

NEW YORK INTERNATIONAL LAW REVIEW

Summer 2004

Vol. 17, No. 2

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NEW YORK STATE BAR ASSOCIATION

INTERNATIONAL LAW & PRACTICE SECTION

Published with the assistance of St. John's University School of Law

NEW YORK INTERNATIONAL LAW REVIEW

Summer 2004
Vol. 17, No. 2

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL LAW & PRACTICE SECTION

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ISSN 1050-9453

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The ICJ's Authority to Invalidate the Security Council's Decisions Under Chapter VII:

Legal Romanticism¹ or the Rule of Law²?

By Babback Sabahi*

Introduction

On September 10, 2003, Libya agreed, separately with the United States and the United Kingdom, to withdraw the two cases that it had brought against those states before the International Court of Justice (ICJ).³ By this mutual withdrawal, the Court lost the opportunity to hear the merits of and pronounce itself upon one of the most controversial issues that it had encountered since its inception, which had the potential for changing the structure of the col-

1. See W. Michael Reisman, Note, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 94 (1993) (using the phrase in reference to Judge Lach's remark in the *Lockerbie* case that "the Court was the guardian of legality of the international community as a whole"); see also Jonathan A. Frank, *A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court Justice Action*, 30 DENV. J. INT'L L. & POL'Y 532, 541-42 (2002) (discussing Judge Lach's opinion in *Lockerbie*, which highlighted the tension between the organs that have independent powers); Christopher K. Penny, *No Justice, No Peace?: A Political and Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia*, 30 OTTAWA L. REV. 259, 287 (1998-99) (arguing that based on the ICJ rulings thus far, it is unlikely that there would be a legal basis for challenging a Security Council resolution at the ICJ).
2. See Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, in ESSAYS IN HONOUR OF WANG TIEYA (Ronald St. John Macdonald ed., 1994); see also Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 10 (2003) (arguing that *Lockerbie* has helped to establish the principle of judicial review within the United Nations' organs); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 521 (2003) (noting that scholars have compared *Lockerbie* to *Marbury v. Madison* to reach the conclusion that judicial review is an implied and necessary power).
3. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.K.*) 2003 I.C.J. (Sept. 10), (ordering the case to be removed from the docket of the Court) (hereinafter "*Lockerbie III*") available at http://www.icj-cij.org/icjwww/idocket/iluk/ilukord/iluk_iorder_20030910.pdf; Sean D. Murphy, *Libyan Payment to Families of Pan Am Flight 103 Victims*, 97 AM. J. INT'L L. 987, 991 (2003) (stating that Libya withdrew its cases against the United States and the United Kingdom).

* J.D., Boston University School of Law, 2004, LL.B., University of Tehran School of Law & Political Sciences, 1992. I am indebted to Professor Daniel Partan of Boston University School of Law for his thoughtful comments on earlier drafts of this article. I am also grateful to my wife, whose continuous support has made the research and preparation of this article possible.

lective security system under the supervision of the United Nations Security Council.⁴ The Court, in the course of resolving those disputes, would have to answer the question of whether it had the authority to invalidate the resolutions of the Security Council, if it found them illegal.⁵

After the collapse of the Communist bloc, important obstacles to the performance of duties of the Security Council under the United Nations (U.N.) Charter were removed,⁶ and the Council became more active in managing international crises, using its Chapter VII powers.⁷ This situation has produced both advantages and concerns. On the one hand, with mixed success, the Council has intervened in many hostilities around the world and has prevented catastrophes, restored the peace, or in some instances, arguably forestalled worse results.⁸ On the other hand, in an increasing number of cases, the Council has been acting on the borders of

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4. See Scott S. Evans, *The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine*, 18 MD. J. INT'L L. & TRADE 21, 75 (1994) (stating that the *Lockerbie* cases brought out the judicial review conflict between the branches of the United Nations); see also Robert F. Kennedy, Jr., Note, *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 VA. J. INT'L L. 899, 912 (1993) (explaining the jurisdictional conflict between the ICJ and the United Nations Security Council in the *Lockerbie* cases). See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 174–75 (1999) (discussing the background of the cases Libya brought to the ICJ against the United States and the United Kingdom).
 5. See M. Cherif Bassiouni, *Reforming International Extradition: Lessons of the Past for a Radical New Approach*, 25 LOY. L.A. INT'L & COMP. L. REV. 389, 407 (2003) (stating that the ICJ lost its opportunity to address the judicial review issue in *Lockerbie* when Libya, the United States and the United Kingdom came to an agreement); see also Ian Brownlie, *Politics and Law in International Adjudication*, 97 AM. SOC'Y INT'L L. PROC. 282, 283 (2003) (noting that in the ICJ's preliminary decision in the *Lockerbie* cases, the ICJ failed to determine whether it had judicial review power over the resolutions of the Security Council); Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871, 875 (2003) (arguing that the ICJ was reluctant to overturn the mandates of the Security Council in general and in the *Lockerbie* cases in particular).
 6. See Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 325 (2000) (describing the politics of the Security Council during the years of the Cold War); see also Adam Roberts, *Crisis in the Gulf: End of Cold War Makes U.N. Bolder*, INDEP. (London), Dec. 3, 1990, at 9 (stating the problems that the Security Council encountered in enacting resolutions during the Cold War). See generally U.N. Charter art. 7 (establishing the Security Council as one of the organs of the United Nations).
 7. See Anatole Kaletsky, *Economic Recovery Needs a Quick Resolution of the Iraq Stand-off*, TIMES (London), Feb. 11, 2003, at 25 (explaining the political interplay of the five permanent members of the Security Council after the end of the Cold War); see also Cheong Suk Wai, *Not Too Late to Avoid Disaster in Iraq*, STRAITS TIMES (Singapore), Feb. 9, 2004 (discussing the actions of the Security Council during and after the Cold War). See generally U.N. Charter arts. 39–51 (establishing the Security Council's Chapter VII powers).
 8. See Judith A. Miller, *National Security: NATO's Use of Force in the Balkans*, 45 N.Y.L. SCH. L. REV. 91, 93 (2001) (outlining the United Nation's interventions under its Chapter VII powers); see also Judith A. Miller, *Reflections on National Security and International Law Issues During the Clinton Administration*, 3 CHI. J. INT'L L. 219, 227 (2002) (mentioning some of the interventions that were approved by the Security Council under its Chapter VII powers); Major Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 48 (1999) (discussing how the United Nations created tribunals under its Chapter VII powers in order to help maintain the peace).

its legal authority (or perhaps beyond it),⁹ which has given rise to worldwide concern about the proper scope and limitations of its powers.¹⁰ With the Council's activism and the expansion of its role and powers, many believe that a supervisory function or judicial review over the Council's actions under Chapter VII is necessary.¹¹ The forum which exercises this function would potentially define and develop more accurately the details of what the Council may or may not do.¹²

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9. Examples of such measures include S.C. Res. 748 (1992) in the Lockerbie incident (demanding the extradition of the Libyan suspects), and S.C. Res. 687 (1991) in the *Iraq Case* (authorizing, under the interpretation of the United States and the United Kingdom, the use of force against Iraq continuously until there was conclusive compliance with other requirements of the resolution. *See* S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 52, U.N. Doc. S/RES/748 (1992) (demanding the extradition of the Libya suspects); *see also* S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 11, U.N. Doc. S/RES/687 (1991) (authorizing the use of force against Iraq until there is conclusive compliance with other requirements of the resolution); U.N. SCOR, Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (2003), (informing the Security Council of measures taken against Iraq in order to insure compliance with the resolutions enacted by the Council) *available at* http://www.un.int/usa/s2003_351.pdf; U.N. SCOR, Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/350 (2003), (informing the Security Council of the measures the United Kingdom and the United States took against Iraq based on its non-compliance with the Council's mandates) *available at* <http://www.jura.uni-muenchen.de/einrichtungen/l/s/simma/dokumente%20andreas/uk%20justification%20letter.pdf>.
 10. *See* Michael J. Glennon, *The Gulf Crisis in International and Foreign Relations Law: The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 88 (1991) (stating that it is doubtful that the Security Council has the power to require member states to use military forces without a specific agreement); *see also* W. Michael Reisman, Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 83–84 (2003) (discussing factors that make the Security Council ineffective). *See generally* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 26 (1995) (stating that Congress has hesitated before allowing the President to act under the authorization of the Security Council).
 11. *See* Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 144 (1999) (discussing the option of having an international court review Security Council resolutions); *see also* Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 277 (1989) (acknowledging the need for increased monitoring of the Security Council). *See generally* Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753, 783 (1999) (stating that the Security Council should refer more international disputes to the International Court of Justice and the other international courts).
 12. *See* David, *supra* note 11, at 146–47 (stating that application of the political question doctrine would have an impact on the scope of resolutions of the Security Council). *See generally* Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273, 290 (2000) (citing an occasion when the International Court of Justice approved a decision made by the Security Council); Jeffrey S. Morton, *The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law*, 9 ILSA J. INT'L & COMP. L. 75, 94–95 (2002) (considering whether the Security Council's power to intervene in hostile situations should be limited).

The most appropriate institution for this purpose is the International Court of Justice (ICJ).¹³ In the past decade, many authors have commented on the issue of the ICJ's authority of judicial review, and the ICJ itself has dealt with it, although not conclusively, in several cases.¹⁴ It is almost trite to say that ICJ has the authority to review the Council's resolutions and analyze their legal effects. The core issue of whether the Court can strike down, or "invalidate" the Council's measures, however, is still unresolved, with heated debates on both sides of the dispute.

