Aps v. Frandsen, 1 W.L.R. 2169 (C.A. 1999) (stating that English law prohibits courts from enforcing revenue laws of foreign countries); *see also* Williams & Humbert Ltd. v. W & H Trade Marks Ltd., 2 W.L.R. 24 (C.A. 1986) (acknowledging the international rule for revenue laws that one state will not apply the rules of another state).

45. *Norway's Application*, 1 All E.R. at 746 (holding that the court finds the collection of evidence to be important). *See* First Am. Corp. v. Sheikh Zayed Al-Nahyan, 1 W.L.R. 1154 (C.A. 1999) (maintaining it is in a country's best interest to aid in requests because of the difficulty of collecting relevant evidence and the importance of preventing fraud); *see also* Marlwood Commercial Inc. v. Kozeny, 3 All E.R. 648 (C.A. 2004) (stating that the public interest in investigating an offense of fraud weighs in favor of disclosure).

46. *See* Lonrho v. Fayed, 3 W.R.L 563 (Q.B. 1989) (describing the court's power to override confidentiality in foreign tax matters); *see also* Mount Murray Country Club Ltd. v. Macleod, U.K.P.C. 53 (Privy Council 2003) (noting that English courts will override the duty of confidentiality if there is a strong public interest). *See generally* A M & S Eur. Ltd. v. Comm'n of the European Cmty., 3 W.L.R. 17 (Q.B. 1983) (finding that the right of confidentiality can be overridden or modified by statute).

47. *See* Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. 3 W.L.R. 430 (A.C. 1978) (rejecting any broad requests and enumerating that the requests should be "specified"); *see also* Transcript by Harry Counsell Corp. of First Am. Corp. v. Clifford (Q.B. 1997) (establishing that if a letter of request is within its limited terms then it can be used for its proper purpose). *But see* Wakefield v. Outhwaite, 2 Lloyd's List L. Rep. 157 (Q.B. 1990) (holding that a request for a broad class of documents should not be followed because it is not focused).

lars.[48] The Court of Appeal therefore held that the request of the Norwegians to the court amounted to an impermissible "fishing expedition."[49]

When the case reached the House of Lords, Lord Goff reiterated the importance of the duty of confidentiality in stating that "witnesses should not be required to reveal the identity of a settlor in breach of a banker's duty of confidentiality unless the witness should have evidence that the settlor was acting as the nominee or agent of the tax payer."[50] Moreover, it was held that the court will have to strike a difficult balance between the desirable policy of assisting a foreign court (judicial comity) and the desirability of upholding the duty of confidentiality.[51] Which way the balance then tilts will depend on the specific circumstances of each case.[52]

In *Nanus Asia Company Inc. v. Standard Chartered Bank*, the United States Securities and Exchange Commission required disclosure of information by an overseas branch of a local bank with the sanction that if the information was not disclosed the funds of the local bank in the United States would be frozen.[53] The High Court in Hong Kong concluded that such orders

48. *Norway's Application*, 1 All E.R. at 746 (finding that requests cannot be made to assist in the obtaining of evidence). *See also* R v. Bow Street Magistrates Court (Q.B. 1997) (holding that a letter rogatory is not to be used in an effort to obtain discovery); Long v. Farrer & Co. E.W.H.C. 1774 (Ch. 2004) (declaring that disclosure cannot be made if the request is too wide).

49. *Norway's Application*, 1 All E.R. at 746 (holding that because the request made by the Norwegians was so broad, that it amounted to a "fishing expedition"). *See* Am. Express Warehousing Ltd. v. Doe, 1 Lloyd's L. List Rep. 222 (C.A. 1967) (defining the forbidden "fishing expeditions" as using broad requests to try and find out what documents are and their nature); *see also* Zakay v. Zakay, 3 F.C.R. 35 (S. Ct. Gilbraltar 1998) (illustrating that this was not a "fishing expedition" because particular information requested was identified in the letter rogatory).

50. *Norway's Application*, 1 All E.R. at 746 (citing the importance of the duty of confidentiality and the requirements of a witness who has knowledge of the identity of the settler). *See* Loble, *supra* note 29, at 510 (referring *to Norway's Application* to describe a witness's duty of confidentiality). *See generally* Gen. Mediterranean Holdings v. Patel, 1 W.L.R. 272 (Q.B. 1999) (recognizing that disclosure is not always required when the documents are confidential but not privileged).

51. *Norway's Application*, 1 All E.R. at 746 (indicating that the court uses a balancing test to determine if they will disclose the information, even though there is a duty of confidentiality). *See* Buttes Gas & Oil Co. v. Hammer, 3 W.L.R. 668 (C.A. 1980) (emphasizing the public interests of confidentiality and of international comity). *But see* Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 677 (2001) (suggesting that interest balancing was inappropriate and that comity is only necessary when there are international limits).

52. *See* Crompton Amusement Machines Ltd. v. Comm'rs of Customs & Excise, 3 W.L.R. 268 (House of Lords 1974) (stating that the document in question holds a significant basis for the balance of interests and whether disclosure will be permitted). *See generally* R v. Solicitor's Disciplinary Tribunal, E.W.H.C. 1323 (2002) (reasoning that the circumstances of the request along with the policy considerations denote which way the balance will tilt); Peter D. Trooboff, *Judicial assistance—jurisdiction—1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—meaning of "civil or commercial matters" as used in the implementing statute and the Convention*, 83 AM. J. INT'L L. 933, 933 (1989) (discussing *In re State of Norway's Application* to show how the Norwegian court used the balancing test to obtain evidence).

53. Nanus Asia Co. Inc. v. Standard Chartered Bank, 1 H.K.L.R. 396 (High Court 1990) (refusing to hold that each branch of an international bank is a separate entity from the parent body). *See* Lee C. Buchheit, *Alternative Techniques in Sovereign Debt Restructuring*, 1988 U. ILL. L. REV. 371, 381 (noting that banks in the United States must also follow disclosure requirements enforced by the Securities and Exchange Commission); *see also* Ronald David Greenberg, *The Eurodollar Market: The Case for Disclosure*, 7 CAL. L. REV. 1492, 1512 (1983) (stating the bank disclosure requirements for the Securities and Exchange Commission).

represented an improper exercise of the foreign penal jurisdiction of a foreign court that the rules of English conflicts of law would not permit except in special circumstances.[54]

Nevertheless, it is of foremost importance that the courts of England should, if they can properly do so, accede to letters rogatory issued by foreign courts seeking evidence to use in foreign litigation.[55] In *First American Corporation v. Sheikh Al-Nahyan*, it was held that the court should execute letters rogatory when the foreign proceedings arose out of a fraud practiced on an international scale.[56] However, in responding to a letter rogatory, the court should assess whether the request is oppressive to the witness.[57] In the instant case, the vagueness and width of the information requested by the foreign court was still considered to be reasonable and relevant, but the request was held to be oppressive since fraud and complicity was alleged against the two intended witnesses.[58]

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54. *Nanus Asia*, 1 H.K.L.R. at 397 (finding that the orders did not involve narrow sanctions and were therefore an unauthorized extension of United States penal laws). *See* George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 COLUM. J. TRANSNAT'L L. 553, 614 (1997) (noting that The High Court of Hong Kong discredited the order because it found it to be overreaching and public in nature); *see also* William S. Dodge, *Breaking the Public Law Taboo*, 44 HARV. INT'L L.J. 161, 190 (2002) (remarking that according to the High Court of Hong Kong even if the proceedings and subsequent disgorgement order were not penal they did aid in the enforcement of public law, and subsequently would not be honored).

55. *See* First Am. Corp. v. Sheikh Al-Nahyan., 4 All E.R. 439, 448–49 (stating that English courts should, in the name of comity, attempt to comply with letters of request); *see also* Pharaon v. Bank of Credit and Commerce Int'l SA, 4 All E.R. 455 (Ch. 1998) (quoting *First American* concerning the need for English courts to accede to letters rogatory when appropriate); Metis, *supra* note 33, at 340 n.27 (referring to P.F. Sutherland, *The Use of the Letter of Request (or Letter Rogatory) For the Purpose of Obtaining Evidence For Proceedings in England and Abroad*, 31 INT'L COMP. L.Q. 784, 785 (1982), which states that complying with letters of request have always been a matter of courtesy).

56. *Sheikh Al-Nahyan*, 4 All E.R. at 439 (holding that the court's deference to honoring letters of request should be heightened in instances of international fraud). *See* Pharaon v. Bank of Credit and Commerce Int'l SA, 4 All E.R. 455 (Ch. 1998) (quoting the holding in *First American* concerning globally scaled fraud). *See generally* Trooboff, *supra* note 52, at 934 (commenting on the appeal by a witness to the House of Lords for English courts to take a more international approach concerning comity).

57. *See* British Airways Bd. v. Laker Airways Ltd., [1958] A.C. 58 (Eng.) (asserting that the High Court would be able to exercise discretion in not requiring an English corporation to abide by an American court order for pretrial discovery because of the oppressive nature of the American system of discovery); *see also* S.C. Insurance Co. v. Assurantie Maatschappij 'de Zeven Provincien' NV, 2 All E.R. 1046 (C.A. 1985) (citing that in the absence of oppressive and vexatious behavior on behalf of the parties to the judicial matter, the court should not restrain the parties use of letters rogatory); Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli, [1980] 2 Lloyd's Rep. 546 (Eng.) (stressing that unless the case being pursued in the foreign jurisdiction is oppressive, the English court should not grant an injunction allowing non-compliance with the foreign court's order).

58. *Sheikh Al-Nahyan*, 4 All E.R. at 439 (remarking that it was oppressive to threaten two witnesses with possible serious allegations in an attempt to thoroughly examine them both). *See* Commerce & Industry Co. of Can. v. Certain Underwriters at Lloyds of London, 2 All E.R. 204 (Q.B. 2002) (noting that it is the court's responsibility to not subject the parties to an action involving oppressive evidence requests); *see also* Viking Insurance Co. v. Rossdale, 1 W.L.R. 1323 (Q.B. 2002) (using *First Am. Corp.* as an example of a proper use of the court's discretion in deciding not to enforce a discovery order that involved oppressive evidence requests).

The English courts have shown no sympathy for foreign courts' trespasses into their jurisdiction.[59] Thus in *Re Westinghouse Uranium Contract*, the House of Lords held that a request for the disclosure of information made in a letter rogatory from the United States District Court ought to be denied, as the information involved was subject to the banker's duty of confidentiality in the United Kingdom.[60] The case commented in detail on claims to privilege against production of documents sought under letters rogatory and differentiates between documents required for the purposes of civil proceedings and documents sought for the purpose of a grand jury investigation which might lead to criminal proceedings.[61] Hence, in the instant case, the court did not provide the information requested, as in doing so the court would have assisted investigatory proceedings.[62] In this case the House of Lords expressed firmly its disapproval of the possibility that a British citizen could be exposed to criminal proceedings conducted in the U.S. in respect of acts performed outside the U.S.[63]

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59. *See* Regina v. Comm'r of Police of the Metropolis, [1995] Q.B. 313 (Eng. Div'l Ct.) (referring to the lack of deference shown by the English courts to foreign states' terms of enforcement). *See generally* In re State of Norway's Application, 1 All E.R. 746 (Q.B. 1989) (illustrating the United Kingdom's lack of deference to foreign states' requests for information, as the court rejected Norway's request for information, claiming it to be "fishing expedition"). *But see* Torok v. Torok, 1 W.L.R. 1066 (Fam. 1973) (expressing the natural hesitation and unhappiness of English judges to intrude upon the jurisdiction of foreign courts).

60. *See* Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. LEGAL F. 35, 63 n.96 (2001) (stressing the degree to which England is opposed to foreign subpoenas requesting confidential bank account information); *see also* Levarda, *supra* note 29, at 1384–85. *See generally* Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., 2 W.L.R. at 81 (discussing the problems and issues of self-incrimination inherent in requesting information from individuals, and from banking institutions acting as their agent).

61. *See Rio Tinto*, 2 W.L.R. at 81 (proclaiming that letters rogatory sought for the purpose of grand jury investigation that may lead to a criminal proceeding were not to be honored by English courts); *see also* Re International Power Indus. NV, B.C.L.C. 128 (Q.B. 1985) (declaring that the Evidence (Proceedings in Other Jurisdictions) Act 1975 does not cover pre-trial discovery for criminal cases, extending only to civil cases); Dunfee et al., *supra* note 29, at 888 n.31 (discussing the decision of the House of Lords to characterize a case as being criminal in order to avoid adherence to the Hague Convention).

62. *See Rio Tinto*, 2 W.L.R. 81, 89–90 (emphasizing that no request for information relating to grand jury investigations would be honored by the English courts); *see also* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 270 (1981) (discussing the argument of the British Attorney-General, later accepted by the High Court, that Great Britain will not recognize American attempts to collect evidence from its citizens if the evidence is related to investigative grand jury hearings); Patricia Anne Kuhn, Comment, Societe Nationale Industrielle Aerospatiale*: The Supreme Court's Misguided Approach To The Hague Evidence Convention*, 69 B.U. L. REV. 1011, 1026 n.102 (1989) (quoting the *Rio Tinto* decision that "over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies.").

63. *See Rio Tinto*, 2 W.L.R. at 81 n.1 (citing section 16 of the Civil Evidence Act 1968, which states that in the course of a criminal proceeding, the accused shall be adjudged according to the laws of the state of residency); *see also* Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery*, 9 NW. J. INT'L L. & BUS. 80, 100–01 (1988) (concerning the application of Fifth Amendment privileges to foreign defendants in criminal proceedings). *But see Developments in the Law of Immigration: Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1344 (1983) (discussing the comity that should be afforded to foreign criminal judgments).

Even if the U.K. is entitled, under s.23 of the Convention, not to "execute letters of request issued for the purpose of obtaining pre-trial discovery of documents,"[64] the U.S. Supreme Court has ruled, in *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, that the Convention itself is optional rather than mandatory.[65] This step will allow to some extent the circumvention of the protection offered by English courts to its citizens. Since the U.S. is the only party to the Convention that regards its requirements as optional this might have serious repercussions on the comity existing between nations.[66]

III. Subpoenas

Foreign courts can ignore the issue of comity altogether by serving a subpoena on local offices of international banks in order to obtain evidence located in their overseas branches (in our case, in the U.K.).[67] A foreign court may issue a subpoena,[68] *ad testificandum* (to compel a

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64. Hague Conference on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555 (asserting that any state after having signed the agreement may still declare letters or request invalid if they are for the purposes of pre-trial discovery), *available at* http://www.jus.uio.no/lm/hcpil.taking.of.evidence.abroad.in.civil.or.commercial.matters.convention.1971/doc.html#97 (last visited on Sept. 15, 2004). *See* Morris v. Banque Arabe et Internationale d'Investissement SA, Chancery Division (1999) (understanding the text of Article 23 of the Hague Convention to allow discretion to states to accept or reject letters of request for pre-trial proceedings).

65. 482 U.S. 522, 538 (1987) (holding that the Hague Convention is not the exclusive method for obtaining discovery in international settings). *See* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 631–32 (2001) (noting that the Hague Convention is merely a framework for deciding discovery requests); *see also* Diana Lloyd Muse, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073, 1077–78 (1989) (discussing the practical effects of the Hague Convention in the decision in *Aerospatiale* on the United States and other nations).

66. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1894) (stating that, "comity is the recognition which one nation allows within its own territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience." *Id.*); *see also* Bermann, *supra* note 39, at 545 (opining that the decision in *Aerospatiale* denigrates the Hague Convention); Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 226 n.243 (1994) (revealing that many foreign governments have, in response to the decision in *Aerospatiale*, strengthened or enacted provisions to block their nation from discovery by the United States).

67. *See* Mackinnon v. Donaldson, Lufkin & Jenrette Sec. Corp., [1986] Ch. 482 (Eng.) (holding that a state should refrain from serving a local branch of an international bank with letters of request except in special circumstances); *see also* Loble, *supra* note 29, at 510 (discussing the platform that the English High Court would not allow foreign states to infringe upon the rights of English banks, regardless of the method sought to achieve such infringement); Levarda, *supra* note 29, at 1390 (stating that the negative effects of harming comity between nations is outweighed by the need to enforce United States substantive law).

68. CRIMINAL PROCEDURE (ATTENDANCE OF WITNESSES) ACT, 1965, c. 69, § 8 (Eng.) (noting that instead of issuing a subpoena, an English court would now issue a "witness summons"); *see also* Radio Corp. of Am. v. Rauland Corp., [1956] 1 Q.B. 618 (Eng. Div'l Ct.) (holding that a director of a foreign corporation can be required to testify in a foreign jurisdiction through the issuance of a subpoena).

witness to attend court and give testimony) or a *subpoena duces tecum* (to compel a witness to appear and also bring with him certain documents or records in his possession as specified in the subpoena).[69] Where a court seeks to compel a bank to disclose information, it will normally do so by *subpoena duces tecum*,[70] which would require the bank to produce the specified documents at trial.[71] The bank receiving a subpoena must produce the information required; otherwise it would be placed in contempt of court. On the other hand, in complying with the subpoena the bank will risk infringing its duty of confidentiality to the customer.[72]

Following the Privy Council decision in *Robertson v. Canadian Imperial Bank of Commerce*, a disclosing bank is not required to oppose an effective disclosure order on the basis that non-disclosure will protect the customer's interests.[73] The Privy Council said that the bank was compelled by law to produce the bank statement to the court but it should not withhold knowledge of the subpoena from the appellant.[74] However, the bank was not held to be guilty

69. 28 U.S.C. § 1783 (2004) (stating the U.S. rule for the subpoena of a person in a foreign country). *See* Brian T. Corbett, Comment, Donaldson's *Troublesome Legacy: Whether to Afford Targets of SEC Investigations Notice of Third-Party Subpoenas*, 33 CATH. U.L. REV. 667, 698 (1984) (explaining the difference between the *subpoena ad testificandum* and the *subpoena duces tecum*); Orlee Golfeld, Note, *Rule 45(B): Ambiguity in Federal Subpoena Service*, 20 CARDOZO L. REV. 1065, 1068 (1999) (describing the functions of the *subpoena ad testificandum* and the *subpoena duces tecum*).