In this note, I will try to show that the Court possesses the authority to invalidate the Security Council's resolutions under Chapter VII, but has so far abstained from exercising it. If, however, it decides to invalidate a Council resolution, the Council has a legal obligation to abide by such decision. In part I, necessity of the existence of the authority to invalidate for the international society will be discussed. Part II addresses the legal criteria governing the Security Council's decision-making process. Part III explains the bases of the ICJ's authority to invalidate the Council's decisions. In Part IV, the jurisprudence of the Court with regard to its relation with the Council will be reviewed. Finally, Part V deals with the consequences that would follow if the Court decides to invalidate a decision of the Council, especially the possible reactions of the Council.

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13. See *infra* Part III. See generally Major Louis A. Chiarella, *United Nations Operations: Problems Encountered by United States Forces When Subject to a "Blue Purse,"* 154 MIL. L. REV. 53, 65 (1997) (discussing the relationship between the Security Council and the International Court of Justice as two of the primary bodies of the United Nations); David, *supra* note 11, at 147 (considering the effect of the International Court of Justice reviewing decisions made by the Security Council); Grant, *supra* note 12, at 290 (noting an instance when a decision by the Security Council was approved by the International Court of Justice).
 14. See Bartram S. Brown, Book Review, 96 AM. J. INT'L L. 506, 507 (2002) (reviewing U.N. SANCTIONS IN INTERNATIONAL LAW (Vera Gowlland-Debbas ed.)) (stating that the International Court of Justice will be faced with determining the scope of its power of judicial review in the near future). But see Michael J. Glennon, *Agora: The 1994 U.S. Action in Haiti: Sovereignty and Community After Haiti: Rethinking the Collective Use of Force*, 89 AM. J. INT'L L. 70, 72 (1995) (stating that the International Court of Justice has yet to determine its power of judicial review over decisions made by the Security Council); Frederic L. Kirgis, Editorial Comment, *Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making*, 95 AM. J. INT'L L. 579, 580 (2001) (noting that the U.N. Charter omits any provision granting the power of judicial review to any of the primary bodies of the U.N.).

I. The Necessity of the Authority to Invalidate Security Council Decisions¹⁵

In this era, with new frontiers opening for action, the Security Council has been expanding its role and authority.¹⁶ The Council, for good or ill, is designating a wider variety of cases as potential threats to the peace and security of the world,¹⁷ and has been more willing to authorize the use of force in addressing these crises.¹⁸ This situation has become a fertile ground for uncertainty about the scope of the authority of the Security Council and has given rise to serious concerns about the way that the Council interprets and uses its discretion and powers to deal with international problems.¹⁹

Perhaps few, if any, people in 1945 could predict such an active role for the Council in international relations. At that time the divide between the Western capitalist bloc and the

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15. See generally Lucius Caflish, *Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?*, in INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW 653 (Najeeb al-Nauimi & Richard Meese eds., 1995); Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 2 (1996) (referring to the International Court of Justice as the "last-resort defender" of the judicial system); Patricia Y. Reyhan, *Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 ALB. L. REV. 771, 794 (1997) (considering a possible solution to the questions of a nation's rights after the Security Council has made its decision).
 16. See Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 83 (2001) (discussing whether the Security Council has acted with adequate legal authority in certain decisions); see also Mark Rothert, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257, 257 (2000) (stating that the U.N. took bold steps in expanding its authority during the post-Cold War era); Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 443 (1999) (noting the increased role of the U.N. since the end of the Cold War).
 17. See, e.g., S.C. Res. 748 (1992) (Lockerbie Incident); S.C. Res. 1441 (2002). See generally Henry J. Richardson, III, *Constitutive Questions in the Negotiations for Namibian Independence*, 78 AM. J. INT'L L. 76, 82 (1984) (referring to an occasion in which the Security Council implied that it considered South Africa's action in Namibia to be a potential threat to international peace); Daniel M. Creekman, Note & Comment, *A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-Attacks from China*, 17 AM. U. INT'L L. REV. 641, 668 n.173 (2002) (noting that the Security Council could authorize an armed attack in response to a non-armed attack if it determines that the attack is a sufficient threat to international peace and security).
 18. See Jamie Frederic Metzl, Note, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 647 (1997) (noting several recent situations that the Security Council deemed as potential threats and in which it authorized the use of force). See generally Creekman, *supra* note 17, at 668 n.173 (acknowledging that if the Security Council determines an attack to be a sufficient threat to international peace and security, it could authorize an armed attack in response); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 129 (1999) (discussing how the Security Council's power to authorize the use of force is rooted in the U.N.'s Charter).
 19. See Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 925 (1999) (indicating that the United Nations Security Charter was made very broad in order to give the Council the discretion to decide which actions constitute international problems); see also Elisabeth Zoller, *Institutional Aspects of International Governance*, 3 IND. J. GLOBAL LEGAL STUD. 121, 125 (1995) (explaining that the United Nations Security Council has discretion to decide when there is an international problem). See generally Stephen Gordon, Comment, *The Prospects for Challenging U.S. Nuclear Weapons Policy in Light of the World Court's Advisory Opinion on the Legality of the Threat or Use of Such Weapons*, 28 ST. MARY'S L.J. 665, 720–22 (1997) (remarking that the United Nations Security Council uses its discretion to decide whether to enforce World Court decisions).

Eastern communist bloc was an unsurpassable gap.²⁰ Veto power, granted to the permanent members of the Council, functioned as an internal system of checks and balances, to ensure that the Security Council would not exceed potential limitations.²¹ This setup ensured a powerful mechanism of self-limitation, although at the cost of efficiency, under which states that might be targets of the Council's action had the protection of one of the two major blocs on the Council.²² It is unclear whether the framers of the Charter would have left the definition of the Security Council's powers as vague as it is, if they could have predicted the fall of the communist bloc and the subsequent concerted action of all the permanent members of the Council.

The problem became more critical in light of the fact that in the Cold War era virtually all states were aligned with one of the ideological blocs on the Council.²³ The bloc to which the state belonged could provide the necessary protection against the potential excess of power by

20. See Kelly, *supra* note 6, at 321–22 (discussing the post-World War II division within the United Nations Security Council); see also Jules Wagman, *In Retrospect Tad Szulc Takes an Insightful Look at World History Since World War II*, ST. PETERSBURG TIMES, Aug. 5, 1990, at 6D (providing an overview of the large division between capitalist and communist society in the world in 1945); Wai, *supra* note 7 (mentioning that the United Nations Security Council was split between the main superpowers in 1945).
21. See Mohammed Bedjaoui, THE NEW WORLD ORDER AND THE SECURITY COUNCIL, TESTING THE LEGALITY OF ITS ACTIONS (1993) (Bernard Noble trans., 1994) (discussing the self-regulating feature of the Council); see also Major Joseph P. “Dutch” Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 6–7 (2001) (discussing the veto power of permanent members of the United Nations Security Council and their ability to frustrate Council initiatives); Lobel & Ratner, *supra* note 18, at 145 (explaining that any resolution of the United Nations Security Council is at the will of the permanent members because they have the use of a veto); Jelena Pejic, *Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 858 (1997) (detailing the strengths of the permanent-member veto power in international situations); Carsten Stahn, *Future Implication of the Iraq Conflict: Enforcement of the Collective Will After Iraq*, 97 AM. J. INT’L L. 804, 813 (2003) (noting that the veto power for the permanent members was created to ensure a system of checks and balances on the United Nations Security Council).
22. See Reisman, *supra* note 1, at 83–84 (stating that during the Cold War the United Nations Security Council’s veto power blocked most proposals since most nations were aligned with one of the Council’s two major powers); see also Patrick Reilly, Comment, *While the United Nations Slept: Missed Opportunities in the New World Order*, 17 LOY. L.A. INT’L & COMP. L.J. 951, 960 (1995) (discussing how the veto power is necessary to maintain a limit on the Security Council’s power); Richard Butler, *Principles Must Trump Power Politics*, AUSTRALIAN, Sept. 16, 2002, at 9 (noting that the veto power was abused by both the United States and Soviet Union during the Cold War in order to benefit their allies).
23. See Jules Lobel, *American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT’L L. 19, 20 (2000) (attributing the United Nations Security Council deadlock on most issues post-1945 to the Cold War); see also David Bills, Note, *International Human Rights and Humanitarian Intervention: The Ramifications of Reform on the United Nations’ Security Council*, 31 TEX. INT’L L.J. 107, 110 (1996) (noting that in the Cold War era there was a great division between all states on the United Nations Security Council); Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 7–8 (1994) (emphasizing that when the Cold War ended the political alignments within the Security Council changed).

the Council, by exercise of the veto power.²⁴ Today with a more diverse arena in terms of regions and cultures present on the international relations level, the distribution of power on the Council looks utterly inadequate. Countries from the West and the East, and the Chinese have permanent presence and veto power on the Council,²⁵ but Muslims, Africans, Eastern Asians (except China), Latin Americans, and southern Asians, many of whom appeared on the international arena after the creation of the United Nations, are denied such privileges.²⁶ This situation may result in opportunistic and self-interested exercises of power by the permanent members of the Council against the less powerful members of the international community.²⁷

Another reason for the necessity of defining and developing the scope of the Security Council's powers as soon as possible is the unfairness in the working procedure of the Council. In the proceedings before the Council under Chapter VII, all members of the Council, even parties to the dispute, can participate, and more importantly, vote (U.N. Charter, Article 27).²⁸

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24. See Bialke, *supra* note 21, at 6 (noting that the United Nations Security Council veto power was enacted to maintain peace among the five major powers by giving none of the powers too much strength); see also Burns H. Weston, *The Gulf Crisis in International and Foreign Relations Law, Continued: Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 528 (1991) (stating that the veto power exists to prevent one nation from exerting too much power over the Council); Alexander Casella, *The New World Disorder: U.N. Finds Itself Caught Between Myth and Reality*, BANGKOK POST, Feb. 2, 2000 (highlighting that the veto system used by the United Nations Security Council ensures that no action can take place unless the five permanent members agree to it).
25. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 565–67 (1993) (assessing the five permanent members' veto power on the Council); see also Kelly, *supra* note 6, at 321–22 (naming the permanent members of the United Nations Security Council that have veto power); Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 592–93 (1995) (listing the five permanent members of the Security Council as the People's Republic of China, France, Russia, the United Kingdom, and the United States).
26. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 749 (1988) (commenting that the veto privilege granted to only the five permanent nations may need to be modified to accommodate the presence of other younger nations); see also Tom Ashbrook, *U.N. Fights Fatigue as It Turns 50; Reforms Idled by Discord*, BOSTON GLOBE, June 25, 1995, at 1 (questioning whether the permanent members need to be changed to reflect current world realities); Michael J. Jordan, *Who's In, Who's Out: U.N. Security Council Mulls Reform*, CHRISTIAN SCI. MONITOR, Oct. 16, 2002, at 7 (suggesting reform proposals to expand the number of permanent members in the Council).
27. See generally Amber Fitzgerald, Comment, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 320 (2000) (outlining the problems associated with the limited number of nations with permanent status on the Security Council); Dwight Newman, *A Human Security Council? Applying a 'Human Security' Agenda to Security Council Reform*, 31 OTTAWA L. REV. 213, 223–24 (2000) (discussing the concentrated power of the Security Council); Paul Conlon, Recent Development, *Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice*, 35 VA. J. INT'L L.J. 633, 667–68 (1995) (stating that legal scholars have begun to focus on the problems of opportunism that exist within the Security Council).
28. See U.N. Charter art. 27 (outlining the voting procedures of the Security Council). See generally Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 MIL. L. REV. 187, 189–92 (1992) (addressing the problems associated with allowing the permanent members of the Security Council to have veto power); Jetson E. Lincoln, *Remaking U.N. for a Changed World Means End to Veto Power*, N.Y. TIMES, Feb. 12, 1993, at A32 (criticizing the veto power of the permanent members of the Security Council as undemocratic).

In other words, there is no requirement of recusal.²⁹ This can result in awkward situations where a party to the dispute is a member of the Council, and can influence the other members and even change the disposition of the case by its own vote.³⁰ For example, in the proceedings before the Security Council on the *Lockerbie* incident,³¹ the United States and the United Kingdom voted against Libya in the Security Council.³² The result of the vote against Libya was ten to none, with five abstentions.³³ If the U.S. and U.K. had not participated in the voting, the number of positive votes would have dropped to eight, one below the minimum nine positive votes required for a decision under Chapter VII.³⁴ Moreover, in the proceedings before

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29. See Brownlie, *supra* note 2, at 94 (detailing the negative aspects of the voting powers of the Security Council). See generally Caron, *supra* note 25, at 554–56 (discussing the problems associated with the collective power of the permanent members of the U.N. Security Council); Frederic L. Kirgis, Jr., *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 510–12 (1995) (reviewing the first fifty years of the Security Council and the particular problem of permanent members voting on issues in which they are directly involved).
 30. See generally Reinhard Drifte, *Japan and Security Council Reform: Multilateralism at a Turning Point?*, 1 ASIAN-PAC. L. & POL'Y J. 14 (2000) (showcasing how the U.S. influences the members of the Security Council, particularly Japan); Fitzgerald, *supra* note 27, at 330–32 (detailing the problem of self-interested actions by Security Council members); Weston, *supra* note 24, at 523–25 (reviewing several instances in which the United States bargained with and pressured other Security Council members to agree to certain self-interested measures).
 31. See S.C. Res. 748 U.N. SCOR, U.N. Doc. S/Res/748 (1992) (implementing economic sanctions against Libya in order to compel its cooperation against the terrorist actions of its citizens); see also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1998 I.C.J. 9, 18 (Feb. 27) (arguing that the Security Council was outside its jurisdiction when it implemented sanctions against Libya) (hereinafter "*Lockerbie I*"). See generally Caryn L. Daum, Note, *The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Pan Am Flight 103 Bombing over Lockerbie, Scotland*, 23 SUFFOLK TRANSNAT'L L. REV. 131, 144 (1999) (noting that Libya was compelled to cooperate with the U.S. and U.K. due to their powerful place on the Security Council).
 32. See S.C. Res. 748 U.N. SCOR, U.N. Doc. S/Res/748 (1992) (imposing sanctions against Libya); see also *White House Statements; Statements by Press Secretary Marlin Fitzwater on Libya and Venezuela*, DEP'T ST. DISPATCH., Dec. 7, 1992, at 874 (announcing the White House's intention to reaffirm their commitment to force the Libyan government to cooperate with terrorist investigations through Security Council resolutions). See generally John Grant, *The Background*, 11 INT'L LEGAL PERSP. 3, 8 (1999) (discussing the Security Council resolutions that were brought against Libya by the U.S. and U.K.).
 33. See James Bone, *U.N. Imposes Sanctions on Gadaffi*, TIMES, Apr. 1, 1992, at Overseas News (noting that "[t]en of the fifteen Security Council members supported the sanctions resolution [against Libya for actions related to the terrorist action in Lockerbie, Scotland]"); see also *U.N. Sanctions Clamp on Libya*, ADVERTISER, Apr. 1, 1992 (reporting on how the Security Council voted when it implemented sanctions against Libya). See generally *Unfriendly Skies for Libya*, N.Y. TIMES, Jan. 25, 1992, at pp. 1, 22 (reporting that "[a] unanimous Security Council has ordered Libya to surrender for trial two agents accused of planting the bomb that blew up Pan American Flight 103 over Lockerbie, Scotland, in 1988").
 34. See U.N. Charter art. 27, para. 3 (requiring that decisions of the Security Council shall be "made by an affirmative vote of nine members"). See generally Craig Hammer, Note, *Reforming the U.N. Security Council: Open Letter to U.N. Secretary General Kofi Annan*, 15 FLA. J. INT'L L. 261, 261 (2002) (outlining the voting procedures of the U.N. Security Council); Bone, *supra* note 33, at Overseas News (noting that ten of the fifteen Security Council members voted for sanctions against Libya, which was "only one more than the number required").

the International Court of Justice (ICJ) on the same issue,³⁵ the Court had limited authority to indicate provisional measures in order to prevent the United States and the United Kingdom from compelling Libya to surrender its two nationals, whom the U.S. and U.K. accused of terrorist activities.³⁶ The Court could have indicated such measures against the U.S. and U.K., only in their capacity as members of the international community, and arguably, it did not have the authority to prevent those states from acting in their capacity as the permanent members of the Security Council.³⁷ Under the League of Nations system, the predecessor to the United Nations, such refusal was provided for, and a Council member which was party to a dispute could not participate in the voting.³⁸

Moreover, such a check on the Council's decisions would enhance its legitimacy.³⁹ The characteristic features of the Council, including the veto power of the permanent members and the unchecked and discretionary exercise of power, reflect an anachronistic political mentality,

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35. See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K., 1992 I.C.J. 114, 117–18 (Apr. 14) (order on request for provisional measures seeking review in the International Court of Justice to excuse Libya from the sanctions imposed by the Security Council) (hereinafter “*Lockerbie II*”). See generally Peter H. F. Bekker, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 92 AM. J. INT’L L. 503, 503 (summarizing Libya’s contentions against the United States and United Kingdom at the International Court of Justice); Thomas W. Lippman, *Libya Marks Tragic Date with Bid to Lift Sanctions; U.S. Trial for Bombing Suspects Rejected*, WASH. POST, Dec. 22, 1994, at A28 (reporting on Libya’s appeal to the International Court of Justice against the sanctions that were imposed against it by the U.N. Security Council).
36. See David Stout, *Lockerbie Suspects May be Tried at World Court*, N.Y. TIMES, Jul. 21, 1998, at A8 (discussing the push by the United States and Great Britain to have the suspected terrorists extradited from Libya). See generally *Delivering the Lockerbie Defendants*, N.Y. TIMES, Apr. 6, 1999, at A26 (noting that Libya turned over the two terrorist suspects and they were to be tried in the Netherlands under Scottish law); *Confusing Words from Libya on the 2 Lockerbie Suspects*, N.Y. TIMES, Dec. 7, 1998, at A5 (reporting that the United States and Britain demanded that the two terrorist suspects be delivered).
37. See Eric Zubel, Note, *The Lockerbie Controversy: The Tension Between The International Court of Justice and the Security Council*, 5 ANN. SURV. INT’L & COMP. L. 259, 263 (1999) (asserting that the ICJ’s denial of Libya’s application for provisional measures was a result of Security Council Resolution 748, which was adopted merely two weeks before the Court’s denial); see also Daum, *supra* note 31, at 139 (noting the sanctions placed on Libya by the United States and Great Britain for refusal to turn over the terrorism suspects); Frank, *supra* note 1, at 533 (describing the procedure through which the United States and the United Kingdom effectively overrode the power of the International Court of Justice).
38. See Brownlie, *supra* note 2. See generally Fitzgerald, *supra* note 27, at 332 (describing the United Nations’ attempt to define “dispute”); Kirgis, *supra* note 29, at 511 (highlighting the importance of defining words in interpreting Article 27(3)).
39. See Inocencio Arias, *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, 23 FORDHAM INT’L L.J. 1005, 1013–14 (2000) (positing that the reason for the United Nations’ loss of credibility and prestige is the excessive power of the Security Council and its five permanent members); Caron, *supra* note 25, at 553 (reporting that many members of the international community are having doubts about the Security Council’s legitimacy). See generally Kelly, *supra* note 6, at 331–32 (noting that if the number of permanent members on the Security Council is not increased, people will continue to question the Council’s legitimacy).