70. *See, e.g.,* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 492–93 (1975) (involving a case where a committee of Congress issued a *subpoena duces tecum* on a bank in furtherance of its investigation); *see also* McVane v. FDIC, 44 F.3d 1127, 1130–31 (1995) (discussing whether the Federal Deposit Insurance Corporation can use *subpoenas duces tecum* to request financial information from the family members of the directors of a failed bank). *See generally* 81 AM. JUR. 2 D *Witnesses* § 18 (2004) (stating the purpose of the *subpoena duces tecum*).

71. *See* 81 AM. JUR. 2 D *Witnesses* § 19 (2004) (noting that the purpose of the *subpoena duces tecum* is to compel the disclosure of documents); *see also* Fed. R. Civ. P. 30(b)(1) (2004) (stating that a list of the documents to be produced must accompany a *subpoena duces tecum*). *See generally* Gabriel L. Imperato, *Internal Investigations, Government Investigations*, *Whistleblower Concerns: Techniques to Protect Your Health Care Organization,* 51 ALA. L. REV. 205, 229–30 (1999) (discussing what a company should do upon receipt of a *subpoena duces tecum*).

72. *See, e.g.,* First City, Texas-Houston, N.A. v. Rafidain Bank, 68 F. Supp. 2d 377, 379 (S.D.N.Y. 1999) (holding a bank in contempt for failing to comply with a subpoena); *see also Annual Report: Important Development for the Year. Banking and Savings Institutions,* 38 TAX LAW. 819 (1985) (referring to an Eleventh Circuit case where the court held that a bank's refusal to disclose subpoenaed documents constituted contempt); Heather D. Lawson, *Bank Secrecy and Money Laundering*, 17 BANKING & FIN. L REV. 145, 145 (2002) (explaining the common law duty of confidentiality of a bank to its customers).

73. Robertson v. Canadian Imperial Bank of Commerce, 1 All E.R. 824 (P.C. 1995) (finding that the bank must submit to the subpoena and disclose the requested documents). *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 898 (2d Cir. 1968) (holding that the bank must disclose documents from its German branch despite confidentiality concerns). *But see* X AG v. A Bank, 2 All E.R. 464 (Q.B. 1983) (holding that the injunction prohibiting the bank from disclosing documents would stand due to the harm that would be caused to the plaintiff's business if the information were released).

74. *Robertson*, 1 All E.R. 824 (P.C. 1995) (holding that Canadian Imperial Bank of Commerce must disclose bank statements). *See* Lawson, *supra* note 72, at 155 (explaining that the *Robertson* decision held that although the bank was under a duty to disclose, it was also obligated to inform its customer of the subpoena). *See generally* Crawford, *supra* note 26, at 448 (discussing the decision in *Robertson*).

of a breach of contract or negligence since it was unable to contact the customer, despite using its best endeavor, to inform him that the bank had complied with a subpoena to produce bank statements relating to the customer's affairs.[75]

It should be stressed that *Robertson* is the exception rather than the rule;[76] it is a well-established principle of English law that a subpoena requiring the production by a non-party of documents held outside the jurisdiction concerning business transacted outside the jurisdiction should not be imposed upon a foreign bank.[77] This is because disclosure in such circumstances may amount to a breach of customer confidentiality by the relevant bank branch, because the bank is not compelled by the governing law of the contract to comply with the subpoena.[78]

In *First National City Bank v. Internal Revenue Service*, an employee of First National City Bank was jailed for failure to comply with a subpoena ordering him to produce documents located in the German branch despite the fact that compliance with the order would have been impossible, as it would have been in breach of the German duty of confidentiality.[79] Despite the latter extreme case, the foreign court will normally accept the English courts' injunction to prevent disclosure as a defense to its subpoena.[80]

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75. *Robertson*, 1 All E.R. at 824 (holding that the bank had a duty to use its "best endeavors" to notify its customer of the subpoena). *See* Park v. Bank of Montreal, 1997 Carswell B.C. 777 (expressing that the bank should use its best efforts to inform the customer of its intent to disclose confidential information); *see also* Lawson, *supra* note 72, at 154–55 (commenting that a bank has a duty to use its best efforts to notify its customers of a subpoena).

76. *See* X AG v. A. Bank, 2 All E.R. 464 (Q.B. 1983) (holding that the bank was enjoined from releasing the plaintiff's confidential information). *See generally Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991–1992,* 81 GEO. L.J. 1029, 1029 (1993) (referring to the privilege against disclosure that is sometimes available to banks); Seyfang v. G.D. Searle & Co., 1 All E.R. 290 (Q.B. 1973) (referring to the English custom of exempting third parties from compliance with subpoenas).

77. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., 1 All E.R. 653 (Ch. 1986) (holding that subpoenas should not be enforced against a third party except in the most exceptional of cases); *see also* South Carolina Ins. Co. v. Assurantie Maatschappij .de Zeven Provincien' N.V., 1 All E.R. 1046 (C.A. 1985) (noting that the court lacks the power to enforce a subpoena against a third party to the litigation); *Seyfang*, 1 All E.R. 290 (discussing the English principle of not enforcing subpoenas against third parties).

78. *See* Thomas W. Albrecht & Sarah J. Smith, *Corporate Loan Securitization: Selected Legal and Regulatory Issues*, 8 DUKE J. COMP. & INT'L L. 411, 447 (1998) (acknowledging the contractual obligation of confidentiality that a bank has to its customers under English law); *see also* Robin Morris Collin, *The Law and Stolen Art, Artifacts and Antiques*, 36 HOW. L.J. 17, 42 , 69 (1993) (discussing how a bank's contractual duty of confidentiality works to the advantage of those who engage in illegal art trafficking). *See generally* Libyan Arab Foreign Bank v. Bankers Trust Co., 3 All E.R. 252 (Q.B. 1989) (stating that the contract between a bank and its customers is governed by the law of the place where the account is located).

79. United States v. First Nat'l City Bank, 396 F.2d 897, 898 (2d Cir. 1968) (holding that the bank would have to disclose documents from its German branch). *See* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 115 (S.D.N.Y. 1981) (citing *U.S. v. First Nat'l City Bank*); *see also* W. Clifton Holmes, Comment, *Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering*, 24 NW. J. INT'L L. & BUS. 199, 210–11 (2003) (referring to the ruling in *U.S. v. First Nat'l City Bank* which held that the bank had to comply with the subpoena requesting the disclosure of documents located in Germany).

80. *See* Fed. R. Civ. P. 37(c)(1) (suggesting that "substantial justification" is a defense to failure to disclose subpoenaed information); *see also* Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus,* 10 DUKE J. COMP. & INT'L L. 191, 198 (1999) (describing the Second Circuit's tendency to defer to foreign bank secrecy laws in the interest of judicial comity); Levarda, *supra* note 29, at 1364–65 (discussing the comity approach to extra-jurisdictional discovery).

In *X AG v. A Bank*, the plaintiffs, a multinational corporation and its subsidiary, had accounts with the London branch of the defendant, an American bank.[81] A grand jury subpoena was served on the defendant to produce all documents relating to the account maintained by the plaintiffs at the defendant's London branch.[82] The defendant declared its intention to comply with the subpoena; however, the plaintiffs were granted injunctions from the High Court to restrain the American bank from producing the documents.[83] The injunctions were granted on the ground that if the documents were to be produced the bank would have breached the duty of confidentiality it owed to the plaintiffs under the banker/customer relationship regulated by English law.[84]

In deciding whether the injunctions should have continued for the whole trial, the court had to determine the balance of convenience with regard to:[85]

> (a) (Assuming the New York order was to take effect in London), the breach of both private interest (the implied term of confidentiality in the banker/customer contract) and public interest in guarding the duty of confidentiality imposed on banks operating in England.[86]
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> (b) The New York courts, under the doctrine of foreign government compulsion, would not hold the bank in contempt for not producing the required documents, since it was prevented from doing so by an injunction from the

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81. X AG v. A Bank, 2 All E.R. 464 (Q.B. 1983) (upholding an injunction prohibiting the bank from complying with a subpoena). *See* Peter S. Smedersman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 804 n.82 (1989) (describing the facts and the outcome of *X A.G. v. A Bank*). *See generally* Levarda, *supra* note 29, at 1387 (referring to *X A.G. v. A Bank)*.

82. *X AG*, 2 All E.R. at 464 (affirming an injunction against bank disclosure of documents). *See generally* U.S. v. The Chase Manhattan Bank, N.A., 854 F. Supp. 1080, 1084 (S.D.N.Y. 1984) (citing *X A.G. v. A Bank*); Loble, *supra* note 29, at 510 (discussing the facts and outcome of *X A.G. v. A Bank)*.

83. *X AG*, 2 All E.R. at 464 (explaining lower court's decision to continue injunctions). *See Re Bank, A*, TIMES (London), Feb. 4, 1983 (discussing court's ruling that the balance of convenience lay in continuing the injunctions until trial); *see also Pharaon v. Bank of Credit and Commerce International SA (In Liquidation) Price Waterhouse v. Bank of Credit and Commerce International SA (In Liquidation)*, TIMES (London), Aug. 17, 1998 (summarizing case where defendant applied to court to comply with subpoena for bank documents, risking breach of plaintiff's injunction).

84. *X AG*, 2 All E.R. at 464 (summarizing balance of convenience between the continuation of injunction and the very considerable harm to the plaintiffs). *See Re Bank, A*, TIMES (London), Feb. 4, 1983 (noting court's granting leave to defendant to comply with subpoena to produce bank documents after application of balancing test between public interest and confidentiality); *see also Robertson*, 1 All E.R. 824 (discussing difficulty in determining duty owed by bank to customer).

85. *X AG* , 2 All E.R. at 464 (expressing that the balance of convenience is the correct balancing test). *See* Dir. Gen. of Fair Trading v. Planet Telecom, 2002 WL 347149, at *7 (Ch. Mar. 6, 2002) (applying balance-of-convenience test to grant injunction of misleading advertising); *see also* Att'y Gen. v. Turnaround Distrib. Ltd., [1989] 1 F.S.R. 169, 177–79 (Q.B. 1989) (upholding an injunction against book distribution in Ireland by a U.K. distributor after application of balance-of-convenience test).

86. *See* Tournier v. Nat'l Provincial and Union Bank of Eng., [1924] 1 K.B. 461, 473 (C.A. 1924) (outlining the qualifications of the implied duty of confidentiality in the banker/customer relationship); *see also* Robertson v. Canadian Imperial Bank of Commerce, 1 All E.R. 824 (P.C. 1995) (discussing duty owed by bank to customer); Banque Nationale de Paris S.A. v. Guy Frechin and Others, [1992] E.C.C. 141, 142 (Cass. 1992) (ordering production of bank documents despite duty of secrecy).

> court having jurisdiction on the branch where the documents were located.[87]
>
> (c) If the English court was not to prevent disclosure it would involve the court tolerating a breach of an obligation of confidence which in the ordinary course of business it would maintain in the public interest.[88] In discussing the question of disclosure in breach of the duty of confidentiality, Leggat, J., referred to the case of *British Nylon Spinners Limited*[89] and quoted the passage "it is the proper province of English Courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty to do so for the protection of rights which are peculiarly subject of their protection."[90]

After assessing all these factors the court concluded that the balance of convenience was in favor of the plaintiffs; hence, the injunctions were continued.[91]

A similar view was taken in *FDC Co. Ltd. v. Chase Manhattan Bank, NA*, where the Hong Kong Court of Appeal held that an order directed to a bank by a foreign court to disclose information was not sufficient to constitute a requirement for disclosure under compulsion of law.[92]

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87. *See* Fed. R. Civ. P. 37 (explaining rule for failure to make disclosure and sanctions); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987) (addressing U.S. law on requests for disclosure); C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 483-99 (1992) (examining the role of the RESTATEMENT and judicial decisions in balancing competing interests involved in document disclosure).

88. *See Tournier*, 1 K.B. at 473 (outlining the qualifications of the implied duty of confidentiality in the banker/customer relationship); *see also Robertson*, 1 All E.R. 824 (discussing the duty owed by a bank to a customer); Re A New York Bank, [1983] E.C.C. 342, 363 (Q.B. 1983) (analyzing the duty of confidentiality under English law).

89. British Nylon Spinners Ltd. v. Imperial Chemical Indust. Ltd., [1953] Ch. 19, 19 (C.A. 1952) (affirming holding of lower court to continue injunction because the foreign court order could not assert extraterritorial jurisdiction). *See* Lawrence Collins, *Blocking and Clawback Statutes—The United Kingdom Approach: Part 1*, Sept. J. BUS. L. 372, 373 (1986) (indicating the effect of English jurisdiction on a U.S. court order); *see also* Richard Arnold, *Can One Sue in England for Infringement of Foreign Intellectual Property Rights*, 12(7) EURO. INTELL. PROP. REV. 254, 255-56 (citing *British Nylon* with respect to injunction restraining defendant from assigning non-English patents in compliance with U.S. court order).

90. *British Nylon Spinners*, [1953] Ch. 19 at 27 (stating that English courts should not refrain from exercising their jurisdiction if it is invoked). *See* Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 511 (Eng.) (dismissing the appeal in a conflict of laws case between Greek and English laws where court held jurisdiction agreements were governed by English law); *see also* Royal Bank of Can. v. Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, 2004 WL 62021, at *8 (C.A. Civ. Div. Jan. 23, 2004) (denying injunction restraining bank defendant from obtaining determination of issue in a New York State proceeding where English court had jurisdiction).

91. *See* X AG v. A Bank, 2 All E.R. 464 (Q.B. 1983) (selecting the balance-of-convenience test for the plaintiffs); *see also* Am. Cyanamid Co. v. Ethicon Ltd., [1975] F.S.R. 101, 109 (H.L. 1974) (granting interlocutory injunction after applying balance-of-convenience test); Dir. Gen. of Fair Trading v. Planet Telecom, 2002 WL 347149, at *7 (Ch. March 6, 2002) (applying balance-of-convenience test for injunction against misleading advertising).

92. F.D.C. Co. Ltd. v. Chase Manhattan Bank, N.A., [1990] 1 H.K.L.R. 277, 283 (Hong Kong) (holding that a foreign order to disclose information was not sufficient to constitute a requirement for disclosure). *See* Jim Beam Brands Co. v. Kentucky Imp. Pty. Ltd., [1994] 1 H.K.L.R. 1, 8 (Hong Kong) (asserting that the public interest of assisting a foreign court is insufficient to override the public interest in protecting professional confidentiality); *see also* H.K.C.P. R.H.C. Order 70, 70/6/2 (Hong Kong) (stating general principles for compliance with foreign request for evidence).

Thus the Court of Appeal upheld injunctions restraining the Hong Kong branch of Chase Manhattan from divulging the documents requested or removing any such documents from the jurisdiction.[93] This was despite the fact that Chase Manhattan Bank's failure to disclose in compliance with the orders meant that the office of the bank located within the local jurisdiction was liable to daily fines for non-compliance with the order directed to the overseas office.[94] The view of the Hong Kong Court of Appeal has been confirmed in the English decision of *Bank of Tokyo Limited v. Karoon*.[95]

This was not the case in *Price Waterhouse (a firm) v. BCCI Holdings*,[96] where Price Waterhouse U.K. was asking the court for a declaration that it was not precluded by confidentiality arising from its acting in relation to BCCI from disclosing documents to the Serious Fraud Office and the Bank of England in relation to BCCI's collapse.[97] In such a case, Millet, J., held that despite the strong public interest in the maintenance of the duty of confidentiality such duty was subject to limitation when it is against the important public interest in the effective supervision of the authorized banking institution.[98] Despite the fact that this scenario does not

93. F.D.C. Co. Ltd. v. Chase Manhattan Bank, [1990] 1 H.K.L.R. 277, 289 (Hong Kong) (upholding injunction to preserve bank/customer confidentiality). *See* Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corp., [1987] E.C.C. 139, 152 (Ch. 1985) (discharging subpoena served on London branch of New York-based Citibank for documents in the New York office); *see also* Silvia B. Piñera-Vazquez, *Extraterritorial Jurisdiction and International Banking: A Conflict of Interests*, 43 U. MIAMI L. REV. 449, 455 (1988) (analyzing *In Re Sealed,* where bank acted in good faith and was not compelled to comply with subpoena).

94. *Chase Manhattan Bank*, 1 H.K.L.R. at 289 (fining bank US$10,000 per day for failure to comply with enforcement order). *See* Graco v. Kremlin, Inc., 23 I.L.M. 757, 776 (1998) (imposing severe sanctions for non-compliance); *see also* Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 25 I.L.M. 1475, 1486 (1986) (noting that sanctions might be appropriate for non-compliance).

95. Bank of Tokyo Ltd. v. Karoon, [1987] A.C. 45, 65 (C.A. 1984) (denying an injunction to plaintiff bank's London branch to restrain proceedings in New York). *See* Airbus Industrie G.I.E. v. Patel, 37 I.L.M. 1076, 1085 (1998) (stating that anti-suit injunctions are necessary to protect the jurisdiction of the enjoining court); *see also* In Re Norway's Application, 1987 Q.B. 433, 448 (C.A. 1987) (holding that English law can effectively control questioning of any permissible intrusion into the private affairs of bank customers).

96. Price Waterhouse v. BCCI Holdings (Luxembourg) S.A., [1992] B.C.L.C. 583, 583 (Ch. 1994) (discussing plaintiff's wish to comply with document request without breaching duty of confidentiality to defendant). *See* Hassneh Insurance Co. of Israel and Others v. Steuart J. Mew, [1993] 2 Lloyd's Rep. 243, 249 (Eng.) (explaining circumstances in which breach of duty would be justified in arbitration proceeding); *see also* Hillegom Municipality v. Cornelis Hillenius, [1986] 3 C.M.L.R. 422, 438 (E.C.J. 1985) (holding that bank supervisory bodies under Article 12(1) of the European Communities Banking Directive 77/780 may be required by national law to breach their duty of confidentiality).