which overvalues power, at the expense of the rule of law.⁴⁰ The selection of its privileged members and the authority conferred on those members were the products of power and favor in a period different from the contemporary world.⁴¹ Therefore, the justifications for the way that the system was set up in 1945 are less convincing today. Today it looks like a combination of power and luck, and it is certainly not reflective of the values to which the nations of the world aspire today, such as democracy and rule of law.⁴² The Council looks like a club of privileged members who pursue their national interests in the disguise of maintaining international peace and security.⁴³

Permanent members of the Council would naturally be afraid that a court might strike down their decisions. The flip side, however, is that if that court upholds the Council's decision, the legitimacy of those actions will be enhanced, which in turn will improve the compliance with those decisions, and ultimately would promote the overall goal of maintaining international peace and security.⁴⁴

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40. See Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security*, 13 EMORY INT'L L. REV. 687, 727 (1999) (citing an example of the unchecked power of the Security Council in its sanctions on Iraq). See generally Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111, 115 (1998) (noting that the Security Council hinders impartiality); Joshua M. Koran, *An Analysis of the Jurisdiction of the International Criminal Tribunal for War Crimes in the Former Yugoslavia*, 5 ILSA J. INT'L & COMP. L. 43, 62 n.88 (1998) (hypothesizing about the correct interpretation of the breadth of the Security Council's powers).
41. See Newman, *supra* note 27, at 223 (noting that the Security Council is composed of fifteen members with the five "great powers" from World War II having permanent status). See generally Matthias J. Herdegen, *The "Constitutionalization" of the U.N. Security System*, 27 VAND. J. TRANSNAT'L L. 135, 152 (1994) (stating that the combination of the veto power of the five permanent Security Council members and the unclear "constitutional restraints" of the judicial body threaten the security system); Hammer, *supra* note 34, at 265 (criticizing the representative capacity of the Security Council in light of the existence of only five permanent members).
42. See generally Fitzgerald, *supra* note 27, at 321–22 (citing the veto power of the Security Council's permanent members as a factor contributing to the inequity within the United Nations); M. Jennifer MacKay, *Economic Sanctions: Are They Actually Enforcing International Law in Serbia-Montenegro?* 3 TUL. J. INT'L & COMP. L. 203, 209–10 (1995) (stating that the Security Council's legitimacy is threatened partly because of the perception of unfairness surrounding the veto power of the permanent members); Ken Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 PACE INT'L L. REV. 281, 315–16 (1995) (referring to the behavior of the Security Council toward Libya during the Lockerbie incident as an example of the unchecked power of the Security Council).
43. See David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17 MICH. J. INT'L L. 411, 415 (1996) (labeling the permanent members of the Security Council as a "great power" club). See generally Kelly, *supra* note 6, at 344 (discussing the effect of increasing the permanent membership of the Security Council, otherwise known as the "permanent club"); Reisman, *supra* note 1, at 85 (referring to the Security Council as the "most exclusive club in the world").
44. See Alvarez, *supra* note 15, at 14 (discussing that over the long term, ICJ judgments of Security Council decisions may strengthen international law); see also Kirgis, *supra* note 29, at 518 (stating that judicial review of Security Council resolutions by the ICJ may be possible when a party asserts procedural or substantive improprieties); Frank, *supra* note 1, at 537 (noting the ICJ's decision that member countries are obliged to comply with resolutions passed by the Security Council in accordance with Article 25).

Finally, there is a necessity for resolving conflicts over interpretation of the Charter among different organs of the U.N.⁴⁵ The U.N., as an organization, would face difficulties, if different subdivisions (including the Security Council and the ICJ) apply inconsistent interpretations of the Charter.⁴⁶ Therefore, it is necessary that an international forum be able to decide about the interpretation of the Charter, in this case, the Security Council powers under Chapter VII.⁴⁷ Otherwise, member states will face conflicting obligations under different interpretations.⁴⁸

II. The Existence of Legal Criteria Governing the Security Council's Decision-Making Process⁴⁹

The actions of the Security Council under Chapter VII of the U.N. Charter can be divided into two phases. At first, the Council must determine that there is a threat to, or a

45. See August Reinisch, Note and Comment, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for The Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 865 (2001) (arguing the logic behind having the ICJ determine the legality of Security Council sanctions); see also Carolyn L. Willson, *Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115, 124 (1996) (noting the recent blurring of jurisdictional lines between the principal organs of the United Nations). See generally Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 625, 625 (May 1998) (dissenting opinion of President Schwebel) (opining that the ICJ does not have general power to judicially review Security Council decisions).

46. See Herdegen, *supra* note 41, at 138 (discussing the potential problems that arise if the ICJ declares a Security Council decision to be in violation of international law); see also Igor Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 93 AM. J. INT'L L. 155, 158 (1999) (summarizing the ICJ's opinion that additional conditions imposed upon Macedonia for admission to the United Nations by the Security Council were incompatible with the letter and spirit of the U.N. Charter); Craig Scott et al., *A Memorial For Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 79 (1994) (noting the ICJ's acceptance that the Court and the Security Council will reach conflicting conclusions regarding the same disputes).

47. See Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 431 (2003) (noting the agreement that all U.N. bodies, including the Security Council, are subject to legal constraints imposed by the U.N. Charter); see also Robert N. Wells, *United Nations Is in Need of Reforms and Restructuring*, NEW STRAITS TIMES (MALAYSIA), Nov. 15, 1995, at 13 (suggesting that future disputes confronted by the Security Council be referred to the ICJ for binding jurisdiction). See generally David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 270-71 (1999) (stating that the U.N. Charter permits the Security Council to make measured judgments in response to a breach of the peace or act of aggression).

48. See *infra* Part V.

49. See generally David Schweigman, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE U.N. CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 164-165 (Malanczuk ed., Kluwer Law International 2001) (asking whether there are any legal limits to the Security Council's authority under Chapter VII of the U.N. Charter); Bruno Simma, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 445 (Oxford University Press 2d ed. 2002) (stating that in requiring that the Security Council act in accordance with the Purposes and Principles of the United Nations, the legal limits of the Charter must be observed); Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNIE* 361, 362 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (noting the view that the legality of recent Security Council resolutions should be verified).

breach of, international peace and security, or that an act of aggression has occurred.⁵⁰ Based on this determination it can design actions, including military operations, to address the threat to or breach of peace and security.⁵¹

It must be noticed that although the Charter gives a wide discretion to the Council under Chapter VII, and any judicial organ reviewing the Council's decisions must give deference to the Council's determinations and decisions, the Council does not enjoy absolute freedom.⁵² There are legal boundaries that confine the Council's latitude of action, and more specific rules can be judicially developed to define such boundaries more accurately.⁵³

50. U.N. Charter Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

51. U.N. Charter Article 40 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. Charter Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

52. See David, *supra* note 11, at 126 (suggesting that both the ICJ and the Security Council should incorporate into their respective operations a recognition of each other's authority on pertinent issues); see also David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 653 (1995) (stating that Chapter VII of the U.N. Charter grants sole authorization to the Security Council to make determinations of breaches of international peace and security). See generally Douglas Lee Donoho, *Evolution of Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT'L L.J. 329, 350–51 (1996) (noting that the Security Council's primary authority is to maintain international peace and security and not to enforce international law).

53. See Bialke, *supra* note 21, at 8 (noting that while peacekeeping operations are not specifically enumerated in the U.N. Charter, the ICJ has held that the Charter is sufficiently broad to allow the Security Council to monitor conflicts absent Chapter VII peace-enforcement action); see also Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1, 7 (1995) (listing the three prerequisites that are needed before the Security Council can take Article 42 action); Rajendra Ramlogan, *Towards A New Vision of World Security: The United Nations Security Council and the Lessons of Somalia*, 16 HOUS. J. INT'L L. 213, 224–25 (1993) (stating that the Security Council was created by the U.N. Charter to maintain international peace and security, not to interfere with matters falling within the domestic jurisdiction of a state).

A. Determination of the Existence of an International Crisis⁵⁴

The first issue is whether there are any legal standards which the Security Council must observe in making an Article 39 determination, i.e., the existence of a threat to the peace, a breach of the peace, or an act of aggression.⁵⁵ It would have been reasonable to start with a definition of the concept of “international peace and security.”⁵⁶ This concept, however, is not defined in the Charter, but rather is addressed in reverse order by defining its violation.⁵⁷ The violation of international peace and security is a fact-specific issue, which is left to the discretion of the Council. Peace and security is the default situation and the members of the society know it intuitively.