97. *Price Waterhouse v. Bank of Credit*, B.C.L.C. at 583 (holding that when the public interest in the detection or prevention of wrongdoing, or in preventing a miscarriage of justice, or in the maintenance of public safety prevail, making a contractual undertaking against disclosure would be against public policy). *See* Pharaon v. Bank of Credit and Commerce Int'l SA, 4 All E.R. 455 (Ch. 1998) (explaining that Price Waterhouse, which ordinarily would argue against disclosure of its information by the bank, asks the court to permit disclosure, because of the U.S.-imposed fines for failure to comply with U.S. order). *See generally* Burmah Oil Co. Ltd. v. Bank of Eng., 3 All E.R. 700, 719 (A.C. 1979) (explaining situations where disclosure of confidential information is permitted).

98. *Price Waterhouse v. Bank of Credit*, B.C.L.C. at 583 (allowing disclosure of bank records despite competing public interest). *See* Attorney Gen. v. Guardian Newspapers, 3 All E.R. 545, 659 (Ch. 1990) (explaining that disclosure requires weighing the public interest in maintaining confidence against a countervailing public interest favoring disclosure); *see also* Douglas v. Pindling, [1996] A.C. 890, 902 (P.C. 1996) (determining that disclosure is allowed if public interest in privacy is outweighed by public interest in administration of justice).

directly apply to disclosure sought for the purpose of private litigation, it established an important principle that the duty of confidentiality will not be upheld when a countervailing public interest, like fraud, is involved.[99]

This principle was finally applied to private civil proceeding in *Pharaon v. BCCI*,[100] where pursuant to the U.S. Civil Procedure Rules, which allows one to seek discovery from third parties not party to the action, a subpoena was issued in New York against Price Waterhouse U.K. seeking the production of documents which would have assisted the U.S. litigation.[101]

The disclosure of documents, rather surprisingly, was allowed and the court was eager to stress that it recognized the public interest in potentially overriding the duty of confidentiality in the interests of international fraud.[102] However, such disclosure was to be limited to what is reasonably necessary in the circumstances to achieve such public interest.[103]

Despite the willingness of the courts to provide assistance to the victim of frauds, disclosure of confidential information for purposes other than that for which the subpoena was spe-

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99. *See Guardian Newspapers*, 3 All E.R. at 659 (determining that disclosure is necessary where public interest of confidence is outweighed by another public interest of disclosure such as protection against fraud); *see also* In re Arrows Ltd., [1992] Ch 545, (Eng.) (holding in favor of the public interest of investigating fraud). *See generally* Marlwood Comm. Inc. v. Kozeny, [2004] E.W.H.C. 189 (Q.B. 2004) (noting that if there is reason to believe that a person was involved in fraud the court has powers to require disclosure).

100. *Pharaon v. BCCI*, 4 All E.R. at 455 (explaining that the balancing of public interest against duty of confidentiality should be employed in determining disclosure of confidential materials). *See generally* Bank of Credit and Commerce International Ltd. v. Akindele, [2001] Ch 437 (Ch. 2000) (explaining the facts of *Pharaon*, the largest bank fraud in history); Anu Arora, *Round up: Banking Law*, 1 COMPANY LAWYER 263, 64 (1999) (summarizing the facts of *Pharaon v. Bank of Credit and Commerce Int'l SA*).

101. *Price Waterhouse v. Bank of Credit*, B.C.L.C. at 583 (holding that the third party has to disclose the confidential information due to the public interest). *See* Bales, *supra* note 34, at 776–77 (emphasizing the court's finding that Price Waterhouse does not have sufficient grounds to oppose disclosure). *See generally* Elizabeth J. Cabraser, *Discovery of Accountants as Third Parties and Defendants: Privilege issues and Ethical Considerations*, 526 PRAC. L. INST. 665, 686 (1995) (stating that federal rules do not differentiate between parties and third parties).

102. S*ee Pharaon*, 4 All E.R. at 455 (holding that the duty of confidentiality is outweighed by the greater public interest in making available confidential documents relating to fraud); *see also* Marlwood Comm. Inc. v Kozeny, E.W.H.C. 189 (Q.B. 2004) (noting that disclosing information for the investigation of international fraud takes priority over the duty of confidentiality); Bank of Crete SA v. Koskotas, 1 All E.R. 748 (Ch. 1993) (emphasizing the need for international cooperation in dealing with fraud).

103. *See Pharaon*, 4 All E.R. at 455 (reasoning that the disclosure of confidential documents should be allowed only when reasonably necessary to promote the public interest). *See generally* Rinita L. Sarker, *BCCI: Still Counting the Cost*, 1 COMPANY LAWYER 337, 338 (1999) (emphasizing the necessity for a reasonable necessity in disclosing documents).

cifically obtained would only be acceded to where the court feels that the purpose is "entirely legitimate"[104] or in "exceptional circumstances."[105]

IV. Conclusion

As the relevance of information becomes more global, it appears clear that the English duty of confidentiality between banker and customer is subject to a limiting principle. It is subject to the right to disclose information where there is a higher public interest in cooperating with a foreign court than in maintaining confidentiality.[106] For the individual owed the duty of confidentiality and affected by potentially damaging disclosure, this could be a major problem.

However, the English courts have offered protection in the shape of precise drafting of documents to limit unnecessary disclosure.[107] Moreover, the English courts are reluctant to uphold a foreign court's order which is contrary to English law or which may impose oppressive burdens on witnesses or to allow disclosure if there may be a threat of action or oppressive conduct in the foreign court.[108]

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104. *See* Omar v. Omar, 3 All E.R. 571, (not stated) (Ch. 1996) (describing the scope of legitimate purposes for which confidential information could be used). *See generally* Howard S. Erbstein, *Bank Secrecy Law and its Implication for American Securities Regulation*, 1 COMPANY LAWYER 133, 135 (1995) (listing the special circumstances for which the confidential information could be disclosed); Nigel A. Clayton, *Problems of Self-Incrimination in Seeking to Obtain Bank Records: Part 1*, J. INT'L BANK. L. 115, 116 (1996) (explaining that the special circumstances might include compulsion of law, disclosure in the public interest and disclosure in the interests of the bank).

105. *See* Marlwood Commercial Inc. v. Kozeny, [2004] E.W.H.C. 798, (C.A. 2004) (stating that special circumstances should exist for the disclosure to be made); *see also Bank of Crete*, 1 All E.R. 748 (Ch. 1993) (emphasizing that plaintiffs are only permitted access to confidential information in exceptional circumstances and for a particular purpose). *See generally* Clayton, *supra* note 104, at 116 (emphasizing the need for exceptional situations in disclosing bank account information).

106. *See, e.g.,* Carl Richard, *Banker-Customer-Confidentiality,* J. INT'L BANK. L. 117, 118 (1998) (explaining that when the *Pharaon* court was faced with a choice between duty of confidentiality and cooperating with foreign authority, it chose the latter); *see Marlwood*, 3 All E.R. at 648 (stating that English courts will give considerable weight to the needs of foreign jurisdiction). *But see* Erbstein, *supra* note 104, at 137 (showing that foreign courts can reject a subpoena for disclosure even in a case involving fraud).

107. *See Pharaon*, 4 All E.R. at 455 (emphasizing that a subpoena should be narrowly drafted in such a way as to ask for disclosure of only necessary information). *See generally* Sarker, *supra* note 103, at 338 (emphasizing the necessity for narrow drafting of released documents).

108. *See* Williams & Humbert, [1985] 2 All E.R. at 208 (classifying the laws of other countries either not recognized or not enforced by the English courts); *see* R. v. Crown Court at Southwark, [1990] Q.B. 650 (Q.B. 1989) (showing English court's unwillingness to make orders of disclosure when proper respect is not shown to such confidential information in the United States). *See generally* Royal Bank of Canada v. Cooperatieve Centrale Raiffeisen-Boerenleenbank, [2004] E.W.C.A. Civ. 7 (C.A. 2004) (explaining that English courts will not allow a person to be sued if a foreign proceeding is oppressive or interferes with English due process).

It should also be added that English courts may be somewhat jealous in protecting the sovereignty of the United Kingdom, and thus the line separating the willingness to assist foreign courts and the protection of sovereignty may not always be clearly defined or may sometimes conflict in this regard.[109]

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109. *See generally Marlwood*, [2004] E.W.H.C. at 189 (emphasizing courts' bias against foreign parties in disclosing confidential information); George J. Moscarino, *Beating the Shell Game: Bank Secrecy Laws and Their Impact on Civil Recovery in International Fraud Actions*, 1 COMPANY LAWYER 177, 178–79 (1997) (discussing unwillingness of countries to cooperate with foreign court orders to force disclosure).

F. Hoffmann-La Roche Ltd. v. Empagran S.A.

124 S. Ct. 2359 (2004)

The United States Supreme Court found that the general exclusionary rule and domestic-injury exception of the Foreign Trade Antitrust Improvements Act are not applicable where the cause of action rests solely on foreign harm that is deemed independent of any domestic harm suffered within the United States.

I. Holding

In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,[1] the United States Supreme Court held that five foreign vitamin distributors lacked standing to bring suit in the United States in regard to a price-fixing conspiracy, because the adverse foreign effects suffered by these companies, the sole basis of their action, were independent of any adverse domestic effects suffered within the United States.[2] Because these foreign effects can be independently viewed and separately scrutinized by different courts based on their own local antitrust rules, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")[3] exceptions should not apply to these claims based solely on foreign effect.[4] This decision indicates that the Court has shifted toward the more conservative approach advocated by Justice Scalia in his dissent in *Hartford Fire Insurance Co. v. California*[5] that customary deference should be given to other nations' judiciary systems, even when there is no conflict of laws between the U.S. and these other nations.[6]

II. Background and Facts

Hartford Insurance is based on the view that Congress originally expressed no opinion as to whether defence should be given to Sherman Act cases relying on international comity.[7] The United States Supreme Court in that case determined that the only real limit on allowing foreign injury cases to come under U.S. jurisdiction was whether a conflict of law existed related to a specific antitrust matter.[8] The Court gave little weight to deference to other nations, even though the British government had provided amicus curiae briefs indicating its view that the three London reinsurers under scrutiny were in compliance with British law and policy and

1. 124 S. Ct. 2359 (2004) ("*Hoffmann*").
2. *Id.* at 2364.
3. 15 U.S.C. § 6a.
4. *Id*.
5. Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (holding that if no conflict of laws exists, international comity does not dictate against exercising jurisdiction) ("*Hartford Fire*").
6. *Id.* at 812 (Scalia, J., dissenting in part, clarifying that the Sherman Act should not be applicable and that deference should be given to foreign courts in this matter).
7. *See* H.R. Rep. No. 97-686, at 13 (1982).
8. *Hartford Fire*, 509 U.S. at 797.

should not be subject to scrutiny in the U.S. judicial system for purely foreign harm.[9] The Court held that legality of conduct in Britain did not exclude U.S. judicial review based on the Sherman Act even of purely foreign harm.[10] Justice Scalia's dissent recognized the tradition of deference with respect to foreign harm, but the majority chose not to follow this tradition.[11]

Justice Scalia's reasoning serves as a backdrop to the *Hoffman* case, which began as a class-action suit filed on behalf of foreign and domestic vitamin purchasers, who claimed violations of both section 1 of the Sherman Act and sections 4 and 16 of the Clayton Act.[12] Their complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, created a price-fixing arrangement that artificially raised the price of vitamins for customers in the United States and in foreign countries.[13] As relevant to this recent decision, petitioners moved to have this suit dismissed as to the five foreign vitamin purchasers, who bought vitamins only for delivery to locations outside of the United States.[14] Petitioners noted that these foreign vitamin purchasers never asserted that the vitamin purchases were made in the United States or that these purchase transactions had anything to do with U.S. commerce.[15] The District Court dismissed the claims of these foreign vitamin manufacturers, finding that none of the exceptions to the FTAIA were applicable to these foreign purchasers.[16] The domestic purchasers in this matter transferred their claim to another suit and did not participate in the appeals process.[17]

A divided Court of Appeals for the District of Columbia reversed this decision and declared that the FTAIA's general exclusionary rule and domestic-injury exception did apply.[18] This court believed that the vitamin manufacturers' price-fixing conspiracy had "a direct, substantial, and reasonable foreseeable effect" on domestic trade and that "such effect" gave rise to a Sherman Act claim.[19] The court clarified that, even though it assumed that the effects of higher prices in foreign countries were independent of higher prices in the United States, this lack of connection was irrelevant, because the FTAIA's stated goal is to deter harmful price-fixing activity wherever it may arise.[20]

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9. *Id*.

10. *Id*.

11. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 354 (1959) (recognizing that statutes should not be interpreted in ways that conflict with international law).

12. *Hoffman,* 124 S. Ct. at 2363. Sherman Act, 26 Stat. 209, *as amended*, 15 U.S.C. § 1 (2004). Clayton Act, 38 Stat. 731, 737, *as amended*, 15 U.S.C. §§ 15, 26 (2004).

13. *Id.*

14. *Id*. at 2363–64. These five foreign vitamin distributors were located in Ukraine, Australia, Ecuador, and Panama.

15. *Id*.

16. Empagran S.A. v. F. Hoffmann-La Roche Ltd., 2001 U.S. Dist. LEXIS 20910 (D.D.C. 2001) (granting the motion to dismiss the suits of the foreign vitamin purchasers).

17. *See supra* note 7.

18. F. Hoffmann-La Roche Ltd. v. Empagran S.A, 315 F.3d 338 (D.C. Cir. 2003).

19. *See supra* note 10; Sherman Act, 15 U.S.C. §§ 6a(1), (2) (2004).

20. *Id*.

The Supreme Court granted certiorari in this matter because the circuit courts had come to diametrically opposed determinations regarding the application of the FTAIA's exceptions.[21]

III. The Court's Analysis

A. The Foreign Trade Antitrust Improvements Act Can Apply to Anti-Competitive Conduct That Has a Foreign Effect

Congress passed the Foreign Trade Antitrust Improvements Act to ensure that American exporters understood that they could enter into anti-competitive business arrangements as long as the only adverse effect was upon foreign markets.[22] The FTAIA removed from the reach of the Sherman Act export and other foreign commercial activities, unless those activities adversely affected domestic commerce by negatively affecting importing or exporting within the United States.[23] The language of the FTAIA initially could be viewed as placing all non-import activity out of the reach of the Sherman Act, but the clause regarding the link to domestic effect left the door open to regulation of foreign effect claims.[24] The respondents argued, based on the words "with foreign nations," that the reach of the FTAIA extends only to conduct involving U.S. exports to foreign nations,[25] but the Court rejected this narrow view, referring to the changes that the House Judiciary Committee made to the FTAIA's statutory language to allow for claims outside of direct U.S. commerce.[26] The Court concluded that FTAIA's general rule can apply even when the anti-competitive conduct at issue is wholly foreign.[27]

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21. *See* Den Norske Stats Oljeselskap AS v. HeereMac Vof, 241 F.3d 420, 427 (5th Cir. 2001) (stating that FTAIA exceptions do not apply where foreign injury is independent of domestic harm); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002) (stressing that the exceptions apply even where the foreign injury is independent from the domestic injury); *see also* Deborah J. Buswell, *Foreign Trade Antitrust Improvements Act: A Three-Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979, 979 (2003) (highlighting that the views of the various Courts of Appeals are diametrically opposed); William J. Tuttle, Comment, *The Return to Timberlane?: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANSNAT'L L. 319, 366 (2003) (stressing that this strict approach has been "embraced, modified, and rejected" by numerous courts throughout the U.S.).

22. *See* H.R. Rep. No. 97-686, pp. 1-3, 9-10 (1982).

23. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2004) (clarifying that "Section 1 to 7 [of the Sherman Act] shall not apply to conduct involving trade or commerce . . . with foreign nations unless . . . (1) such conduct has a direct, substantial, and reasonable foreseeable effect . . . and . . . (2) such effect gives rise to a claim under the provisions of section 1 to 7").

24. *Hoffmann*, 124 S. Ct. at 2365.

25. *Id.* The respondents argued that the phrase "with foreign nations" in the language of section 1 of the FTAIA limits overview to export transactions between the United States and foreign nations.

26. *Id.* at 2366. H.R. Rep. No. 97-686, pp. 9-10 (1982). The Court refers to the language of this congressional report that states, while referring to the changes made to FTAIA by the House Judiciary Committee, that: "It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment."

27. *Id*.

B. The Foreign Trade Antitrust Improvements Act's Exceptions Do Not Apply When Adverse Foreign Effect Is Independent of Adverse Domestic Effect

The Court concluded that the vitamin manufacturers' price-fixing conspiracy significantly and adversely affected both U.S. and foreign customers, but the ability to separate the adverse foreign effect from any adverse local effect was critical to the Court's analysis.[28]

This decision to exclude foreign effect represents a critical divergence from the position set forth in *Hartford Insurance* that the only relevant inquiry is whether the foreign antitrust laws conflict with the laws that would be applied by the U.S. court.[29] The independent nature of these effects led the Court to hold that the FTAIA's exceptions did not apply for two main reasons.[30]

1. Principles of Prescriptive Comity Prevent Enforcement Based on the FTAIA's Exceptions

The Court must strike a balance between the goal of effective regulation of anti-competitive behavior and its interference with the sovereign authority of other nations.[31] As a rule, the Court will construe ambiguous statutes in a fashion that does not interfere unnecessarily with the sovereign laws of other nations.[32] Interpreting U.S. laws to allow them to work harmoniously with the laws of other nations ensures that the highly interdependent flow of commerce throughout the world is not hindered.[33] Interference with other nations' regulations should occur only when the cause of action reflects a legitimate legislative effort to redress a domestic antitrust issue caused by anti-competitive conduct.[34] Ideally, the Court wants to limit conflicts with other nations' sovereignty whenever possible.[35]The intent of Congress when it passed the FTAIA indicates that the Court should not attempt to extend the reach of this legislative protection to foreign harm distinct from domestic harm.[36] Specifically, the congressional intent of

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28. *Id.* The Court clarifies that neither the FTAIA's exceptions nor anything else based on the Sherman Act gives these foreign vitamin manufacturers standing to sue in the U.S.

29. *Hartford Fire*, 509 U.S. at 797.

30. *Hoffmann*, 124 S. Ct. at 2365.

31. *Id*.

32. *Id. See, e.g.,* McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10, 20–22 (1963) (choosing to apply the National Labor Relations Act with deference to other nations regarding foreign-flag vessels).

33. *Id*.

34. *Id.* at 2367. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443–444 (2d Cir. 1945) (reflecting the U.S. judiciary's attempt to interfere with foreign antitrust enforcement only when necessary).

35. *Id.*; *see also* David V. Dzara, Den Norske Stats Oljeselskap As v. Heeremac Vof: *Interpreting the Foreign Antitrust Improvements Act to Determine Whether "A Claim" Means "The Claim"*, 16 TEMP. INT'L & COMP. L.J. 411, 446 (2002) (recognizing that the majority's decision takes into account key policy considerations in regard to foreign relations).

36. *Id*.

the FTAIA was to release foreign and domestic anti-competitive behavior from Sherman Act constraints, even when this conduct causes foreign harm.[37]

The Court commented extensively on the negative effect that expanding the reach of the Sherman Act would have on the U.S. judiciary and on the ability of foreign nations to enforce their own anti-competitive conduct regulations.[38] If all foreign harms could be addressed in the United States, this worldwide subject matter jurisdiction would allow a foreign citizen who is unhappy with his local antitrust enforcement to bypass his own sovereign's provisions.[39] The local authority would be undermined, and the U.S. judiciary would be burdened with extra cases that have no effect on U.S. domestic trade.[40] The Court also asserted that, even though most nations agree on what conduct should be considered anti-competitive, there exists a dramatic disagreement regarding the appropriate remedies for these situations.[41] For example, many nations do not agree with the U.S. policy of private treble-damages remedies.[42]

Many foreign nations filed briefs arguing that the ability of foreign plaintiffs to bring suit in the U.S. would undermine these nations' less generous remedial schemes and would upset the local considerations embodied when these laws were created.[43] These nations expressed concern that they would lose the ability to enforce their own antitrust policies, because companies would have less incentive to cooperate with local authorities in return for prosecutorial amnesty.[44] The Court considered all of these potential effects in determining not to expand the reach of the FTAIA to purely foreign harm.[45]

The Court also rejected the respondent's proposal that courts should take account of comity issues on a case-by-case basis.[46] Taking this approach would require each court to make

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37. *Id.* Of course, an exception is made when this conduct also causes domestic harm.

38. *Id.* Foreign nations including Germany, Canada, and Japan filed briefs in support of limiting the reach of the FTAIA.

39. Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW 273, pp. 51–52 (Supp. 2003) (emphasizing that Congress did not intend the FTAIA to make the Sherman Act applicable to all foreign harm suits throughout the world).

40. *Hoffmann*, 124 S. Ct. at 2368. The U.S. taxpayers who support this court system would see little benefit from the expansion of the FTAIA to litigants with no association with the United States.

41. *Id.*

42. *See, e.g.*, 2 ABA SECTION OF THE ANTI-TRUST LAW, ANTI-TRUST LAW DEVELOPMENTS 1208–09 (5th ed. 2002) (asserting that the judicial systems in Germany and France generally do not favor generous treble damages).

43. *Hoffmann*, 124 S. Ct. at 2368. Briefs filed by Germany, Canada, and Japan focused on these nations' fears that their own laws would be undermined.

44. *Id.* The ability of plaintiffs to pursue suit in the United States means defendant companies are more inclined to cooperate only with U.S. officials. Foreign nations would be losing a valuable bargaining chip in regard to ensuring cooperation by these companies.

45. *Id.* The Court cannot emphasize enough the importance of looking at all potential effects of expanding the reach of the FTAIA.

46. *Id.* at 2369. The respondents suggest that the Court can simply abstain when comity considerations so dictate.

a judgment call whenever a potential comity issue is raised; this system would be "too complex to prove workable."[47] Since the determination would be quite technical each time, court procedures would be lengthened, thereby increasing costs and delays, which would in turn threaten foreign nations' abilities to enforce their own antitrust enforcement policies.[48] This multitude of issues related to comity prevented the Court from agreeing with the Court of Appeals' determination to allow suits based purely on foreign injury.[49]

2. No Cases Exist to Show that Congress Designed the FTAIA to Expand in Any Way the Sherman Act's Scope Regarding Foreign Commerce

No prior decisions exist to support the respondent's contention that the FTAIA was created to expand the Sherman Act's scope as applied to foreign commerce.[50] The FTAIA was designed to clarify the reach of the Sherman Act in regard to the participation of companies in anti-competitive behavior that does not have a domestic effect; it does not, as indicated by congressional intent, make this Act applicable when there is only foreign independent harm.[51] The Court quickly disposed of the cases that respondents presented as on point with respect to this issue.[52]

The first three cases involved American and foreign companies jointly engaged in anti-competitive behavior having effects on both domestic and foreign customers.[53] In each of these cases, the plaintiff was the U.S. government, which has extremely broad powers to seek out anti-competitive relief on behalf of the country.[54] These cases were of little use to the court, because private plaintiffs are far less likely to be able to secure the same broad relief.[55] Thus, the Court could not determine, based on these cases, whether a private plaintiff is entitled to the same relief.[56]

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47. *Id.* Even allowing for rare independent foreign injury claims to be tried in the U.S. would create too much confusion to foreign litigants regarding this matter.

48. *Id.* Even in simple cases, the costs associated with litigation preparation would be extremely high as the sides attempt to enter or to avoid the U.S. judiciary system.

49. *Id.* The opinion notes that nations must be allowed to choose whether to follow the antitrust regulations imposed by Congress; forced imposition should not be utilized.

50. *Id.* Neither the Solicitor General nor the respondent provided any cases that indicate that the FTAIA expands the Sherman Act's reach to include independent foreign harms.

51. *Id.* No congressional record indicates to the Court that Congress's goal was to expand the Sherman Act's reach.

52. *Id.* The Court believes that none of the respondents' cases directly address independent foreign harm.

53. *Id* at 2370. *See* Tinken Roller Bearings Co. v. United States, 341 U.S. 593, 595 (1951) (discussing an agreement by U.S. and European anti-friction bearings makers to eliminate competition); United States v. National Lead Co., 332 U.S 319, 325–28 (1947) (presenting an international cartel agreement to restrain commerce in products such as titanium pigments); United States v. American Tobacco Co., 221 U.S. 106, 171–72 (1911) (denouncing an agreement to divide worldwide tobacco markets).

54. *Id.* The U.S. government has legal authority broad enough to allow it to carry out its mission of eliminating anti-competitive harm.

55. *Id.* A vast difference exists between the ability of the government and a private plaintiff to secure relief.

56. *Id.* The government's ability to obtain relief is not reflective of a private party's ability to get the same relief.

Three other lower court cases were also submitted as precedent to support the proposition that the FTAIA's exceptions extend to independent foreign injury, but the Court determined none of them were relevant.[57] In a district court case, an Italian firm was allowed to sue on the basis of a purely foreign injury, but the claim was "inextricably bound up with domestic restraints on trade" and was not an independent foreign injury.[58] Another district court case allowed for a claim based on an injury in the Dominican Republic, but the court also held that this foreign injury was tied to domestic harm and was thus not independent.[59] A third case involved a conspiracy against an independent oil producer in Libya, but the court never addressed the specific issue of independent foreign harm.[60] The Court proclaimed that none of these cases make it clear that Congress intended the FTAIA's exceptions to extend to independent foreign injuries.[61]

The Court also dealt with a linguistic argument emphasizing the Sherman Act's applicability to certain kinds of conduct regardless of where the conduct occurs or who is affected.[62] The respondent asserted that the natural language of the statute agrees with this interpretation.[63] The Court saw some validity in this argument, but noted that similar conduct can be treated differently based on varying circumstances and that the natural language argument is reasonable, but does not outweigh the other considerations, such as deference to other countries' judicial systems, previously discussed in the opinion.[64]

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57. *Id.* The Court is responding to three lower court cases that the respondent presented in its briefs.

58. Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research & Engineering Co., 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. 1977) (allowing an Italian firm to bring a claim based on foreign injury under the Sherman Act).

59. *See* Dominicus Americana Bohio v. Gulf Western Industries Inc., 473 F. Supp. 680 (S.D.N.Y. 1979) (permitting American and Dominican claimants to go forth with a Sherman Act claim for an injury suffered in the Dominican Republic).

60. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68, 72 (2d Cir. 1977) (addressing the claim of an independent oil producer who brought suit against major oil companies that conspired to make it harder for this independent to deal with the Libyan government).

61. *Hoffmann*, 124 S. Ct. at 2371. None of these cases clearly show that the Sherman Act should be extended to independent foreign injuries.

62. *Id.* at 2372. The respondent argued that since the conduct is harmful enough to give rise to a claim of domestic injury, the language of the Sherman Act also allows for all other related claims, even those for independent foreign injury. *See also* Joshua P. Davis, *Supreme Court Review of the Foreign Trade Antitrust Improvements Act: A Case of a Misleading Question?*, 38 U.S.F.L. REV. 431, 432 (2004) (questioning whether the FTAIA excludes all anticompetitive conduct that has a foreign effect).

63. *Id.* (The Court actually agrees that this interpretation is the more natural reading but is still not swayed by the argument because it is outweighed by international comity considerations.)

64. *Id.* A statute may or may not apply to the same conduct based on other circumstances. The Court agreed with the natural language reading of the statute but noted that other policy reasons must be given greater weight based on the situation.

IV. Conclusion

The Supreme Court overturned the decision of the Court of Appeals, holding that the FTAIA does not expand the reach of the Sherman Act to include purely independent foreign harm. The Sherman Act can reach a foreign harm, but it must be tied to a domestic harm for an exception to the FTAIA to be applied. The legislative intent of the drafters of the FTAIA and the principles of comity regarding the sovereignty of nations are the main drivers of this determination not to expand the reach of the Sherman Act. The Court resolved the split in the Court of Appeals, but has still left the door open regarding this action if these foreign purchasers can demonstrate that the foreign harm suffered is not truly independent of the domestic harm inflicted by this vitamin cartel.

This decision changes the rule of *Hartford Insurance*, which allowed courts to determine standing in cases alleging purely foreign harm based simply on whether a conflict of law existed. Unlike the situation in *Hartford Insurance*, where plaintiffs had standing only in the U.S., because the conduct was actually legal in the U.K., the five vitamin manufacturers in *Hoffman* still had standing to bring their cases in their home countries. It is submitted that this distinction was critical, as it allowed the Court to express a more conservative approach to standing without hindering these parties from being able to address their claims. Thus, the Court was finally able to express its customary deference to foreign countries' laws as advocated by Justice Scalia.[65]

This opinion also indicates to foreign nations that the United States will no longer impose its will regarding anti-competitive laws if it does not have a legitimate interest in the outcome. The U.S. recognizes the importance of allowing nations to deal with anti-competitive behavior as these individual nations see fit. Deference in these matters is key to ensuring cooperation among the countries in our interwoven world economy.

Curtis Young

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65. *Hoffman*, 124 S. Ct. at 2373 (addressing Justice Scalia's view in the concurring opinion that the interpretation of the statute is consistent with the principle that statutes should be read with customary deference to foreign countries' laws).

Austria v. Altmann

124 S. Ct. 2240 (2004)

The FSIA applies to a claim based on conduct that occurred in 1948, before Congress enacted the FSIA.

In *Austria v. Altmann,*[1] the Court decided the narrow issue of whether the Foreign Sovereign Immunities Act of 1976[2] ("FSIA") applies to claims that are based on conduct that occurred before the FSIA's enactment, and even before the United States adopted the so-called "restrictive theory" of sovereign immunity in 1952.[3] The Court held that the FSIA applied in a case where an American citizen claimed ownership of six Gustav Klimt paintings housed by Austria in an Austrian art gallery, originally seized by the Nazis.

Prior to 1952, the Supreme Court, as a matter of grace and comity, deferred to the decisions of the political branches, particularly the executive branch, over whether to take jurisdiction in actions against foreign sovereigns and their instrumentalities.[4] In 1952, the State Department adopted the restrictive theory of sovereign immunity.[5] Under the restrictive theory, sovereign immunity was recognized with regard to sovereign or public acts, but not with respect to private acts.[6] Since the State Department adopted this theory, decisions about sovereign immunity were highly political and usually a matter of diplomacy.[7] However, if foreign nations failed to request immunity from the State Department, the courts were responsible for determining whether sovereign immunity existed.[8] Thus, the determinations were divided between the executive and judicial branches, with no clear governing standards.[9] Congress enacted the FSIA in 1976 to remedy these problems.[10]

Facts

Respondent Maria V. Altmann ("respondent") is a niece and sole surviving heir of Ferdinand Bloch-Bauer ("Bloch-Bauer").[11] Prior to 1938, Bloch-Bauer was a wealthy sugar magnate and lived in Vienna, Austria.[12] He and his wife, Adele, owned six Gustav Klimt paintings,

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1. 124 S. Ct. 2240 (2004).
2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 et seq. (1976).
3. *Altmann*, 124 S. Ct. at 2243.
4. *Id.* at 2248.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2243.
12. *Id.*

among other valuables, in their primary residence.[13] Adele died in 1925.[14] In her will, she asked Bloch-Bauer to bequeath the paintings to petitioner, the Austrian Gallery ("Gallery"), after his death.[15] Adele's attorney advised the Gallery that Bloch-Bauer was not legally obligated to comply with his wife's request, because Bloch-Bauer owned the paintings.[16]

On March 12, 1938, the Nazis invaded and claimed to annex Austria.[17] Bloch-Bauer fled to Zurich, Switzerland.[18] The Nazis took over his home and divided up his valuables, including the Klimt paintings.[19] Dr. Erich Führer ("Führer"), a Nazi lawyer, took the paintings.[20] He sold three to the Gallery, sold one to the Museum of the City of Vienna, and kept one for himself.[21] The sixth painting remained in private hands until 1988, when a private art dealer donated it to the Gallery.[22] After his death in 1945, Bloch-Bauer bequeathed his estate to respondent, another niece, and a nephew.[23]

In 1946, Austria enacted a law declaring all transactions motivated by Nazi ideology to be null and void.[24] However, a different provision of Austrian law prohibited the export of artwork deemed important to Austria's cultural heritage and required anyone wishing to export art to get permission from the Austrian Federal Monument Agency (the "Agency").[25] The Gallery and the Agency allegedly adopted a practice of forcing Jews to donate or trade valuable artworks to the Gallery in exchange for export permits for other works.[26]

In 1947, Robert Bentley, Bloch-Bauer's nephew and heir, hired Austrian lawyer Dr. Gustav Rinesch ("Rinesch") to locate and recover his uncle's stolen property.[27] In 1948, Rinesch requested that the Gallery return the three Klimt paintings purchased from Führer, but the

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13. *Id.*
14. *Id.*
15. *Id*. at 2243–44.
16. *Id*. at 2244.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. at 2245 n.3.
23. *Id*. at 2244.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*. The recovery of Nazi-looted art has been the subject of several recent law review articles. *See* Michael J. Bazyler, *Nuremburg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000); Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383 (2000); Vanessa A. Wernicke, *The "Retroactive" Application of the Foreign Sovereign Immunities Act in Recovering Nazi-Looted Art*, 72 U. CIN. L. REV. 1103 (2004).

Gallery refused, citing Adele's original bequest.[28] Rinesch obtained export permits for Bloch-Bauer's other artworks from the Gallery.[29] In exchange, Rinesch, purporting to be a representative of Bloch-Bauer's heirs, signed a document acknowledging that Bloch-Bauer wanted to donate the six Klimt paintings to the Gallery.[30] Furthermore, Rinesch helped the Gallery obtain the painting Führer kept for himself and the painting sold to the Museum of the City of Vienna.[31] Respondent claims that Rinesch never had respondent's permission to conduct these transactions on her behalf.[32]

In 1998, Austria enacted a new restitution law, under which individuals who had been coerced into donating artworks to state museums in exchange for export permits could reclaim their property.[33] Respondent sought recovery of the Klimt paintings and other artworks under the new law.[34] However, a committee of Austrian government officials and art historians declined to return the six paintings, because they concluded that Adele's will created a binding legal obligation that Bloch-Bauer donate the paintings to the Gallery upon his death.[35]

Procedural History

Initially, respondent filed suit in Austria, but the court there ruled that she would have to deposit approximately $350,000, to cover court costs, in order to proceed.[36] Respondent withdrew her Austrian suit, then filed in the United States District Court for the Central District of California. Respondent's complaint asserted that petitioners, the Republic of Austria ("Austria") and the Gallery, as an instrumentality of Austria, were not entitled to sovereign immunity.[37] Petitioners filed a motion to dismiss.[38] Their defense of sovereign immunity was a two-part claim.[39] First, petitioners claimed that they would have enjoyed absolute immunity from suit in United States' courts in 1948, when their alleged wrongdoing occurred.[40] Second, petitioners claimed that the FSIA did not divest them of that immunity retroactively.[41] The District Court rejected this argument and concluded that the FSIA applied retroactively to actions based on pre-1976 events, relying on the retroactivity analysis set out by the Supreme Court in *Landgraf*

28. *Altmann*, 124 S. Ct. at 2244.
29. *Id.*
30. *Id.*
31. *Id.* at 2244–45.
32. *Id.* at 2245.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 2246.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

v. USI Film Products.[42] The District Court deemed the FSIA a jurisdictional statute that did not affect petitioners' substantive legal rights, and thus the FSIA controlled.[43]

The Ninth Circuit agreed that the FSIA applied; however, that court had a different rationale.[44] The Ninth Circuit reasoned that applying the FSIA to Austria's alleged wrongdoing was permissible, because Austria could not have expected to receive immunity for its action, even in 1948.[45] The court concluded that, at the time of petitioners' alleged wrongdoing, the United States courts deferred to case-by-case immunity determinations by the State Department.[46]

The Supreme Court granted certiorari, limited to the issue of the FSIA's general applicability to conduct that occurred prior to its enactment in 1976 or prior to the State Department's adoption of the restrictive theory of sovereign immunity in 1952. The Court affirmed the Ninth Circuit's result, but rejected the reasoning on which it was based.[47]

Analysis

The Court found that the FSIA did not appear to "operate retroactively" within the meaning of *Landgraf* for two reasons.[48] First, prior to 1976, foreign states had no "right" to sovereign immunity even if they had a justifiable expectation that United States courts would grant them immunity for their public acts, as long as the State Department did not recommend otherwise.[49] Second, the FSIA merely operates to open United States courts to plaintiffs with preexisting claims against foreign states but neither "increases liability for past conduct" nor "imposes new duties with respect to transactions already completed."[50]

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42. 511 U.S. 244 (1994). The terms of the Court's presumption against retroactive application are as follows: When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly proscribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id*. at 280.