This view, however, is inadequate. Although a certain degree of discretion is necessary for the Security Council in dealing with international crises, presumption of an unlimited discre-

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54. See generally Schweigman, *supra* note 49, at 164–165 (stating that Article 39 requires that the Security Council determine whether there is an act of aggression, or threat to or breach of international peace); Simma, *supra* note 49, at 723 (noting that the Security Council enjoys considerable discretion in determining whether a threat or breach to the peace, or an act of aggression exists); Cedric E. Evans, Note, *Economic, Legal, and Political Dilemmas of Privatization in Russia: The Concept of “Threat to Peace” and Humanitarian Concerns: Probing the Limits of Chapter VII of the U.N. Charter*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 213, 235 (1995) (arguing that the Security Council should not use its broad powers to cite any concern as the basis for its threat to peace determinations).
 55. See Stahn, *supra* note 21, at 805 (noting that in the absence of other Security Council decisions, the determination of whether a Council resolution can serve as the legal basis for the use of force must be made through traditional means of dialogue between member states). See generally Capt. Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 255, 255 (1997) (stating that the Security Council’s recent involvement in international and civil wars falls under the Council’s Article 39 power of determining the existence of a threat to peace, breach of the peace, or act of aggression); *Second-Stage Resolution May Be Necessary. What Happens if Iraq Fails to Co-Operate With the U.N. Inspectors? Patrick Smyth Explains the U.N. Charter Mechanism for Taking Military Action and How It Would Affect Ireland*, IRISH TIMES, Nov. 9, 2002, at 10 (reporting that under the U.N. Charter, the Security Council is the sole body empowered to determine whether there is a breach of peace and to decide appropriate remedial measures).
 56. See U.N. Charter art. 1(1), para. 1 (stating that the maintenance of international peace and security is a purpose of the United Nations); see also U.N. Charter art. 2(3), para. 3 (noting that international peace and security is a principle of the United Nations); Daniel Pickard, *When Does Crime Become a Threat to International Peace and Security?*, 12 FLA. J. INT’L L. 1, 3 (1998) (describing the “purpose” in Article 1(1) of the United Nations Charter as an open-ended definition).
 57. See U.N. Charter art. 2(4), para. 4 (defining the violation of international peace and security by stating that “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”); see also Jennifer L. Czernecki, *The United Nation’s Paradox: The Battle Between Humanitarian Intervention and State Sovereignty*, 41 DUQ. L. REV. 391, 393 (2003) (noting that international peace and security is defined in Article 2(4) of the United Nations Charter, which offers a prohibition on the use of force). See generally Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7, 10 (2003) (indicating that in order to maintain international peace and security, the United Nations Charter Article 2(4) provides a far-reaching limitation on the use of force by states).

tion is wrong.⁵⁸ With regard to threats to international peace and security, two problems have recently arisen. First, the expansion of the scope of the Council's power and shrinkage of the concept of sovereignty of states have prompted the Council to characterize certain situations that traditionally would fall into the category of domestic issues as potential threats to the international peace and security, e.g., humanitarian catastrophes resulting from civil war.⁵⁹ It is not clear whether the threat of spillover to neighboring states is the underlying threat, or a common threat to the lives of a great number of human beings is the concern of the international community.⁶⁰

Second, there are an increasing number of cases where, although the international context is not disputed, the existence of threat is questionable.⁶¹ Some examples include the *Lockerbie*

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58. See generally U.N. Charter art. 1(1), para. 1 (defining the discretion of the Security Council by stating that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."); Amy E. Eckert, *United Nations Peacekeeping in Collapsed States*, 5 D.C.L. J. INT'L L. & PRAC. 273, 295 (1996) (providing that a limitation on the Security Council's ability to act under Chapter VII is that a situation must constitute a "threat to the peace, breach of peace, or an act of aggression"); Lois E. Fielding, *Taking A Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, 73 U. DET. MERCY L. REV. 551, 558 (1996) (noting that the General Assembly's powers limit the Security Council's role in maintaining international peace and security).
 59. Schweigman, *supra* note 49, at 178; Simma, *supra* note 49, at 723. See Newman, *supra* note 27, at 226 (characterizing the Somali humanitarian crisis as a threat to international peace and security).
 60. See generally Fink, *supra* note 53, at 41 (considering the potential for the humanitarian crisis in Bosnia to spill over into Greece and Turkey as a rationale for Chapter VII intervention); Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795, 829 (2003) (explaining that Kosovo's central location in a tense region created a potential for a spillover into the neighboring countries of Greece, Macedonia, and Montenegro); Evans, *supra* note 54, at 230 (describing the threat to peace and security in Rwanda as a humanitarian crisis created by the number of refugees and the deaths of thousands of innocent civilians).
 61. See Kirgis, *supra* note 29, at 513 (questioning the existence of a threat to international peace and security in Somalia, because it was supported only by a vague mention of the consequences of the Somali civil war); see also Gideon A. Moor, Note, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT'L L.J. 870, 912 (1995) (suggesting that the fighting in Bosnia does not qualify as a threat to international peace and security). See generally Lisa Leila Jama, Comment, *Humanitarian Intervention: An Examination of the United Nations' Role in the Modern Age of Civil Conflicts*, 12 FLA. J. INT'L L. 521, 524 (2000) (noting the difficulty of determining whether there is a threat in situations such as a civil war).

Case⁶² and the Second Gulf War in Iraq.⁶³ In the first instance, the Council declared Libya's non-cooperation in resolving the dispute a threat, although four years had passed from the bombing without any new incident.⁶⁴ In the second case, the past history of the government of Iraq, in addition to the possession of weapons of mass destruction (in violation of the Security Council resolutions⁶⁵), according to the United States, the United Kingdom and their allies, was held to have constituted a current threat to international peace and security, although there was no credible evidence of a plan of aggression.⁶⁶

The unprincipled use of the power to characterize a situation, granted by Article 39 of the Charter, is a disturbing uncertainty in international relations.⁶⁷ Threat and breach are subjec-

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62. See S.C. Res. 731, U.N. SCOR, 47th Sess., 3033 mtg. at 1, U.N. Doc. S/RES/731 (1992) (stating that Libya's failure to act in renouncing terrorism constituted a threat to international peace and security); see also Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 298 (1996) (stating that the Security Council's discretion in determining a threat should be more limited because of instances such as the *Lockerbie Case*); Bills, *supra* note 23, at 114 (questioning the existence of a threat to international peace and security where Libya was sanctioned for the Lockerbie incident).
63. See Richard B. Lillich, *The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post-Cold War World*, 3 TUL. J. INT'L & COMP. L. 1, 6 (1995) (questioning the link in Iraq between violations of human rights within a state and a threat to international security). See generally Jost Delbruck, *A More Effective International Law or a New "World Law"?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 708 (1993) (referencing the Security Council's determination that the forcible repression of minorities in Iraq comprised a threat to international peace and security); Catherine Tinker, *Environmental Rights and International Peace: "Environmental Security" in the United Nations: Not a Matter for the Security Council*, 59 TENN. L. REV. 787, 793 (1992) (discussing the "humanitarian intervention" to assist the Kurds in Iraq that followed the Gulf War).
64. S.C. Res. 748 (1992). See generally S.C. Res. 748, U.N. SCOR, 47th Sess., 3063 mtg. at 1, U.N. Doc. S/RES/748 (1992) (announcing that Libya's failure to act against terrorist activity and to comply with Resolution 731 constitutes a threat to international peace and security); Evans, *supra* note 4 (1994) (referencing Libya's refusal to extradite its nationals).
65. U.N. Sec. Council Res. 687 (1991); U.N.S.C. Res. 1441 (2002). See Jordan J. Paust, *Terrorism: Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 555 (2002) (stating that Iraq's breach of Security Council Resolutions 687 and 1441 provided legal justification for the use of force against Iraq).
66. S.C. Res. 1441 (2002). See Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?* 34 CAL. W. INT'L L.J. 1, 22–24 (2003) (describing the general nature of the United States' fear that Iraq possessed weapons of mass destruction); see also Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 526 (2003) (noting that the Security Council does not require an actual act of aggression in order to consider a nation to be a threat to international security).
67. See Lt. Col. Richard W. Aldrich, *How Do You Know You Are at War in the Information Age?*, 22 HOUS. J. INT'L L. 223, 250–51 (2000) (describing the flexible language of Article 39); see also Pickard, *supra* note 56, at 3–4 (noting that the U.N. has never concisely defined the language of Article 39); Alan D. Surchin, Note, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 493–94 (1995) (arguing that the Security Council's power to authorize force under Article 39 is limited only by the U.N.'s theoretical interest in maintaining international peace).

tive concepts and capable of being stretched, which makes them vulnerable to abuse.⁶⁸ There are, however, objective criteria in the U.N. Charter and international law that can be used to define the contours of the Article 39 powers and enumerate their elements.⁶⁹

One avenue for development of more specific rules about determinations of the Security Council is to search for analogies to other, more developed areas of international law. The applicability of the rules to the decision-making of the Council would depend on the closeness of the analogy. The determination of threat to international peace has some elements in common with the rules governing the use of force in self-defense.⁷⁰ One element is the temporal scope of threat.⁷¹ A threat usually grows gradually until it becomes imminent, before materializing into a breach of peace.⁷² Although it is concededly hard to determine a point in time when the threat needs to be addressed, the threat should pass a certain threshold and come

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68. See Jost Delbruck, *Prospects for a World ("Internal") Law?: Legal Developments in a Changing International System*, 9 IND. J. GLOBAL LEGAL STUD. 401, 425 (2002) (arguing that the broad interpretation of "threat" under Article 39 increases the danger of U.N. over-involvement); see also Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 356 (noting that the Security Council has broad discretion to determine what constitutes a threat to international security under Article 39); Walter Gary Sharp, Sr., *American Hegemony and International Law: The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 43 (2003) (explaining that Article 39 authorizes states to use force even where they would not otherwise have the right to do so in self-defense).
 69. See Delbruck, *supra* note 68, at 425 (arguing that despite Article 39's expansive language, the small number of serious violations act as a constraint upon the authorization of force); see also Lt. Todd A. Wynkoop, *The Use of Force Against Third-Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 42 NAVAL L. REV. 91, 93–94 (1995) (stating that a permanent Security Council member's veto and the requirement of consistency with the U.N. Charter serve as independent limits on the use of force under Article 39); Gardam, *supra* note 62, at 298 (noting that the Security Council uses an objective test to determine whether there has been a breach of the peace or threat to international security).
 70. See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 35–36 (2003) (describing the overlap between self-defense and the need to demonstrate an armed attack); see also Scott, *supra* note 46, at 68 (explaining that a nation's right to act in its own self-defense must be weighed against the corresponding threat to international peace). See generally Ruth Wedgwood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 210 (2001) (stating that the U.N. Charter recognizes a nation's inherent right to self-defense, while also empowering the Security Council to judge whether a threat to international security exists).
 71. See John W. Head, *The United States and International Law After September 11*, 11 KAN. J.L. & PUB. POL'Y 1, 4 (2001) (discussing the fact that a nation's right to self-defense only lasts as long as there is an immediate threat, and until the Security Council responds effectively); see also Reinisch, *supra* note 45, at 856–57 (noting that the Security Council considers actions falling short of aggression to be a threat, not a breach, of international peace). But see Elias Davidsson, *The U.N. Security Council's Obligations of Good Faith*, 15 FLA. J. INT'L L. 541, 545–46 (2003) (stating that there are no concrete criteria for defining a breach of international peace).
 72. See Mark R. Hutchinson, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624, 636 (1993) (asserting that the U.N. is employing an expansive definition of a "threat to international peace," which goes beyond threats of military force); see also Pickard, *supra* note 56, at 4–5 (noting that according to modern U.N. standards, threats to international peace may not be limited to imminent military attacks). But see Jeong H. Pires, *North Korean Time Bomb: Can Sanctions Defuse It? A Review of International Economic Sanctions as an Option*, 24 GA. J. INT'L & COMP. L. 307, 325 (1994) (arguing that the Security Council considers acts which do not qualify as acts of aggression as threats to international peace).