43. *Altmann*, 124 S. Ct. at 2246–47.

44. *Id*. at 2247.

45. *Id*.

46. *Id*.

47. *Id*.

48. *Id*. at 2251.

49. *Id*.

50. *Id*.

The Court recognized that courts interpreted the FSIA to do more than just provide jurisdiction.[51] Additionally, statutes that create jurisdiction "speak to the substantive rights of the parties" and such statutes are "subject to a presumption against retroactivity."[52] The Court distinguished the FSIA from the statutory amendment in *Hughes Aircraft Co. v. United States ex. rel. Schumer,*[53] in that the jurisdictional limitation in that statute adhered to the cause of action and was essentially substantive.[54] The FSIA, in contrast, limited the jurisdiction of federal and state courts to entertain claims against foreign sovereigns.[55] Additionally, the FSIA did not create or modify any causes of action, nor purport to limit foreign countries' decisions about what claims against which defendants their courts will entertain.[56] The Court acknowledged that, even if the FSIA created jurisdiction where there was none before, this characteristic was in some tension with other, less substantive aspects of the FSIA.[57] Thus, this tension rendered the Landgraf approach inconclusive.[58] The Court deferred to the FSIA, rather than presume it was inapplicable, because its enactment postdated the conduct in question.[59]

The Court questioned whether anything in the FSIA or the circumstances surrounding its enactment suggested that the FSIA was inapplicable to the petitioners' 1948 actions.[60] However, the Court found evidence that Congress intended the Act to apply to pre-enactment conduct.[61] From the language of the FSIA's preamble,[62] the Court determined that immunity claims, not actions protected by immunity, were the relevant conduct regulated by the FSIA.[63] Furthermore, this language suggested that Congress intended courts to resolve all such claims in conformity with the principles set forth in the FSIA, regardless of when the underlying con-

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51. *Id*. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 496–97 (1983) (stating that the FSIA was a codification of the standards governing foreign sovereign immunity as an aspect of substantive federal law). The Court also noted that in a suit against a foreign sovereign the plaintiff will be barred from raising his claim in any court in the United States unless one of the FSIA exceptions applies. *Id. See Verlinden*, 461 U.S. at 497.

52. *Altmann*, 124 S. Ct. at 2251 (quoting Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 951 (1997)).

53. *Id*. at n.15.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id*. at 2252.

60. *Id*.

61. *Id*.

62. *Id*. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter. 28 U.S.C. § 1602 (1976).

63. *Id*. at 2252–53.

duct occurred.[64] The Court cited examples of FSIA provisions that applied to cases arising out of conduct that occurred before 1976.[65]

Additionally, application of the FSIA to all pending cases regardless of when the underlying conduct occurred was most consistent with two of the FSIA's principal purposes: to clarify the rules that judges should apply in resolving sovereign immunity claims and to eliminate political participation in the resolution of such claims.[66] Even though it did not endorse the reasoning of the Ninth Circuit, the Court affirmed its judgment because the FSIA clearly applied to conduct that occurred prior to 1976 and prior to 1952, when the State Department adopted the restrictive theory of sovereign immunity.[67] The Court emphasized the narrowness of its holding.[68]

Concurrence

Justice Scalia joined the Court's opinion, then restated his position from *Landgraf*.[69] He argued that a jurisdiction-expanding statute should be applied, even if it sometimes has the effect of creating a forum where none existed.[70] Thus, the FSIA did not create or modify substantive rights.[71] He asserted that because the FSIA affected substantive rights only accidentally, and not as a necessary and intended consequence of the law, it was different from the statute in *Hughes Aircraft*.[72]

Justice Breyer, joined by Justice Souter, joined in the Court's opinion and judgment, then stated several additional considerations.[73] The issue identified by Justice Breyer was whether

64. *Id*. at 2253.

65. *Id*. *See* Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (holding that whether an entity qualifies as an instrumentality of a foreign state for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 482–83, 497 (1983) (upholding a constitutional challenge to 28 U.S.C. § 1330's grant of subject matter jurisdiction involving a dispute over a contract that predated the FSIA).

66. *Altmann*, 124 S. Ct. at 2253.

67. *Id*. at 2254.

68. *Id*. Accordingly, the Court declined to review whether section 1605(a)(3) covered the case. Further, the Court did not comment on the act of state doctrine. The Court also rejected the United States' (as amicus curiae) recommendation to bar application of the FSIA to claims based on pre-enactment conduct. Finally, the Court stated that, should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the executive on a particular question of foreign policy. *Id*.

69. *Id*. at 2256.

70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*.

the expropriation exception of the FSIA,[74] withdrawing an otherwise applicable sovereign immunity defense, applies to takings that took place years before its enactment.[75] The Breyer concurrence found that it did, because, as respondent argued, Congress intended the expropriation exception to apply retroactively, removing a defense of sovereign immunity where "rights in property" were "taken in violation of international law," irrespective of when that taking occurred.[76]

The concurrence found support of this view in several ways. First, the FSIA had no explicit language limiting it to prospective application.[77] Second, it stated that sovereign immunity was about a defendant's status at the time of suit, not about a defendant's conduct before the suit.[78] Also, Justice Breyer stated that a sovereign's reliance on future immunity would have been unreasonable and no protection would be warranted.[79] The concurrence then addressed the historical inquiry set out by the dissent[80] and found that it was too speculative and threatened to create legal uncertainty that the FSIA was designed to put to rest.[81] Additionally, Justice Breyer identified other legal principles, applicable to past conduct, that were available to adequately protect any actual past reliance and adequately prevent a flood of expropriation claims against foreign nations.[82] These included statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens*.[83]

Dissent

The dissent, written by Justice Kennedy and joined by the Chief Justice and Justice Thomas, argued that the issue was whether the courts, by applying the statutory principles the FSIA announced, would impose a retroactive effect in a case involving conduct that occurred over 50 years ago, and nearly 30 years before the FSIA's enactment.[84] The dissent argued that the Court's general rule was not to apply a statute if its application would impose a retroactive effect on the litigants.[85] The dissent argued that the FSIA does not exempt itself from the gen-

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74. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. 28 U.S.C. § 1605(a)(3) (1976).

75. *Altmann*, 124 S. Ct. at 2258.

76. *Id*. at 2259.

77. *Id*.

78. *Id*.

79. *Id*. at 2260.

80. *See infra* and note 86.

81. *Altmann*, 124 S. Ct. at 2261.

82. *Id*. at 2261–62.

83. *Id*. at 2262.

84. *Id*. at 2264.

85. *Id*.

eral rule, because it contains no clear statement requiring retroactive effect.[86] Additionally, it argued that the FSIA was essentially jurisdictional but was a subclass of jurisdictional statutes because it created jurisdiction, as explained in *Hughes Aircraft*.[87] The question the dissent asked was: Does the FSIA confer jurisdiction where before there was none?[88]

The dissent argued that the proper analysis to answer this question was to ask another question: How do the jurisdictional effects that the FSIA created compare to those that would govern as expected by the parties in 1948?[89] The dissent argued that in 1948 foreign sovereigns understood foreign sovereign immunity law to support three valid expectations.[90] First, nations could expect that a baseline rule of sovereign immunity would apply.[91] Second, they could expect that if the executive made a statement on the issue of sovereign immunity, that would be controlling.[92] Third, they could expect that they would be able to petition the executive for intervention on their behalf.[93] The dissent argued that these principles controlled and, if petitioners' conduct would not be subject to suit under them, then the FSIA would impose a retroactive effect by creating new jurisdiction.[94]

Conclusion

The Supreme Court held that the FSIA applies to claims that are based on conduct that occurred before the FSIA's enactment, and even before the United States adopted the restrictive theory of sovereign immunity in 1952. The Court looked to the FSIA itself to make this determination. Because the FSIA did not operate retroactively and Congress intended the FSIA to apply to pre-enactment conduct, the Court affirmed the Ninth Circuit's judgment affirming the denial of petitioners' motion to dismiss.

It is unlikely that this holding will act as precedent for interpreting other statutes as having pre-enactment application. The FSIA is a unique statute because of the history of foreign sovereign immunity. Prior to the enactment of the FSIA, foreign states could have anticipated suit in the United States. Pre-1976 suits, however, would probably be less frequent because of the political and diplomatic determination necessary for sovereign immunity during that period.

Additionally, it is unlikely that this holding will open the floodgates to similar litigation for two reasons. First, similar cases can and have been brought through other channels. These

86. *Id.*

87. *Id.* at 2266–67.

88. *Id.* at 2267.

89. *Id.* at 2268.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2269.

include monetary reparations cases brought against Swiss banks[95] and actions against France for transporting Jews to concentration camps.[96] Second, Nazi art cases are very fact-specific. For instance, a party must have the desire to make a claim, have a solid evidentiary trail, and have substantial proof to bring an action.

Although it is rare that the Supreme Court would allow a statute to apply to conduct before its enactment, the Court's narrow holding in this case limits the impact that the decision will have on other statutes.

Tisha Magsino

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95. *See In Re* Holocaust Victim Assets Litigation, 302 F. Supp. 2d 89, 91 (E.D.N.Y. 2004) (discussing the adoption of the recommendation of a Special Master regarding $60 million in excess funds following the $1.25 billion settlement of the class action against the largest Swiss banks); *see* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 31–32 (2000) (noting that the filing of a class action lawsuit against the three largest private Swiss banks initiated the modern era of Holocaust asset litigation); Jodi Berlin Ganz, Note, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306, 1356–62 (1997) (summarizing three class action suits by Holocaust victims to reclaim their assets in Swiss bank accounts).

96. *See* Rebecca E. Hill, *2003–2004 Survey of International Law in the Second Circuit*, 31 SYRACUSE J. INT'L L. & COM. 327, 331 (2004) (discussing action in which Holocaust victims brought suit against the French railroad which transported French civilians to Nazi concentration camps); Alan Riding, *Nazis' Human Cargo Now Haunts French Railway*, N.Y. TIMES, March 20, 2003, at A3, *available at* LEXIS, News Library, The New York Times File (reporting about a case brought in France against the railroad for transporting Jews to death camps as a crime against humanity); Patti Waldmeir, *How Far Should the Long Arm of U.S. Law Reach?*, FINANCIAL TIMES (London), March 1, 2004, at 9, *available at* LEXIS, News Library, News-All (English Text) File (questioning the effect of the Altmann case on pending lawsuit brought by Holocaust survivors and heirs against the French national railways for transporting Jews to concentration camps).

Philip Morris Int'l, Inc. v. Commission

2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 (2003)

Corporations cannot challenge the European Commission's decision to bring a civil action before an American court, because filing legal proceedings before a court in a non-Member State does not result in binding legal effects for the purposes of Article 230 of the Treaty Establishing the European Community.

I. Holding

In *Philip Morris Int'l, Inc. v. Commission*,[1] the Court of First Instance upheld the decision of the European Commission ("Commission")[2] to commence civil actions before federal courts of the United States against various American tobacco manufacturers for their participation in a scheme to smuggle untaxed cigarettes into the European Community ("Community").[3] The court determined that the filing of these proceedings does not result in a binding legal effect with regard to the Commission's powers and the balance of the Community legal order.[4] Furthermore, the court held that in prohibiting challenges to this enactment, members of the Community are not denied access to judicial protection because effective remedies are available under Articles 235 and 288 of the Treaty.[5] Therefore, the Commission's measures cannot be the subject of an action for annulment.[6]

II. Facts and Procedural Posture

In an effort to end the practice of smuggling cigarettes into the European Community,[7] on July 19, 2000, the Commission approved "the principle of civil action, in the name of the

1. Joined cases 377/00, 379/00, 260/01 & 272/01, Philip Morris Int'l, Inc. v. Commission, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 (2003) ("*Philip Morris*").

2. The European Commission, comprised of 20 Commissioners who represent its Member States, is the policy-making executive of the European Union. The Commission is primarily responsible for conducting trade negotiations.

3. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶¶ 118–119 (2003). The purpose of the European Community is to integrate the European Atomic Energy Community (Euratom), the European Coal and Steel Community (ESC), and the European Economic Community (EEC, or Common Market).

4. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 2, 2003 ECJ CELEX LEXIS 23 ¶¶ 57, 91 (2003) (explaining that there are specific procedures set forth pursuant to Community law for resolving the claims at issue against the tobacco manufacturers).

5. *Id*. at ¶ 123.

6. *Id*. at ¶ 64 (stating that "a decision to apply to one court cannot be the subject of an action for annulment before another court" for numerous reasons, including the fundamental right to apply to the court "laid down by law," secondly, that an action's pleadings should be raised before the court having jurisdiction, and, finally, because disputes should not be resolved between different courts).

7. *See* David J. Malcolm, *Tobacco, Global Public Health, and Non-Governmental Organizations: An Eminent Pandemic or Just Another Legal Product?*, 28 DENV. J. INT'L L. & POL'Y 1, 40–42 (1999) (elaborating on the means by which cigarettes are smuggled across the world).

Commission, against certain American cigarette manufacturers."[8] Pursuant to this enactment, the Community, represented by the Commission, brought a civil action on November 3, 2000 before the United States District Court for the Eastern District of New York against various companies owned by the Philip Morris group (Philip Morris), the Reynolds group (Reynolds), and Japan Tobacco Inc.[9] The Community asserted violations of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),[10] common law fraud, public nuisance, and unjust enrichment, seeking compensation for the loss in customs duties and value-added tax, as well as injunctive relief aimed at ceasing the smuggling.[11] In a decision rendered on July 16, 2001, the District Court dismissed these claims.[12]

Shortly thereafter, on July 25, 2001, the Commission approved a new type of civil action brought "jointly by the Community and at least one Member State" in an American forum against the group of cigarette conglomerates who had been parties in the previous action.[13] Subsequently, on August 6, 2001, the Commission along with 10 Member States filed a second action against Philip Morris and Reynolds,[14] and later in 2002, filed a third action against Japan Tobacco Inc.[15] After the District Court dismissed the second and third actions on the basis of the revenue rule,[16] on March 20, 2002, the Commission approved the appeal of the District Court's judgment and did so before the United States Court of Appeals for the Second Circuit.[17] In response to this appeal, the tobacco companies (applicants) filed applications with the Court of First Instance in December 2000 seeking annulment of the first action,[18] to which

8. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 1 (2003).

9. *Id.* at ¶ 2.

10. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (1970). RICO allows the plaintiff to recover treble damages for any injury suffered.

11. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 4 (2003).

12. European Community v. Philip Morris Companies, Inc., 150 F. Supp. 2d 456 (E.D.N.Y. 2001), *aff'd in part, vacated and remanded in part*, 355 F.3d 123 (2004); *see* Att'y Gen. of Can. v. R.J.R. Tobacco Holdings, Inc., 268 F.3d 103, 109, 115, 199, 128 (2d Cir. 2001) (holding that the Circuit adheres to "that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement.").

13. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 6 (2003).

14. *Id.* at ¶ 7 (listing the 10 Member States which are parties to this action, including Spain, Belgium, Germany, Greece, France, Italy, Luxembourg, the Netherlands, Portugal, and Finland).

15. *Id.* at ¶ 9; *see* European Community v. Philip Morris Companies, Inc., 150 F. Supp. 2d 456 (E.D.N.Y. 2001), *aff'd in part, vacated and remanded in part*, 355 F.3d 123 (2004).

16. European Community v. Japan Tobacco, Inc., 186 F. Supp. 2d 231, 234 (E.D.N.Y. 2002), *vacated and remanded*, 355 F.3d 123 (2004) (defining the revenue rule as a common law doctrine which prevents the court of one sovereign from enforcing final judgments of taxation and unadjudicated tax claims of another sovereign); *see* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 715 (2002) (defining the "revenue rule" as an American common law rule which precludes the individuals of one nation from enforcing tax judgments or claims in the courts of other nations).

17. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶¶ 10–11; *see* European Community v. Japan Tobacco, Inc., 186 F. Supp. 2d 231 (E.D.N.Y. 2002).

18. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 12 (2003).

the Commission objected on the ground of inadmissibility.[19] The court joined the cases and allowed the parties to present oral arguments.[20]

III. The Court's Analysis

The Court of First Instance examined whether the applicants could challenge the Commission's two unilateral acts on July 19, 2000 and July 25, 2001, which allow the commencement of proceedings before a court of a non-Member State under that state's laws (contested acts), in an action for annulment pursuant to the fourth paragraph of Article 230 of the Treaty.[21] In its analysis, the court considered the substance of the Commission's measures.[22] Additionally, the court evaluated the effects these measures would have, because only an act or decision that has legally binding effects that affect the interests of an applicant may be the subject of an action for annulment.[23] Such legal effects must be definitive, in that they must cause a distinct change in the applicants' legal positions.[24]

A. Effects on the Institutional Balance of the Community Legal System

The court first addressed the applicants' argument that the contested acts were challengeable because of the legally binding effects produced by their adoption, which allegedly breached the principle of institutional balance.[25] The applicants contended that the Commission's decision to approve of the contested acts upset the division of powers between the Community and the Member States and thus brought about a distinct change in their legal positions.[26] However, the court reasoned that even if the Commission's decision was erroneous, an encroachment on the institutional balance could not be asserted as an exception to the admissibility rules governing actions for annulment.[27] The court noted that the Community courts had

19. *Id*. at ¶ 13.

20. *Id.*

21. *Id*. at ¶¶ 74–76; *see* Treaty Establishing the European Community, March 25, 1957, art. 230 [formerly 173], para. 4, 1997 O.J. (C 340) 272 (providing that "any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.").

22. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 76 (2003); *see* Case 60/81, IBM Corp. v. Commission, 1981 E.C.R. 2639 ¶ 9 (1981) (suggesting that a court should look to a measure's substance in order to determine whether its annulment is open to challenge).

23. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 9 (2003); *see* Case C-117/91, Bosman v. Commission, 1991 E.C.R. I-4837 ¶ 13 (1991) (in analyzing whether a measure is a proper subject for an annulment action, the court must consider the measure's nature as well as its legal effects).

24. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 83 (2003).

25. *Id*. at ¶ 42.

26. *Id*. at ¶¶ 41, 85.

27. *Id*. at ¶¶ 86–87; *see also* Case C-345/00, FNAB v. Council, 2001 E.C.R. I-3811 ¶ 41 (2001) (explaining that there are no remedies available under Article 230 EC for one who believes "that an act of a Community institution has been adopted in breach of the principle of institutional balance, regardless of whether the act in question is of direct and individual concern to that person.").

never created an exception permitting judicial review of acts that appeared to be unlawful and that lacked legal effects.[28]

Moreover, the Court of First Instance determined that the case at bar was not sufficiently analogous to *France v. Commission*,[29] in which the court held that the measure at issue was open to challenge.[30] The contested act in the *France* case was a decision that conferred upon the Vice President of the Commission the power to sign an agreement with the United States concerning the application of competition law.[31] The applicants proposed that this act was similar to the contested acts that empowered the President and a Member of the Commission to take appropriate measures to file civil actions before an American court.[32] However, the court held that not all decisions that confer powers upon an individual result in legal effects.[33] Rather, the purpose and rationale behind the decision to confer such powers is the determinative factor.[34] In light of these considerations, the court reasoned that the *France* decision was distinguishable, because there the explicit wording of the act in question made its intention to produce legal effects apparent. Conversely, in the present case, the powers conferred related only to the procedure of commencing proceedings before the District Court and thus produced no effects.[35]

Secondly, the court evaluated the applicants' contentions that the Commission ignored Community law procedures governing the recovery of tax and customs duties, as well as the remedies for combating fraud, by allowing the commencement of proceedings in an American court.[36] The only remedy available to the Commission under Community law is to file infringement proceedings against the Member States in Community tribunals.[37] The applicants alleged that the disregard of these procedures denied them the benefit of the safeguards and protection of the Community law.[38] The court reasoned that because the applicants did not assert the disregard or circumvention of specific procedures providing for the recovery of duties, they failed to establish that their legal position had been affected.[39] The court also determined that because the applicants did not specifically demonstrate the manner in which

28. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 88 (2003).

29. Case C-327/91, France v. Commission, 1994 E.C.R. I-3641 (1994).

30. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 90 (2003); *see* Case C-327/91, France v. Commission, 1994 E.C.R. I-3641 ¶¶ 15, 17 (1994).

31. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 90 (2003).

32. *Id.*

33. *Id*.

34. *Id*.

35. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 90 (2003).

36. *Id.* at ¶ 92.

37. *Id*. at ¶ 57 (guaranteeing "that . . . no arbitrary finding [would] be made against [the applicants].").

38. *Id.* at ¶ 92.

39. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 101 (2003) (noting that to the knowledge of the applicants, no procedures for the recovery of tax and customs duties had been brought against them in any Member States).

the contested acts altered their legal position regarding anti-fraud procedures, their claims were insufficiently supported.[40] Furthermore, the court explained that although the issuance of advisory opinions would be a favorable remedy to corporations that fear their interests would be prejudiced because of actions taken by Community institutions, preventative decrees are not provided for under the Community's legal system and, thus, are not permitted.[41] Moreover, the court emphasized that it would be inappropriate for the Community judicature to alter the legal remedies provided by the Treaty.[42]

The applicants also submitted that the Commission affected their legal position in a definitive way by subjecting the applicants to the laws of a different legal order.[43] The court explained that although the commencement of proceedings before the District Court inevitably results in the application of American legal principles, the fact that the law may differ from Community law or that of the Member States is insufficient to bring about a distinctive change in the legal position of the applicants.[44] The court reasoned that this is because the commencement of proceedings creates an opportunity for a newly initiated procedure to alter the parties' legal positions by issuing a judgment; however, the mere commencement of proceedings does not in and of itself change the legal position of the parties to the case.[45] Rather, only a judgment of an American court in a civil action can result in the alteration of a party's legal position.[46]

Although some procedural decisions may produce legally binding effects under Article 230,[47] the court determined that the contested acts in the case at bar did not.[48] The court found that the commencement of proceedings before an American court neither substantively altered the applicants' rights nor imposed new obligations upon them.[49] Furthermore, the court added that applicants would not enjoy the benefit of procedural rights even if the Commission brought an infringement proceeding because there is no procedure pursuant to Com-

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40. *Id.* at ¶ 103.

41. *Id.* at ¶ 124.

42. *Id.* (stating that "[i]t is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty.").

43. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶¶ 53–56, 92 (2003). The applicants argue that the Commission is circumventing Community law procedures by forcing them to conduct civil proceedings before American courts, therefore exposing them to risks and uncertainties. Furthermore, they emphasize that a District Court judgment cannot be reviewed by the Community's legal system and is not safeguarded by Community law because the District Court is not bound by the principle of supremacy of Community law over national law.

44. *Id.* at ¶¶ 94, 105 (highlighting that there is no mechanism for the issuance of a preliminary ruling pursuant to Article 234 EC for proceedings brought before the District Court).

45. *Id.* at ¶¶ 79, 93.

46. *Id.* at ¶ 79.

47. *See, e.g.*, *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶¶ 96–97 (2003) (defining procedural decisions as ones which "produce effects which go beyond the procedural framework and substantively alter the rights and obligations of the parties concerned.").

48. *Id.* at ¶ 98.

49. *Id.*

munity law conferring on the applicants the safeguards they might have been denied.[50] Therefore, the commencement of proceedings before the District Court would not prejudice or deprive the applicants of any procedural rights.[51]

B. Effects of the Initiation of Civil Proceedings Under United States Law

The applicants argued that the commencement of actions under the laws of the United States would produce legal effects by subjecting them to American rules of civil procedure.[52] Specifically, the applicants referred to receiving a default judgment for failing to respond to a suit in a timely manner and having to comply with the discovery rules of the United States, which would require them to disclose information which would otherwise be protected in proceedings under Community law.[53] In response, the court explained that the consequences described by the applicants usually arise when they are called to defend themselves in any court.[54] The court concluded that, although the protection of the applicants' interests may be costly in terms of the possible consequences at stake, filing a civil action in an American federal court does not result in a binding legal effect.[55]

Next, the court evaluated whether the applicants' legal position would suffer substantive effects resulting from the commencement of proceedings before the district court.[56] The applicants feared the potential of exposure to unfavorable judgments and penalties in an American forum.[57] Despite these possible risks, the court reiterated the principle that the decision to commence proceedings before the district court does not necessarily alter the applicants' legal position.[58] Thus, the initiation of a civil action is a "mere consequence of fact" rather than a legal effect.[59]

C. Effective Judicial Protection

Lastly, the court addressed the applicants' concerns that they would be denied access to justice if the court dismissed their claims, because the applicants would not have any other means to challenge the contested acts.[60] The court emphasized that the Treaty guarantees the

50. *Id.* at ¶100.

51. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 100 (2003).

52. *Id*. at ¶¶ 59, 109.

53. *Id.* at ¶100.

54. *Id*. at ¶ 110.

55. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶¶ 110–112 (2003).

56. *Id*. at ¶¶ 61, 114 (referring to the consequences of losing the RICO claim and subsequently suffering treble damages or the risk of paying punitive damages based on the common law claims).

57. *Id.*

58. *Id.* at ¶ 114 (stating that the decision to commence proceedings "merely sets in motion proceedings intended to establish their liability, the substantive existence of which is not determined by the filing of the action.").

59. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 114 (2003).

60. *Id.* at ¶ 120.

right to an effective remedy for everyone whose liberty is ensured by the Union.[61] Specifically, Articles 173, 177, and 184 of the Treaty protect natural and legal persons from the application of general measures that they cannot directly challenge by allowing the Court of Justice to review the legality of these measures.[62] In cases in which the Community is responsible for implementing these measures, natural or legal persons may directly bring an action in court.[63] If national authorities are responsible for implementing such measures, natural or legal persons may file suit in the national courts and then appeal to the Court of Justice for a ruling.[64] The court concluded that even though a decision cannot be challenged by way of an action for annulment, individuals are not denied access to justice and are still afforded the right of effective judicial protection in Community courts.[65]

IV. Conclusion

The Court of First Instance concluded that the applicants' challenge of the Commission's decisions, which allowed the commencement of civil proceedings in the court of a non-Member State, was inadmissible and that these measures were not appropriate subjects of an action for annulment.[66] Therefore, the Commission was permitted to privately litigate European policy issues in an American forum.

The court's decision greatly impacted the constitutional structure of the European Community by affording it the right to invoke a legal remedy that it had never been able to in prior years, therefore effectively increasing the powers of the Commission. In allowing the Commission to file an action in an American court, the Court of First Instance substantially expanded the Commission's authority to include the power to bring actions in foreign forums in matters involving international policy and taxation. Thus, the Commission is no longer limited to the specific authority it has traditionally had in enforcing Community law pursuant to the strict provisions of the Treaty. Instead, it enjoys a broader power that is not subject to review. An unchecked power such as this is dangerous because it allows the Commission to ignore the limitations imposed on its power of enforcement, thereby allowing it to circumvent the established procedures of the Treaty.

In affirming the Commission's measures allowing the use of American courts to recoup outstanding taxes and duties, the court abandoned the strict interpretation it has given the

61. *Id.* at ¶ 121; *see* Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1339 ¶ 23 (1986) (acknowledging the legal protection offered by the Treaty which establishes a system of remedies and procedures permitting review of the legality of adopted acts, thereby safeguarding persons against the application of general measures which they cannot contest directly).

62. Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1339 ¶ 23 (1986).

63. *Id.*

64. *Id.*

65. *Philip Morris*, 2003 E.C.R. II-00001 [2003], 1 C.M.L.R. 21, 2003 ECJ CELEX LEXIS 23 ¶ 123 (2003) (stressing that individuals may bring actions for non-contractual liability under Articles 235 and 288 of the Treaty if the conduct involves liability for the Community).

66. *Id.* at ¶ 125.

common law revenue rule in past years. Consequently, the litigation of issues concerning European policy in American forums may have negative implications on diplomacy because of the risk that the judiciary lacks the competence and the power to render judgments on issues concerning foreign relations and the provisions of a different legal order. It is also likely that this liberalized application of the revenue rule will substantially impact the resolution of future disputes involving similar issues because of the uncertainties resulting from this new precedent.

Ariana Gambella

United States v. Giffen

326 F. Supp. 2d 497 (S.D.N.Y. 2004)

The application of U.S. mail and wire fraud statutes does not extend to the deprivation of foreign citizens of the honest services of their government, resulting from an American citizen bribing foreign officials in a foreign country; the defendant's conduct, however, did violate the Foreign Corrupt Practices Act.

I. Holding

In *United States v. Giffen*,[1] the defendant was charged with violations of the Foreign Corrupt Practices Act,[2] mail fraud[3] and wire fraud statutes,[4] money laundering statutes,[5] and the federal income tax laws.[6] The District Court for the Southern District of New York denied the defendant's motion to strike portions of his indictment on the grounds that they were precluded by the act of state doctrine[7] and those portions of the indictment that alleged a scheme to deprive the citizens of Kazakhstan of the honest services of their government officials.[8] The court held that the act of state doctrine did not bar James H. Giffen's prosecution, because his official title in the Kazakh government did not entitle him to make illegal payments to government officials.[9] The court also held that the intangible right to honest services does not make a federal crime of bribery of foreign officials in foreign countries.[10] Accordingly, the defendant's motion to dismiss was granted in part and denied in part.[11]

II. Background

The defendant James Giffen ran the New York-headquartered Mercator Corporation and was its principal shareholder, board chairman and chief executive officer.[12] In its 62-count indictment, the United States government charged Giffen with violating the Foreign Corrupt

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1. United State v. Giffen, 326 F. Supp. 2d 497 (S.D.N.Y. 2004) ("*Giffen*").
2. 15 U.S.C. § 78dd-2 (2004). *See* Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593 (2002) (describing history and background materials surrounding the Foreign Corrupt Practices Act as federalizing the law of bribery, as well as the usage of the mail- and wire-fraud statutes to achieve this aim).
3. 18 U.S.C. §§ 1341, 1346 (2004).
4. 18 U.S.C. § 1343 (2004).
5. 18 U.S.C. §§ 1956, 1957 (2004).
6. 26 U.S.C. §§ 7206, 7212. (2004). The defendant did not challenge any of the tax counts. *See Giffen*, 326 F. Supp. 2d at 499 n.1.
7. *Id*. at 499.
8. *Id*.
9. *Id*. at 503.
10. *Id*. at 506.
11. *Id*. at 499.
12. *Id*.

Practices Act (FCPA), mail fraud, wire fraud, money laundering, and violating the federal income tax laws.[13] The prosecution alleged "that between 1995 and 1999, Giffen made unlawful payments totaling $78 million to senior Kazakh officials to obtain business for [Mercator]," and engaged in a series of complex financial transactions in order to conceal these illicit payments.[14] After its independence from the Soviet Union, Kazakhstan began to tap its rich oil and gas reserves and sold rights in them to international oil companies;[15] the Kazakh government hired Mercator to advise it regarding these oil and gas transactions.[16]

The indictment also alleged that on or about August 1, 1995, Giffen was named a Counselor to the President of Kazakhstan.[17] The Counselor position was a semi-official title that enabled Giffen to effect numerous oil and gas transactions.[18] Mercator received nearly $67 million for successfully brokering oil and gas transactions.[19] Apart from Mercator's success fees on these transactions, Giffen allegedly deposited approximately $70 million into escrow accounts in Swiss banks and then diverted these escrow monies into the Swiss bank accounts of several different offshore entities, in order to conceal that they were benefiting senior Kazakh officials.[20] In total, the government contended that Giffen funneled more than $78 million in cash and luxury items to the senior Kazakh officials for their personal benefit.[21] The senior Kazakh officials had the power to help obtain and retain "lucrative business as advisors and counselors to the government of Kazakhstan."[22] The illegal payments thus ensured that Giffen and Mercator remained in a beneficial position, from which they could divert large sums from oil transactions into accounts for the benefit of senior Kazakh officials and Giffen himself.[23]

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13. *Id*.

14. *Id*.

15. *Id*. For more information on the privatization of Kazakhstan following the fall of the Soviet Union and growth of corruption related to this privatization, see Yuliya Mitrofanskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT'L L. REV. 1399 (1999).

16. *See Giffen*, 326 F. Supp. 2d at 499.

17. *Id*. at 499–500.

18. *Id*. at 500.

19. *Id*.

20. *Id*. at 500. The Kazakh officials were the current President of Kazakhstan, Nursultan Nazarbaev, and Nurlan Balgimaev, the former Prime Minister and Oil Minister of the Republic of Kazakhstan. *Id*.

21. *Id*. at 500. Giffen purportedly paid off $36,000 of Balgimbaev's personal bills and gifted an $80,000 speedboat to Nazarbaev. *Id*.

22. *Id*. at 500.

23. *Id*. at 500. *See generally* Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863, 918–9 (2001) (discussing the endemic nature of corruption in Kazakhstan and necessity of bribery as a prerequisite for nearly every governmental action).

III. The Court's Analysis

The defendant moved to dismiss counts one through fifty-nine of the indictment on the grounds that they were barred by the act of state doctrine.[24] These counts of the indictment alleged that Giffen violated the FCPA and committed substantive FCPA crimes.[25] The FCPA makes it illegal for an individual or company in the United States to make illicit payments to a foreign official to cause that foreign official to assist in obtaining or retaining business for the payor.[26] Accepting the allegations in the indictment as true,[27] the illicit payments to senior Kazakh officials were for the sole purpose of obtaining and retaining business for Mercator.[28] Payments to Kazakhstani officials for the purpose of obtaining and retaining business fell squarely within the text of the FCPA.[29]

However, if the act of state doctrine applied, it would bar prosecution of Giffen on these counts. The act of state doctrine precludes American courts from sitting in judgment on acts of a governmental character done by a foreign state within its territory.[30] Act of state issues arise only when a court *must* decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.[31] The doctrine represents the belief that, if the judi-

24. *Giffen*, 326 F. Supp. 2d at 499.

25. *Id*. at 500.

26. *See* 15 U.S.C. § 78dd-2(a):

> a) Prohibition. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934 [15 USCS § 78dd-1], or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--
> (1) any foreign official for purposes of--
> (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

27. *Giffen*, 326 F. Supp. 2d at 500.

28. *Id*.

29. *See* text of FCPA, *supra* note 26; *see also* Schroth, *supra* note 2 (explaining usage of the FCPA to combat foreign bribery by U.S. citizens).

30. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 444 (1987); *see also* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404–06 (1990) ("*Kirkpatrick*") (describing jurisprudential foundation of the act of state doctrine).

31. *See Kirkpatrick*, 493 U.S. at 406 (emphasis in original).

ciary were to pass judgment on the legality of foreign acts on foreign soil, it would hinder the executive branch in its conduct of foreign affairs.[32]

Giffen argued that the activities charged in the indictment were all performed in his capacity as an agent of the Kazakh government.[33] He contended that because he was entitled to maintain appropriate international accounts and to receive monies on behalf of the government, and because he was acting as an official of the Kazakh government, the court must consider the validity of the law of Kazakhstan and the official acts of its leaders.[34] Despite his position within the Kazakh government, Giffen was not shielded from FCPA scrutiny.[35] After reviewing the evidence offered by the defendant in support of his position, the court concluded that his secret payments did not constitute "official acts" of Kazakhstan.[36] The defendant's "titled position" did not provide him a shield from which to safeguard himself against prosecution for the illegal act of bribery of government officials.[37]

The court also noted that the act of state doctrine has a territorial limitation: it is limited to a government's acts within its own State.[38] In this case, the illicit activities occurred in the United States and Switzerland, not Kazakhstan.[39] The indictments against the defendant did not require the court to rule on the legality of any public acts of the Kazakh government.[40] The defendant failed to establish that his bribes to senior Kazakh officials were effected pursuant to the powers conferred by the Kazakh government;[41] merely that he held an official title did not create an "act of state" and did not bar his prosecution.[42]

The indictment alleged that Giffen's actions deprived the citizens of Kazakhstan of the honest services of their government officials.[43] Giffen asserted that the application of the hon-

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32. *Id*. at 404. However, where the executive branch files an action, as in this case, courts are reluctant to invoke the act of state doctrine. *Giffen*, 326 F. Supp. 2d at 502; *see also* United States v. Evans, 667 F. Supp. 974, 987 (S.D.N.Y. 1987) (noting the important fact that prosecution by the government demonstrates conformity with the executive branch's position). *But see* Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 n.2 (2d Cir. 1985) (stating that "whether to invoke the act of state doctrine is ultimately and always a judicial question").

33. *Giffen*, 326 F. Supp. 2d at 502.

34. *Id*.

35. *Id*. at 503.

36. *Id*.

37. *Id*.

38. *Id*.

39. *Id*. The indictment alleged deposits of monies into Swiss banks, which were then used by the defendant to fund offshore entities for the personal benefit of Kazakh officials. *Id*.

40. *Id*.; *see* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 408 (1990).

41. *Giffen*, 326 F. Supp. 2d at 503.

42. *Id*.

43. *See* 18 U.S.C. § 1346; *see also Giffen*, 326 F. Supp. 2d at 504.

est services theory impermissibly extends the mail and wire fraud statutes to cover activities beyond Congress's original intent.[44] He also argued that section 1346 was unconstitutionally vague as applied to him[45] and violated fundamental principles of international comity.[46] Section 1346 reinstated the "intangible rights" theory[47] that had been overturned in *United States v. McNally*.[48] The court looked at whether any pre-*McNally* precedent supported prosecution of American citizens for depriving foreign nationals of the honest services of their own governmental officials.[49] The prosecution, however, offered only three indictments, two from 1978 and one from 2003, in support of its position that section 1346 applied to Giffen's actions.[50] In view of the total absence of pre-*McNally* precedent supporting the government's overseas application of the intangible rights theory, the court concluded that, in enacting section 1346, Congress was merely recriminalizing the deprivation of the intangible right to honest service as it existed before McNally.[51] As a corollary, the court held that section 1346 did not criminalize deprivations of "all intangible rights of honest services, whatever they might be thought to be."[52] Accordingly, the court held that Congress did not intend that the intangible right to honest services encompass bribery of foreign officials in foreign countries.[53]

The defendant also argued that application of the honest services theory to his alleged bribery scheme was unconstitutionally vague.[54] First, the text of section 1346 did not mention

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44. *Giffen*, 326 F. Supp. 2d at 504.

45. *Id*.; *see also* United States v. Rybicki, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) ("*Rybicki*") (holding that when interpretation does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' *i.e.*, in light of the specific facts of the case at hand and not with regard to the statute's facial validity).

46. *Id*.

47. *See* 18 U.S.C. § 1346:

> For the purposes of this chapter [18 U.S.C.S. §§ 1341 et seq.], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

48. *See* United States v. McNally, 483 U.S. 350, 358 (1987) ("*McNally*") (holding that then-existing mail fraud statutes did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly); *see also Rybicki*, 354 F.3d at 133–34 (stating that Congress, in enacting Section 1346, intended to recriminalize mail- and wire-fraud schemes to deprive others of that "intangible right of honest services" which had been protected before *McNally*).

49. *Giffen*, 326 F. Supp. 2d at 505. *See generally* James Lockhart, *Validity, Construction, and Application of 18 U.S.C.A. § 1346, Providing, That for Purposes of Some Federal Criminal Statutes, Term "Scheme or Artifice to Defraud" Includes Scheme, or Artifice to Deprive Another of Intangible Right to Honest Services*, 172 ALR FED 109, at 2b–2c (2004) (describing enaction of § 1346 to overrule *McNally* and discussing "honest services" and "intangible rights").

50. *Id*. at 504. The government conceded that there were no court decisions addressing the validity of the 25-year old indictments. In the third indictment, the district court dismissed the honest services charge. *See* United States v. Lazarenko, 2004 U.S. Dist. LEXIS 19660, at 14 (N.D.Cal. 2004).

51. *Giffen*, 326 F. Supp. 2d at 505; *see Rybicki*, 354 F.3d at 138.

52. *Giffen*, 326 F. Supp. 2d at 505.

53. *Id*. at 506.

54. *Id*.; *see Rybicki*, 354 F.3d at 135 (recognizing the vagueness inherent in § 1346 as Congress did not define "honest services" and the difficulty in seeking a clear and limited meaning of the section).

bribery of foreign officials.[55] Second the legislative history of the statute was silent in that regard.[56] Finally, there were no published decisions addressing the honest services theory espoused by the government.[57]

The Second Circuit has addressed vagueness challenges against section 1346, but has not reached a definite conclusion on the matter.[58] For instance, the Circuit rejected a vagueness challenge to section 1346 as applied to domestic kickback schemes.[59] In *Giffen*, however, the district court avoided ruling on the matter, by distinguishing the issue to be decided.[60] The court presented the issue as whether section 1346 is vague as applied to Giffen's foreign bribery scheme—not as applied generally or to domestic private-sector schemes.[61] In noting the difficulties present in applying section 1346 to the defendant's actions, the court stated that, while numerous cases in the pre-*McNally* era applied the honest services theory to public sector corruption,[62] none applied the intangible rights theory to corruption in a foreign nation.[63] Additionally, to determine whether Kazakh citizens were deprived of the honest services of their government, the court would need to define "honest services" in Kazakhstan[64] and determine the compact between Kazakh citizens and their government.[65] This ethereal analysis would go beyond an American court's province of decision.

This analysis leads into Giffen's final argument against application of section 1346 to him. He argued that it presented a non-justiciable controversy:[66] "there can be no violation of section 1346 in a public corruption case unless a government official owed a duty of honest services to the public."[67] In response, the government contends the notion that government officials owe a duty of honest services to the public is not "so idiosyncratically American" as to have no application to Kazakhstan.[68] The court reacted to the prosecution's response with

55. *Giffen*, 326 F. Supp. 2d at 505.

56. *Id*.

57. *Id*.

58. *See* United States v. Adler, 274 F. Supp. 2d 583 (S.D.N.Y. 2003) (recognizing tension between *Handakas* and *Rybicki*, but finding section 1346 not void for vagueness as applied to bribery scheme involving a local official); *see also* United States v. Handakas, 286 F.3d 92 (2002) (finding section 1346 unconstitutional as applied to construction company paying a substandard wage in violation of New York law); *Rybicki*, 287 F.3d 257 (affirming a section 1346 conviction against attorneys who arranged for secret gratuities to be paid to insurance claim adjusters).

59. *Rybicki*, 354 F.3d at 124.

60. *Giffen*, 326 F. Supp. 2d at 506.

61. *Id*.

62. *See McNally*, 483 U.S. at 363 n. 1 (Stevens, J., dissenting).

63. *Id*.

64. *Giffen*, 326 F. Supp. 2d at 507.

65. *Id*. at 506–7.

66. *Id*. at 507.

67. *Id*. *See generally* Nichols, *supra* note 23 (describing perceptions of Kazakhstani citizens with respect to corruption in their state and among government officials).

68. *Id*.

something approaching disdain. The court stated, "in effect, the Government urges that American notions of honesty in public service developed over two centuries be engrafted onto Kazakh jurisprudence."[69] In soundly rejecting this contention, the court refused to export American legal standards to a foreign state's judicial system.[70] "An argument in favor of the export of United States law represents not only a form of legal imperialism but also embodies the essence of sanctimonious chauvinism."[71] In the interest of international comity, the court refused to consider such an extraterritorial enlargement of the government's powers under section 1346.[72] The court then accepted the defendant's arguments and held that the mail fraud amendment of section 1346 did not apply to Giffen.[73]

The amendment extending the mail fraud statute to cover instances of denial of right to honest services was inapplicable to the case at hand.[74] Moreover, the statute was unconstitutionally vague as applied to bribery of foreign officials in a foreign country.[75] Finally, application of the mail fraud statute to the case would be barred in the interest of international comity.[76] The court granted the defendant's motion to dismiss the portions of counts fifteen through twenty-three of the indictment that alleged a scheme to deprive the citizens of Kazakhstan of the honest services of their government officials.[77]

IV. Conclusion

The District Court for the Southern District of New York concluded that neither the act of state doctrine nor any exceptions contained within the FCPA prevented Giffen's prosecution for making illicit payments to senior Kazakh officials. However, the court did find the application of section 1346 as applied to the defendant's mail and wire fraud in Kazakhstan unconstitutionally vague.

The court wisely refused to extend the "honest services" amendment of section 1346 to bribery of foreign officials in a foreign state. The court avoided the disagreement over whether the section is unconstitutionally vague by distinguishing the facts of the present case, involving international corruption, from purely domestic schemes, holding that the statute was not intended to cover such cases. Moreover, the court refused to engage in "legal imperialism" by exporting American standards to a foreign country's legal system. The court avoided unneces-

69. *Giffen*, 326 F. Supp. 2d at 507.

70. *Id*.

71. *Id*. (quoting Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F. Supp. 107, 163 (D. Del. 1983), *aff'd*, Appeal of Chase Manhattan Overseas Banking Corp., 740 F.2d 956 (3d Cir. 1984)).

72. *Giffen*, 326 F. Supp. 2d at 508.

73. *Id*.

74. *Id*. at 506.

75. *Id*. at 507.

76. *Id*. at 508.

77. *Id*.

sary determinations of legal issues and effectively reserved resolving domestic application of the statute for a later case.

Application of "denial of honest services" would have required the court to determine what level of honest services the citizens of Kazakhstan would be owed by their officials. This would inevitably involve a subjective evaluation by an American court of the amount of corruption acceptable in Kazakhstan; it would also seem inevitable that an American court would determine that the level of corruption was too high, and thus apply American legal standards. In effect, the court would determine that Kazakhstan's legal system is inferior relative to America's and that Kazakhstan should adopt the superior legal standard.

Any analysis of foreign legal standards combined with a subjective decision to enforce one's own as the better one is the essence of "legal imperialism." A court cannot export its own legal system and graft it onto a foreign country's, merely because it views its own as superior. An effort to convince Kazakhstan to conform to American standards regarding corruption must come through the diplomatic process; the Kazakh people, not American judges, must decide what level of corruption to accept in their society.

Daniel Biegelman

Intertec Contracting A/S v. Turner Steiner International, S.A.

6 A.D.3d 1, 774 N.Y.S.2d 14 (1st Dep't 2004)

Dismissal of an action between foreign companies on *forum non conveniens* grounds was inappropriate because a substantial nexus between the plaintiff's chosen forum and the cause of action was present. A treaty accorded the plaintiff equal treatment with regard to judicial access, and the plaintiff's potential hardship would far outweigh the defendant's if the case were dismissed pursuant to New York Civil Practice Law and Rules 347.

I. Holding

In *Intertec Contracting A/S v. Turner Steiner International, S.A.*, the Appellate Division, First Department, found a *forum non conveniens* dismissal under New York CPLR 327 inappropriate.[1] The court determined that a substantial nexus existed between New York State and the cause of action.[2] It also gave strong deference to the plaintiff's choice of New York as a forum on the basis of a bilateral treaty granting Danish plaintiffs the same right of access to United States courts as that enjoyed by United States nationals.[3] The court exercised its independent discretion in the matter and concluded that a dismissal of the action on *forum non conveniens* grounds would impose more severe hardship on the plaintiff than on the defendant.[4]

II. Factual and Procedural Background

The plaintiff, Intertec Contracting A/S, a Danish corporation, brought suit against the defendant, Turner Steiner International, S.A., a Belgian corporation, in New York State Supreme Court, seeking damages for delays allegedly caused by the defendant's negligence dur-

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1. Intertec Contr. A/S v. Turner Steiner Int'l, S.A., 6 A.D.3d. 1, 4, 774 N.Y.S.2d 14, 16 (1st Dep't 2004). The *forum non conveniens* doctrine developed in case law and was codified in New York Civil Practice Law and Rules. *See* N.Y. CPLR 327(a) (providing that court may dismiss action "on any conditions that may be just" when it finds that "in the interest of substantial justice the action should be heard in a different forum").

2. *Intertec*, 774 N.Y.S.2d at 16–17.

3. *Id.* at 17; *see* Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, U.S.-Den., art. V, para. 1, 12 U.S.T. 908 (hereinafter "FCN") (providing that "companies of either party shall be accorded national treatment and most-favored-nation treatment with respect to access to courts of justice . . . within the territories of the other party, in all degrees of jurisdiction, both in pursuit and in defense of their rights").

4. *Intertec*, 774 N.Y.S.2d at 17; *see also* Holness v. Mar. Overseas Corp., 676 N.Y.S.2d 540, 545 (1st Dep't 1998) (an appellate court is not limited to an abuse of discretion standard of review and may exercise independent discretion in ruling on a *forum non conveniens* motion) (citing Highgate Pictures v. DePaul, 549 N.Y.S.2d 386, 388 (1st Dep't 1990)).

ing a construction project in Sri Lanka.[5] In the course of pre-trial discovery, the court granted the defendant's motion to remove the case to federal court,[6] where the defendant later moved to compel arbitration, arguing that the subcontract incorporated an arbitration agreement by reference to another general contract.[7] The federal court found otherwise and remanded the action back to state court.[8] On remand, the defendant moved to dismiss the action on the basis of *forum non conveniens*.[9] The Supreme Court, New York County, granted the motion, finding that, because all of the events giving rise to the dispute occurred in Sri Lanka, New York had no interest in the outcome.[10]

III. Court's Analysis

A. *Forum Non Conveniens* Under CPLR 327

In deciding to retain jurisdiction, the Appellate Division recognized at the outset that the *forum non conveniens* doctrine, as codified in CPLR 327, is founded on notions of justice, fairness, and convenience.[11] The court also underscored that it is permitted to consider all relevant factors in its determination, and that no one factor is controlling.[12]

Turning to the particular facts and circumstances of the case, the court found that the defendant had failed to demonstrate that greater hardship would result if the case remained in New York.[13] The defendant regularly held board meetings in its New York offices.[14] A substan-

5. *See Intertec*, 774 N.Y.S.2d at 15–16. The plaintiffs are Intertec (Gibraltar) Ltd., Intertec Overseas Ltd., both incorporated in Gibraltar, and Intertec Contracting A/S, their parent company, incorporated in Denmark with offices therein. *Id.* at 16. The defendants are Turner Steiner East Asia Ltd., incorporated in Hong Kong, Turner Steiner International, S.A., its parent company, incorporated in Belgium with offices in New York, and The Turner Corporation, the latter's parent company, incorporated in Delaware with an office in New York. *Id.* at 16–17. For the sake of clarity, plaintiffs and defendants are referred to in the singular.

6. *Id.* at 16.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; *see also* Silver v. Great Am. Ins. Co., 278 N.E.2d 619, 622 (1972) (establishing that the *conveniens* doctrine "turns on considerations of justice, fairness, and convenience and not solely on the residence of one of the parties"); *see also* DAVID D. SIEGEL, NEW YORK PRACTICE § 28, at 29–30 (3d ed. 1999) (explaining how the *conveniens* doctrine has evolved under CPLR's embrace of the *Silver* decision).

12. *Id.* at 17; *see, e.g.*, Islamic Rep. of Iran v. Pahlavi, 467 N.E.2d 245, 248 (1984) (stating that no one factor controls the determination; rather, courts should weigh various public policy factors, such as the burden on New York courts, potential hardship on the defendant, and the unavailability of an alternative forum); *see also* Allan R. Stein, Forum Non Conveniens *and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 793 (1985) (observing that the *forum non conveniens* doctrine is "practically devoid of hard rules"). *See generally* SIEGEL, *supra* note 11, §§ 28–29 (providing a helpful overview of the doctrine and its application in germane New York cases).

13. *Intertec*, 774 N.Y.S.2d at 17.