close to real breach of peace in order to justify action by the Security Council.⁷³ In this regard, perhaps the same criteria that govern the use of force by states in self-defense under Article 51 of the U.N. Charter can be a useful guideline.⁷⁴ In other words, the threat must at least be imminent and justify a pre-emptive strike by a state, in order to warrant an adverse characterization (and further military action, if needed) by the Council.⁷⁵ Under this criterion, the Council should not take “preventive” actions (as opposed to preemptive actions), against a state.⁷⁶

In addition, the power of the Council to take action against a threat does not extend into the future forever.⁷⁷ If the threat materializes into a breach of peace, and then peace is established again, albeit under new circumstances, the Council will not have authority to take

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73. See Simma, *supra* note 49, at 722; Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 21 (2003) (discussing the role of aggression in determining whether there has been a breach of international peace). See generally Stephen J. Toope, *International Conference: Does International Law Impose a Duty upon the United States to Prevent Genocide?*, 46 MCGILL L.J. 187, 191 (2000) (commenting that massive human rights violations have amounted to breaches of international security, justifying Security Council intervention).
74. See William H. Taft IV & Todd F. Buchwald, *Future Implication of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 558–60, 61 (2003) (discussing the implications of the U.N. Security Council's use of the Article 51 “self defense” standard to allow member nations to engage in military action to defend Kuwait during the Gulf War); see also Bialke, *supra* note 21, at 28–29 (analyzing the use of Article 51 “use of force” justification to “invite” member states to engage in self-defense actions for the protection of Kuwait during the 1st Gulf War). See generally Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 805–06 (2003) (quoting the language of U.N. Article 51 and noting member states' use of the language to justify their own armed conflicts).
75. See Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 170–72 (2003) (presenting both the “restrictionist” and “counter-restrictionist” interpretations of the element of “imminence” required by Article 51 of the U.N. Charter); see also Thomas Graham, Jr., *Is International Law Relevant to Arms Control?: National Self-Defense International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 3–5 (2003) (quoting Article 51 of the U.N. Charter and analyzing the element of “imminence” embodied therein); Greenwood, *supra* note 57, at 11–17 (explaining the elements required by the U.N. Security Council under Article 51 in order for a state to proceed in a self-defense action).
76. See Timothy Kearley, *Regulation of Preventative and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 665–73 (2003) (presenting the criteria required by the United Nations for self-defense and analyzing the preventative and preemptive theories posited by member states); see also Mark E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603, 621–23 (1994) (examining the historically preventative approach to self-defense taken by the United Nations and evaluating the movement toward a more preemptive approach). See generally Richard A. Falk, *Agona: Future Implication of the Iraq Conflict: What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 598 (2003) (scrutinizing the “preventative” actions taken by the United States in the Iraq conflict under the U.N. Charter).
77. See Head, *supra* note 71, at 4–5 (citing the limited “duration” requirement for self-defense under the United Nations Charter); see also Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 199 (1984) (exploring the ‘proportionality’ element that member states of the United Nations must respect in order to take military action in self-defense). See generally Colonel James P. Terry, *Responding to Attacks on Critical Computer Infrastructure: What Targets? What Rules of Engagement?*, 46 NAVAL L. REV. 170, 177 (1999) (admitting that the United Nations requires that actions taken in self-defense must be “temporally” linked to the original attack).

action.⁷⁸ In practice, however, the Council does not consider the hostilities over, as soon as the first aggressor seizes territory of another state. In the invasion of Iraq by Kuwait, and the invasion of the Falkland/Malvinas Islands by Argentina, the Council determined that the breach of peace was ongoing, although there was no further resistance by Kuwait or the U.K. (at least, temporarily).⁷⁹ When the conditions settle, however, breach will terminate.⁸⁰ At this stage, the international community has to deal with the consequences of the breach of law, and the Charter does not authorize use of force for this purpose.⁸¹ The customary method for addressing violations of international law is to resort to peaceful methods of dispute settlement including arbitration or adjudication before the ICJ.⁸² Obviously, the Council can take coercive measures, short of use of force against the country which breached the peace. In sum, the powers of Chapter VII should be used to prevent or stop armed hostilities, not to provide justice or pun-

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78. See Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 539–41 (2002) (recognizing that the U.N. Security Council's ability to act is limited to the time directly following an armed attack); see also Michael C. Bonafede, Comment, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 169–72 (2002) (identifying that the U.N. Charter limits the response time of an action in self-defense to immediately following an attack). See generally John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 314–16 (2003) (citing the "armed attack" constraint on the United Nations Security Council to authorizing a counterattack in self-defense).
79. See Anthony C. Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491, 523–54 (1993) (observing that in both the Falkland Islands and Iraqi-Kuwait invasions, the actions taken were well after the initial breach of peace had been cured); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 453 (1991) (remarking on the justification of the breach of peace to achieve "justice" in the Iraq-Kuwait and Falkland Islands invasions). See generally Commander Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 MIL. L. REV. 27, 44–46 (1997) (considering the non-action of the United Nations Security Council in both the Iraq-Kuwait and Falkland Islands affairs).
80. See Head, *supra* note 71, at 4–5 (exploring the proportionality and duration requirements of Article 51 of the U.N. Charter which mandates a state take immediate self-defense action or none at all); see also Polebaum, *supra* note 77, at 199 (remarking that the U.N. requirement of "proportionality" limits the time an action may be taken in self-defense). See generally Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637 (1984) (considering the lack of a "breach of peace," and corresponding unlawfulness of military action, in the Argentine-Falkland Islands conflict due to the lapse of time).
81. See U.N. Charter art. 39 (defining the terms under which the United Nations Security Council will allow a member to take military action); see also Lobel & Ratner, *supra* note 18, at 134–37 (outlining the conditions under which the U.N. Security Council is authorized by the U.N. Charter to allow a state to take defensive action). See generally Dr. Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defense—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081, n.10–20 (2002) (noting that the right of military action for self-defense is limited to a response to an armed attack).
82. See Joe C. Irwin, *An Alternative Role for the International Court of Justice: Applied to Cameroon v. Nigeria*, 26 DENV. J. INT'L L. & POL'Y 759, 765 (1998) (discussing the ICJ's role in preventing armed conflict by utilizing dispute resolution processes); see also Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811, 822–23 (2003) (stating that the ICJ helps preserve peace by providing a forum for the adjudication of international disputes); Susanne Starecki, Note, *Remedying Past Abuses of Governmental Power—Legal Accountability for the 1968 Events in Poland*, 26 HASTINGS INT'L & COMP. L. REV. 479, 501–02 (2003) (identifying the ICJ's function as a judicial organ dedicated to the peaceful settlement of international disputes).

ish the wrongdoers.⁸³ It is noticeable that the Council has never claimed that it directly authorized the use of force for the latter purposes (although it has ordered judicial measures on the basis that they were necessary for restoration of peace).⁸⁴

Another element is the nature and the severity of the threatened action.⁸⁵ For example, under certain circumstances a trans-border terrorist activity may be considered a threat against international security.⁸⁶ Obviously, the magnitude of the attack and the possibility of further similar actions are important factors in assessing the threat.⁸⁷ For this purpose, the requirement

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83. See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 505 (1996) (positing that the Security Council's application of Chapter VII should be limited to the maintenance of peace and not punishment of crimes); see also Lt. Col. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 170–71 (1999) (interpreting Chapter VII as giving the Security Council authority to enforce peace but not to impose punishment).
84. For example, setting up the United Nations Compensation Commission (UNCC) to hear the claims of damages against Iraq by countries that suffered damages during the Iraq-Kuwait war 1990–91, and setting up ICTY and ICTR, to put on trial the people responsible for the atrocities in, respectively, Yugoslavia (1992–95) and Rwanda (1994). See Aaron K. Baltes, *Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia*, 49 ME. L. REV. 577, 602 (1997) (examining the authority given the Security Council for the establishment of an international tribunal for the former Yugoslavia); see also Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 426–27 (1994) (citing the authority vested upon the Security Council for the implementation of the International Criminal Rwandan Tribunal statute).
85. See Miller, *supra* note 8, at 97–98 (identifying the Kosovo situation as one in which international peace would have been seriously threatened without the intervention of outside forces); see also Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 486 (1999) (citing as a serious threat to international security the possession of weapons of mass destruction by certain states). See generally Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207, 207 (2001) (describing instances where the United States has relied on Article 51 of the U.N. Charter to justify taking action against perceived threats by other nations).
86. See David P. Fidler, *Public Health and International Law: Bioterrorism, Public Health, and International Law*, 3 CHI. J. INT'L L. 7, 12–13 (2002) (citing bioterrorism, resulting from the presence of weapons of mass destruction in certain states, as a serious potential threat to national security); see also Hendrickson, *supra* note 85, at 229 (stressing the importance of Article 51 being read to include terrorism as a clear threat to international security); Vandana Pednekar-Magal & Peter Shields, *The State and Telecom Surveillance Policy: The Clipper Chip Initiative*, 8 COMM. L. & POL'Y 429, 439 (2003) (suggesting that following the dissolution of the Soviet Union, terrorism emerged as a major international security concern).
87. See Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander*, 11 CONN. J. INT'L L. 1, 11–13 (1995) (proposing possible methods for assessing the degree of threat posed by terrorist acts); see also L.C. Green, Book Review, 74 AM. J. INT'L L. 224, 225 (1980) (reviewing LEGAL ASPECTS OF INTERNATIONAL TERRORISM (Alona E. Evans & John F. Murphy eds.)) (cautioning that the use of force against terrorism could be a greater threat to international security than terrorist acts themselves); John-Alex Romano, Note, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023, 1024 (1999) (suggesting that weapons of mass destruction in the hands of terrorists pose a significant threat to international security).

of proportionality in the use of force in self-defense can be useful.⁸⁸ In other words, the nature and severity of the threat should warrant the use of force in self-defense by the victim, in order to justify military action by the Security Council.⁸⁹

The third element of the law governing the use of force in self-defense is the availability of other means of dealing with the crisis.⁹⁰ Characterization of a situation as a threat by the Council, which can trigger adverse action under Chapter VII, should remain the last resort in dealing with an international crisis.⁹¹ Not every situation that carries a potential for conflict of interests should be called a “threat” to international peace and security.⁹² As long as the crisis can be handled through diplomatic means, or other mechanisms of dispute settlement, adverse char-

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88. See Douglas Kash, *Abductions of Terrorists in International Airspace and on the High Seas*, 8 FLA. J. INT'L L. 65, 85 (1993) (discussing the abduction of terrorists as a measure of self-defense, noting that the principle of proportionality requires that an act taken in self-defense not exceed in magnitude the act it is seeking to prevent); see also Kelly J. Malone, Comment, *Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force*, 12 PAC. RIM L. & POL'Y J. 807, 831 (2003) (noting the challenges associated with applying proportionality principles in determining the degrees of force to use for preemptive acts); Randy W. Stone, Comment, *Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo*, 50 CATH. U. L. REV. 501, 504–05 (2001) (examining the theoretical underpinnings of the doctrine of proportionality and its ability to protect civilians during wartime when applied).
89. Schweigman, *supra* note 49, at 191. See Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229, 233–34 (1996) (discussing the relationship between a state's right to use force in self-defense and the Security Council's right to use force in that same instance); see also Christopher C. Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA J. INT'L L. 151, 199 (2002) (noting the lack of existing standards to determine when the Security Council can use military action in response to terrorist threats).
90. See Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 490 (1999) (stating that the use of force for anticipatory self-defense is justified only when all peaceful means of dispute resolution have been exhausted); see also Schmitt, *supra* note 66, at 531 (asserting that force should be used in response to an international security threat only as a last resort, when all other nonforceful options have been exhausted). See generally Lobel, *supra* note 23, at 156–57 (positing that within the context of humanitarian aims, all peaceful means should be attempted prior to the utilization of force if the intent of the effort is to be achieved).
91. See Jama, *supra* note 61, at 523 (demonstrating that Article 42 demands that all non-lethal sanctions discussed in Article 41 should be applied as a condition precedent to the Security Council's finding of an existing threat); see also Kirgis, *supra* note 29, at 522 (explaining that use of military action be a last resort because it is in direct conflict with the goals of “mutual respect” and “state sovereignty”); Ronald C. Santopadre, Note, *Deterioration of Limits on the Use of Force and Its Perils: A Rejection of the Kosovo Precedent*, 18 ST. JOHN'S J. LEGAL COMMENT. 369, 377 (2003) (noting that the primary goal of the U.N. Charter was to promote peaceful resolution of international conflicts instead of resorting to the use of force).
92. See Glenn T. Ware, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive 25*, 44 NAVAL L. REV. 1, 10 (1997) (enumerating the U.N. charter factors to consider in determining whether an internal conflict can be considered a threat to international peace and security). See generally Pickard, *supra* note 56, at 5 (stating that the Security Council is the sole arbiter in deciding whether a threat exists to international peace and security). But see Tinker, *supra* note 63, at 787 (acknowledging that the absence of war and military conflict does not guarantee the absence of a threat to international peace and security, citing other causes of instability).

acterization should be avoided.⁹³ Therefore, the occurrence of a threat must be established, only when other means of dealing with the situation have already failed.⁹⁴ It must be noticed that under Article 51, there is no obligation to negotiate with the hostile party,⁹⁵ and there is no need to exhaust all the peaceful means of dispute settlement, before using force.⁹⁶ Moreover, because no two crises are alike, perhaps a reviewing forum should grant more deference to the

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93. See Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 906 (2002) (suggesting that states utilize countermeasures such as economic sanctions or prosecution under criminal law in situations that do not permit military action); see also Schmitt, *supra* note 66, at 530 (stating that "principles of necessity" require all reasonable alternatives to be extinguished by a nation prior to the use of force). But see Greenwood, *supra* note 57, at 8 (explaining that the U.S. has traditionally relied on preemptive actions to settle any possible threats to international peace and security).
94. See Polebaum, *supra* note 77, at 198 (explaining that in order for a nation to assert self-defense uses of force when threatened, all adequate alternatives of protection must have been previously exhausted); see also Arend, *supra* note 79, at 522 (noting that the Charter established peaceful alternatives to forceful action against a threatening nation, such as the ICJ); Carrie J. Niebur Eisnagle, *An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209, 221 (2003) (quoting Carol Bellamy, executive director of the U.N. Children's Fund, as denouncing the use of violence in response to attacks and favoring the use of international justice forums for redress).
95. See U.N. Charter art. 51, (declaring "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" and requiring that such action be reported to the U.N. Security Council); see also D. W. Bowett, SELF-DEFENSE IN INTERNATIONAL LAW 185–86 (1958); Keith D. Barber, *No Fire This Time: False Accusations of American War Crimes in the Persian Gulf*, 146 MIL. L. REV. 235, 261 (1994) (reviewing Ramsey Clark, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* (1992)) (quoting Res. 678, U.N. Sec. Council (1990) "Nothing in the U.N. Charter requires a nation that has been attacked, and the nations that would assist it, to engage in diplomatic efforts prior to a defensive response").
96. See Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT'L L. 455, 482 (1994) (referring to scholars who broadly interpret Article 51's right to self-defense to mean "that Article 51 preserves, not extinguishes, the right to anticipatory self-defense as developed under customary international law"). But see Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Start Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73, 103 (1985) (noting that the U.N. Charter Articles 2, 3 and 51 when read together support the approach to peaceful means for the settlement of international disputes, with the exception of a response to an actual armed attack); contra Hendrickson, *supra* note 85, at 211 (asserting that Article 51 clearly requires states to act in accordance with U.N. Charter provisions and the advice of Security Council effectively limiting the Article 51 right).

Council's judgment in this area.⁹⁷ The Council, however, should be satisfied that other methods would not work in defusing the crisis.⁹⁸

Finally, there should be a reserved area of activity that cannot be considered a threat against peace under any circumstances.⁹⁹ For example, developing and acquiring weapons (as opposed to deploying them) should be off-limits for the Council,¹⁰⁰ as a corollary of the sovereignty of states and the right of self-defense¹⁰¹ (except perhaps where there is clear and convincing evidence that the acquirer of the weapons has the intention to use them offensively).

97. See I.I. Lukashuk, *New Thinking by Soviet Scholars: The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 516 (1989) (describing the "obligatory" impact of a Security Council decision). See generally Herdegen, *supra* note 41, at 155 (stating that the Security Council determination of the existence of a threat must be subject to judicial scrutiny as to whether the state violated international law). But see Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509, 551 (1996) (detailing the constraints on Security Council determination of a threat to international peace and security).

98. See Halberstam, *supra* note 89, at 232 (explaining that no state has been denied by the Security Council the right to self-defensive use of force when it is victim of an armed attack); see also Michael J. Matheson, Book Review, 97 AM. J. INT'L L. 466, 499 (2003) (reviewing Lindsay Moir, *THE LAW OF INTERNAL ARMED CONFLICT* (2002)) (rationalizing that while alternatives to use of force in response to a threat to international security may be useful, the Security Council should not hesitate to authorize use of force when appropriate). But see Eugene V. Rostow, *The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 511 (1991) (remarking that the Security Council determines a threat to the peace in rare situations when they vote that the conflict has not been resolved by other means).

99. See U.N. Charter art. 2, para. 7 (stating that the Charter does not authorize the United Nations to intervene into matters that are essentially within the domestic jurisdiction of a state, and that this provision shall not affect the application of Chapter VII); Pickard, *supra* note 56, at 14–17 (arguing that an activity without transnational consequences or an activity that is not widely recognized as criminal does not constitute a threat to international peace). But see Davidsson, *supra* note 71, at 546 (arguing that a textual reading of the U.N. Charter places no limits on determining the existence of a threat to the peace).