14. *Id.*

tial amount of pre-trial discovery had also been conducted in New York.[15] The bulk of the records and documents necessary to the litigation had been exchanged and kept in New York.[16] In addition, the defendant had agreed to transport more files from Sri Lanka to New York when the action was removed to the federal court.[17] Given these protracted pre-trial activities, which evidenced a great expenditure of time and resources by both parties, the court had no trouble finding that the presumption of hardship on the defendant was greatly diminished.[18] Alternatively, the court noted the severe hardship which would fall upon the plaintiff if New York relinquished jurisdiction in light of the delays and difficulties the plaintiff had suffered since bringing the action in 1998, as well as the potential hardship of starting a new action in Sri Lanka.[19] On the basis of the foregoing facts, the court determined that the substantial nexus between the cause of action and New York was sufficient to justify reserving jurisdiction.[20]

Next, the court took note of a treaty between the United States and the plaintiff's home country, Denmark.[21] *Inter alia*, the agreement requires that Danish companies, such as the plaintiff's, be given the same rights as United States nationals to pursue legal action in the United States.[22] Consequently, the court held that the plaintiff's choice of New York as a forum for litigation merited great deference.[23]

B. Standard of Review

The court exercised independent discretion in holding that New York should entertain the cause of action.[24] For purposes of determining whether as a matter of policy New York is a convenient forum, courts are not bound to any standard of appellate review and thus have virtually unfettered discretion to decide whether to dismiss an action on *forum non conveniens*

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*; *see supra* note 5.
22. *See Intertec*, 774 N.Y.S.2d at 17; *see also* FCN, *supra* note 3. It is quite common for FCN treaties to provide for national treatment of foreign plaintiffs. *See* Allan I. Mendelsohn & Renée Lieux, *The Warsaw Convention Article 28, the Doctrine of* Forum Non Conveniens*, and the Foreign Plaintiff*, 68 J. AIR L. & COM. 75, 90–91 (2003). The treaties usually contain some standard language stating that each state shall have equal "access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." *See* Allan Jay Stevenson, Forum Non Conveniens *and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267, 283 & n.105 (1990) (noting that some 30 FCN treaties which the United States has entered into are still in force; listing treaties and their "national treatment" clauses).
23. *Intertec*, 774 N.Y.S.2d at 17.
24. *Id.* at 16.

grounds.[25] For instance, a court will likely keep the case in its state if, in light of pertinent factors, it has little confidence in the proper resolution of the case in an alternative forum.[26] Indeed, a key factor considered by the *Intertec* court was that Sri Lanka was in the midst of a violent civil war.[27] The court recognized that this made Sri Lanka an unsuitable alternative forum.[28] Therefore, the court concluded that no alternative forum was available.[29]

C. Other Relevant Factors

Apart from determining that it would be imprudent to confer jurisdiction to Sri Lanka,[30] the court balanced other public and private factors in concluding that New York was the proper forum.[31] Most of the witnesses likely to appear in the litigation resided in the United States or Europe.[32] Because both the plaintiff and the defendant were multinational companies with abundant financial resources, the hardship in bringing potential witnesses to New York was minimal.[33] Additionally, the burden on New York courts in applying Sri Lankan law was slight, because foreign laws are frequently applied.[34] The court relied on these factors in further justifying New York's jurisdiction over the parties and reversing the trial court's decision to dismiss the action on *forum non conveniens* grounds.

IV. Conclusion

Forum non conveniens is an equitable doctrine. The *Intertec* court reached an equitable result, consistent with the way the doctrine has been applied by New York courts under CPLR 327.[35] Because the outcome turns on the particular facts of a given case, the court enjoyed independent discretion and used it sensibly. Although the events giving rise to the suit took place in a foreign country, the dispute had a strong connection to New York for reasons the

25. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (landmark case analyzing the application of the *forum non conveniens* doctrine to foreign plaintiffs; stating that a trial court is vested with sound discretion in a *forum non conveniens* inquiry and that its determination may be reversed only where there is a clear abuse of discretion); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (highlighting that "[m]any of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds"); *see also* Martin v. Meith, 35 N.Y.2d 414, 417–18, 321 N.E.2d 777, 779 (1974) (New York Court of Appeals exercising independent discretion by considering the entire record in a case where the Appellate Division affirmed the preservation of jurisdiction in opposition to a motion to dismiss on *forum non conveniens* grounds); *see also supra* note 4.

26. *See* SIEGEL, *supra* note 11, § 28, at 30 (positing that a dismissal in international disputes depends on the degree of confidence a court has in the jurisprudence of a foreign nation).

27. *Intertec,* 774 N.Y.S.2d at 17.

28. *See id.* at 17–18 (concluding that under such circumstances "it would be improvident to direct the parties and any potential witnesses to submit to Sri Lankan jurisdiction at the present time or for the foreseeable future").

29. *Id.* at 17.

30. *See supra* notes 27–28 and accompanying text.

31. *Intertec*, 774 N.Y.S.2d at 18.

32. *Id.*

33. *Id.*

34. *Id.* (citations omitted).

35. *See supra* note 11.

court examined.[36] Furthermore, the court's judgment flowed from public policy concerns that in their totality legitimize the court's decision to retain jurisdiction over the matter.

Yakov Pyetranker

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36. *See* Part III.A., *supra.*

Olguin v. Santana

2004 U.S. Dist. LEXIS 15099 (Aug. 5, 2004)

The Hague Convention on the Civil Aspects of International Child Abduction may require children abducted to New York by abused mother to be returned to Mexico, where father had and exercised shared custodial rights if no physical or psychological harm results.

I. Holding

In *Olguin v. Santana*,[1] the United States District Court for the Eastern District of New York denied defendant's motion to dismiss plaintiff's petition for the return of their two sons, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction[2] and its implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611. Defendant claimed that (1) plaintiff did not, at the time of the claim, enjoy rights of custody over their children, but only rights of visitation; and (2) even if plaintiff did enjoy such rights, he did not actually exercise them over the children at the time defendant removed them from their Mexican residence.[3] The court analyzed both parts of the claim and determined that defendant failed to establish either part.[4]

II. Facts

Noel Stalin Reyes Olguin (plaintiff) and Maria del Carmen Cruz Santana (defendant) began living together, unmarried, in late 1996, shortly after their first son was born.[5] As early as that date, plaintiff abused alcohol, spending his time outside of work carousing with friends and girlfriends.[6] He physically abused defendant, even while she was pregnant; sometimes, he beat her in front of their older son or his father.[7] On July 19, 2001, plaintiff attempted to throw defendant down the stairs in their home in front of their second son, whom plaintiff had unsuccessfully urged defendant to abort.[8] Defendant reported the beating to police; after a two-month stay at her parents' house, she took the children to the Bronx, New York.[9]

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1. 2004 U.S. Dist. LEXIS 10599 (Aug. 5, 2004).
2. 25 Oct. 1980, TIAS No. 11670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10498, entered into force for the United States 29 April 1988.
3. *Id.* at *1.
4. *Id.* at *7, *17.
5. *Id.* at *1–*2.
6. *Id.*
7. *Id.* at *2–*3.
8. *Id.* at *3.
9. *Id.*

During his family's absence, plaintiff moved in Mexican court in September 2001 for visitation rights.[10] The court denied plaintiff's motion notwithstanding defendant's failure to appear in court.[11] An appellate court reversed the decision, granting plaintiff visitation rights.[12] In February 2002, plaintiff sought to enforce these rights through letters to Mexican courts; a month later, however, the case was closed due to inactivity.[13] In April 2002, an appellate court affirmed the discontinuance.[14]

Approximately eight months after defendant's flight from Mexico, plaintiff and his father arrived at her Bronx residence.[15] Plaintiff's father convinced defendant that plaintiff would improve his behavior, and promised the children gifts, if defendant and the children returned home to Mexico.[16]

Returning in April 2002, defendant and her sons resided with plaintiff in a home owned by plaintiff's parents.[17] Whereas plaintiff's parents provided the children with food and clothing, plaintiff also contributed financial support to the family, albeit with a much smaller income than his parents' incomes combined.[18] Plaintiff worked from 1:00 to 8:00 p.m.[19] Before starting work, he would occasionally drop his older son off at school, sometimes accompanied by his other son.[20] After work, he would sometimes take the children either to the park or for a car ride. He also accompanied them to soccer games and to church.[21]

After a brief period of abstinence, plaintiff reverted to his old ways, drinking with friends, abusing alcohol and beating defendant.[22] In May 2003, thirteen months after her return, defendant again escaped plaintiff's abuse, taking the children with her to New York.[23]

Plaintiff moved in the U.S. District Court, Eastern District of New York, for the return of his sons, pursuant to the Convention and its implementing U.S. legislation.[24] The case was docketed in December 2003.[25] Judge Gleeson held a hearing on July 12, 2004, listening to tes-

10. *Id.* at *6.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *6.
15. *Id.* at *3.
16. *Id.* at *3.
17. *Id.* at *3–*4.
18. *Id.* at *4.
19. *Id.*
20. *Id.* at *4.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at *1.
25. Olguin v. Santana, No. 1:03CV06299 (E.D.N.Y. Dec. 16, 2003).

timony from both parties as well as members of plaintiff's family on the issue of whether plaintiff actually exercised custody rights at time defendant removed them in May 2003.[26] The parties submitted the opinions of two Mexican-law experts on this issue.[27]

III. Jurisdiction of the Court

On October 25, 1980, member states of the Hague Conference on Private International Law signed the Hague Convention on the Civil Aspects of International Child Abduction, in order to "secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State."[28] Each signatory state was to designate a central authority to discharge the duties imposed by the Convention.[29] In cases where a party from a signatory state wrongfully brought children to the United States or retained them there, that authority would address and resolve the issue of wrongfulness by looking to the law of the child's country of habitual residence.[30]

In 1988, Congress passed the International Child Abduction Remedies Act to implement the Convention.[31] The Convention and its implementing legislation authorize U.S. courts to determine only rights under the Convention and not the merits of any underlying child custody claims.[32] A removal is wrongful only if in breach of "rights of custody," as opposed to "rights of access."[33] Rights of custody include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[34] Such rights of custody may extend to those over children born out of wedlock.[35]

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26. Olguin v. Santana, 2004 U.S. Dist. LEXIS 15099, at *1–*2.

27. *Id.* at *2.

28. Hague International Child Abduction Convention, Oct. 25, 1980, art. 1; 51 Fed. Reg. 10498 (1986).

29. Hague International Child Abduction Convention, art. 6; 51 Fed. Reg. 10498; *see also* Richard D. Kearney, *Developments in Private International Law*, 81 AM.. J. INT'L L. 724, 731–32 (1987) (commenting that the threat of a parent abducting a child during a marital dispute was deemed serious enough in the U.S. to enforce the Uniform Child Custody Jurisdiction Act in all fifty states).

30. 51 Fed. Reg. 10506; *see also* Kearney, *supra* note 29, at 732 (noting that otherwise, a local court may tend to favor an abducting parent of similar nationality over the other parent).

31. 41 U.S.C. §§ 11601–11611 (2004) (enacted April 29, 1988 as P.L. 100–300, § 2, 102 Stat. 437).

32. 42 U.S.C.S. § 11601(b)(4) (2004); *see also* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 458 (D. Md. 1999) (stating that when determining whether a child should be returned, the court does not determine the custody rights of the parents, which are under the jurisdiction of the child's habitual residence).

33. Olguin v. Santana, 2004 U.S. Dist. LEXIS 15099, at *4–*5, citing the Convention, art. 3, 51 Fed. Reg. 10498.

34. *Olguin* at *7–*8, citing the Convention, art. 5, 51 Fed. Reg. 10498.

35. See *Olguin* at *9, n.2, citing Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (holding that the law under a particular Mexican state—not the one of habitual residence of the parties in *Olguin*—recognizes rights of *patria potestas* over illegitimate children and equating these rights with the Convention's rights of custody).

IV. The Court's Analysis

A. Existence of Custody Rights

Citing the court orders during the interim of her first departure to New York, defendant claimed that plaintiff did not have custody rights but only visitation rights; thus, the court did not have jurisdiction under the Convention to consider plaintiff's petition.[36] Defendant argued that notwithstanding her and the children's subsequent residence with the plaintiff in 2002, plaintiff continued to have only rights of visitation, not of custody, because the Mexican court had issued an order granting visitation.[37] The court rejected this argument as being against Mexican law.[38] The court followed the plaintiff's expert witness' argument that under Mexican law, the visitation order expired when the case was closed for inactivity.[39] Thus, the argument continued, until a Mexican court determined otherwise, plaintiff and defendant had equal rights of custody over the children.[40] The court held that the standard for determining custody rights is minimal, requiring only one right of custody, if necessary.[41]

B. Actual Exercise of Custody Rights

The burden of proof to establish non-exercise of custody rights is on the abductor, rather than the guardian suing for wrongful removal.[42] Specifically, whereas plaintiff bears the burden of producing evidence of his exercise of custody rights, defendant bears the burden of persuasion otherwise.[43] Like the issue of the existence of custody rights, the issue of their actual exercise has a minimal standard; preliminary evidence is needed to show that plaintiff took physical care of his children.[44] On this point, the court followed a decision of the Sixth Circuit, which stated three policy reasons for adhering to such a standard.[45] First, it has been held that American courts are not well-suited to determine consequences of parental behavior under foreign law.[46] Second, decisions from American courts about the adequacy of one's parents' exercise of custody rights border on determining the merits of the custody dispute, which they are unau-

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36. *Olguin* at *6.

37. *Id.* at *7.

38. *Id.* at *8.

39. *Id.*

40. *Id.* at *8–*9.

41. *Id.* at *9, citing Furnes v. Reeves, 362 F.3d 702, 714–15 (11th Cir. 2004) (interpreting "rights of custody attributed to a person . . . either *jointly or alone*" in art. 3(a) of the Hague Convention, as requiring a minimal standard of "only one right of custody. Further, [the parent] need not have a *sole* or even *primary* custody"). *Furnes* at 714 (alteration in original).

42. *Olguin* at *10–*11, citing Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, *in* 3 Acts & Documents of the Fourteenth Session of the Hague Conference 426, 449 (1980).

43. *Olguin* at *11, n.3; *see also* Shealy v. Shealy, 295 F.3d 1117, 1122 (10th Cir. 2002) (stating that petitioner bears the burden of showing actual exercise of custody rights).

44. *Olguin* at *12–*13.

45. *Id.* at *13–*16, citing Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).

46. *Olguin* at *14, citing *Friedrich*, 78 F.3d at 1065.

thorized to do.[47] Lastly, it would be difficult to determine precisely the acts and motivations of the parties involved in their parental roles.[48]

In the present case, plaintiff demonstrated that he lived with defendant and their children during the period from April 2002 to May 2003, before defendant left for the second time with the children.[49] Moreover, plaintiff provided financial support for his family, transported one son to and from school, and accompanied his children at soccer games and church.[50] Because plaintiff satisfied his burden of production, and because defendant failed to rebut the presumption of actual exercise of custody rights, the court found that plaintiff indeed exercised his rights at time of removal.[51]

V. Conclusion

Although the court denied defendant's motion to dismiss, it ordered an inquiry into whether returning the children to Mexico would subject them to a grave risk of physical or psychological harm, and if so, whether either party or Mexican authorities could effectively reduce that risk.[52]

There is no indication in the record that plaintiff directed abuse at the children, at least not after they were born. Thus, although the defendant's flight was justifiable, in light of the danger plaintiff posed to her, that aspect is not directly relevant to the court's ultimate decision. Rather, it is the potential danger to the children that the court will address.[53] This approach is consistent with the Convention's Preamble, whereby the interests of the child have primary importance as against those of the parents.[54] Restraints on determination by U.S. tribunals of the merits of international disputes in cases of child abduction and the liberal construal of rights of custody have thus compelled this court to ironically saddle the defendant with the role of "abductor." Perhaps the only way defendant could have avoided this dubious status would

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47. *Olguin* at *14, citing *Friedrich* at 1065.

48. *Olguin* at *14, citing *Friedrich* at 1065.

49. *Olguin* at *16.

50. *Id.*

51. *Id.* at *17–*18; *see also* Peter D. Trooboff & Mark P. Kindall, *Treaties—Hague Convention on Child Abduction—Wrongful Removal—Grave Risk of Harm to Child*, 83 AM. J. INT'L L. 586, 589 (1989) (insisting in a particular case that despite mother's full custody to child as to the day-to-day responsibility of caring for him, she did not enjoy full authority to determine his place of residence, against the father's custody rights under the Convention).

52. *Olguin* at *18; *see also* Convention, art. 13(b), 51 Fed. Reg. 10499 (allowing an exception for wrongful removal where a grave risk of harm to the abducted child exists).

53. *See, e.g.,* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376–77 (8th Cir. 1995) (dismissing wife's evidence of her husband's physical, verbal and sexual abuse toward her as too "general" to satisfy the presence of a grave risk to their infant).

54. *See* Convention, Preamble, 51 Fed. Reg. 10498.

have been to abandon her children for her own safety. Nonetheless, a grave risk of psychological harm to the children may justify defendant's actions in the second stage of proceedings.[55] Defendant could emphasize that the second son witnessed his father attempting to shove her down a flight of stairs, as well as any other instances of the children observing such abuse, to establish psychological, if not physical, harm. Similarly, defendant has support in a previous case in the Second Circuit, where the court affirmed a finding that recurrent abuse of a mother and her children by the father posed a prospect of post-traumatic stress disorder, which would require the children not to return to their father.[56] International law arguably recognizes life and health as fundamental to human rights. Therefore, when mothers sense a threat to either or both, they are justified in acting as the defendant did in the present case.

Richard Elem

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55. *See* Convention, art. 13(b) (denying return of the child where "a grave risk that his or her return would expose the child to . . . psychological harm or otherwise place the child in an intolerable situation").

56. Blondin v. Dubois, 238 F.3d 153, 156, 163 (2d Cir. 2001). In similar circumstances to *Olguin*, the mother left the house twice with the children, staying away on one occasion for as long as eight or nine months. *Id.* at 156.

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