100. See Simma, *supra* note 49, at 721 (asserting that armament by states in itself is not a threat to the peace). See generally Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 91 (1989) (asserting that Congress has the right to supply the military means for countering terrorism, and to the extent that limitations on that right are not mandated by the U.N. Charter, that right is indefensible). But see Fielding, *supra* note 58, at 568 (addressing the special threat posed by acquiring nuclear weapons, which may warrant action by the Security Council).

101. See U.N. Charter art. 51 (stating that "the Charter of the United Nations shall not impair the inherent right of individual or collective self defense if an armed attack occurs"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), 1993 I.C.J. 325, 32 (acknowledging that Bosnia and Herzegovina have the sovereign right to defend themselves against acts of genocide); see also Carin Kagan, *Jus Cogens and the Inherent Right to Self Defense*, 3 ILSA J. INT'L & COMP. L. 767, 820–21 (1997) (arguing that a state's inherent right of self-defense is not dependent upon the action of the Security Council).

The second type of determination under Article 39 of the U.N. Charter is determination of breach of the peace.¹⁰² In most cases, common sense will prevent any disagreement over whether a breach has occurred. This convenience, however, does not mean that there is no room for doubt on borderline cases. Important factors in determining a breach of the peace include the intensity of the military actions, the vulnerability of civilian populations and the views of the parties to the conflict.¹⁰³ Therefore, single, isolated incidents involving the use of force, such as cross-border shootings, should not count as breaches of peace.¹⁰⁴ However, this is also an area where the Council possesses large latitude in its determination, because of the importance of the specific facts in each case.¹⁰⁵ It must be noticed that a breach of peace is removed as soon as the hostilities end.¹⁰⁶ Even if some advantage is gained by the illegal use of

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102. See U.N. Charter art. 39 (stating that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”). See generally Thomas M. Franck, *The U.N. and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL’Y 51, 54 (2001) (explaining that the Security Council determined a “breach of the peace” under Article 39 as a prerequisite to taking action under Chapter VII in the Korean War); Davidsson, *supra* note 71, at 542 (maintaining that the Security Council meets its primary responsibility of ensuring international peace by determining first whether a breach of the peace exists).
103. See Simma, *supra* note 49, at 721 (characterizing a breach of the peace as hostility between armed units of two states); see also Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT’L L. 519, 539–40 (1994) (examining factors that may cause an internal hostility to be a matter of international concern). See generally Phillip Apuuli Kasaija, *Current Legal Issues in the Great Lakes Region of Africa: International Law and Uganda’s Involvement in the Democratic Republic of the Congo (DROC)*, 10 U. MIAMI INT’L & COMP. L. REV. 75, 87 (2001) (using the 1994 genocide in Rwanda as an example of a matter sufficient enough to warrant Security Council action).
104. See Carlyn M. Carey, Comment, *Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study*, 49 AM. U. L. REV. 243, 265 (1999) (noting that the conflict in Kosovo, in which the Security Council took action under Chapter VII, did not consist of mere isolated acts of violence, but rather was an armed conflict between two distinct parties). See generally Glennon, *supra* note 14, at 72 (arguing that it is doubtful whether a breach of the peace occurred in Somalia, Rwanda, and Haiti, where no hostility broke out that posed a serious risk to the vital interests of other states). But see Matheson, *supra* note 16, at 83 (arguing that cross-border violence can constitute a breach of the peace).
105. See King, *supra* note 97, at 517–18 (asserting that Article 39 intended to give broad discretionary power to the Security Council to define and determine the existence of a breach of the peace); see also Sean D. Murray, *Nation-Building: A Look at Somalia*, 3 TUL. J. INT’L & COMP. L. 19, 35 (1995) (arguing that despite the Security Council’s wide discretion to determine the existence of breaches and threats to the peace, issues of legitimacy still arise); David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 466 (1996) (stating that although the drafters of the U.N. Charter deliberately invested the Security Council with wide discretion to decide freely when a breach of the peace existed, they did not confer unlimited discretionary power on the Security Council to authorize military intervention in internal conflicts).
106. See generally John Quigley, *The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT’L L. 249, 264 (1996) (stating that the Security Council has the responsibility for deciding when to terminate hostilities); Davidsson, *supra* note 71, at 554 (asserting that after the Security Council has adopted measures to address a breach of the peace, it must determine when such a breach has ended). But see Simma, *supra* note 49, at 721 (stating that in determining a breach of the peace, it is irrelevant whether the hostilities end quickly because of the defeat of one side).

force, the Security Council should not intervene to undo the wrong by force (unless the conditions after the violation constitute further threat to international peace).¹⁰⁷

Lastly, the Council can determine that an act of aggression has occurred, which warrants use of force.¹⁰⁸ Determination of an act of aggression involves the determination of the aggressor, too, and in this regard is different from the determination of breach of peace.¹⁰⁹ The General Assembly, in Article 1 of Resolution 3314 (XXIX) (Definition of Aggression), offered the following definition of aggression:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.¹¹⁰

Determination of an act of aggression involves the recognition of the aggressor, which is using force in violation of international law, and in this sense is different from the determination of a breach of peace.¹¹¹ This definition is an example of how the law governing the actions of the Security Council can be developed. It must be noticed that a General Assembly resolution, as such, is not binding on the Council, and the resolution itself in Article 4 states that “[t]he acts enumerated [in article 3] are not exhaustive and the Security Council may deter-

107. See U.N. Charter art. 39; Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 898–99 (1992) (indicating the limits on forcible intervention by the Security Council to actions that themselves constitute at least a threat to international peace and security); Hutchinson, *supra* note 72, at 636 (stating that the Security Council is only able to conduct “prophylactic military operations” in domestic situations that may result in potential international conflict).

108. See Miller, *supra* note 8, at 92 (noting that the Security Council has the option of using force when dealing with an act of aggression); Mary Ellen O’Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT’L L. 473, 480 (1997) (stating that the Security Council was given broad authority to respond with force to acts of aggression and breaches of international peace). See generally Anthony Clark Arend, *Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions; International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 738–39 (2002) (discussing the intentions of the framers of the U.N. Charter to allow for use of force by the Security Council in cases of clear, overt acts of aggression).

109. See Kirgis, *supra* note 29, at 527 (expressing the authority of the Security Council to determine the aggressor in a threat to the peace, breach of the peace or an act of aggression). See generally Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 393 (1993) (discussing the significance of determining the aggressor in the analysis of events that may constitute acts of aggression); Bialke, *supra* note 21, at 42 (explaining the reasoning for not determining an aggressor where both sides are involved in armed conflict and determining the aggressor where one side has committed a clear, overt act of aggression).

110. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

111. See Simma, *supra* note 49, at 722; Kirgis, *supra* note 29, at 527 (stating that the Security Council has the authority to determine the aggressor in a threat to the peace, breach of the peace or an act of aggression). See generally Gardam, *supra* note 109, at 393 (noting that determining the aggressor is significant in the analysis of events that may constitute acts of aggression).

mine that other acts constitute aggression under the provisions of the Charter.”¹¹² Moreover, “the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”¹¹³ The resolution, however, helps clear uncertainties and provides a legal basis for action.¹¹⁴

Another aspect of the problem of defining the scope of violation of international peace and security is the possible precedential value of the practice of the Council.¹¹⁵ When the Council declares certain situations a threat to, or a breach of peace and security, or an act of aggression, those determinations may give rise to a rule of customary international law, which could become part of the law governing the Council’s actions.¹¹⁶ However, because factual situations are never exactly the same, a reviewing forum must be very cautious in making generali-

112. See G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142–43, U.N. Doc. A/9631 (1974); see also Jennifer Trahan, *Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOY. L.A. INT’L & COMP. L. REV. 439, 461 (2002) (noting the power given to the Security Council to determine acts of aggression). See generally Rachel Pierce, Note, *Which of the Preparatory Commission’s Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should Be Adopted into the Rome Statute of the International Criminal Court?*, 15 BYU J. PUB. L. 281, 287–288 (2001) (discussing the duty of the Security Council to determine what in fact constitutes an act of aggression).

113. G.A. Res. 3314, art. 2.

114. See Trahan, *supra* note 112, at 443–44 (stating that U.N. Resolution 3314 defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” and setting out a series of acts qualifying as aggression); Pierce, *supra* note 112, at 292 (noting that the reason the U.N. adopted the provisions of Resolution 3314 was to add uniformity by the use of familiar legal language within the Resolution); Theodore Meron, *Defining Aggression for the International Criminal Court*, 5 SUFFOLK TRANSNAT’L L. REV. 1, 7 (2001) (stating that the resolution provides an illustrative list of acts that would be considered as acts of aggression).

115. See Richard Falk, *The United Nations Family: Challenges of Law and Development: The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT’L L.J. 341, 341 (1995) (discussing the dangerous precedent set by allowing force to be used during the first Gulf War and its effect on the authorization of the U.S. to use force in Haiti). But see Dr. Clinton W. Alexander, *NATO’S Intervention in Kosovo: The Legal Case for Violating Yugoslavia’s National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT’L L. 403, 439 (2000) (arguing that in fact the clear definition of aggression and what it constitutes helps to avoid problems of dangerous precedent). See generally Fink, *supra* note 53, at 19 (discussing the dangerous precedent potentially set by specific resolutions).

116. See Falk, *supra* note 115, at 341 (acknowledging the danger of defining a specific threat or breach and its potential effect on international law). See generally Cedric E. Evans, *The Concept of “Threat to Peace” and Humanitarian Concerns: Probing the Limits of Chapter VII of the U.N. Charter*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 213, 235–36 (1995) (arguing that precedential effect is important in allowing states to follow unambiguous provisions as opposed to guessing the meaning of the resolutions); Newman, *supra* note 27, at 228–29 (discussing the benefits and disadvantages to the states of possible specific Security Council acts and their arguably negative or positive effects on precedent).

zations about the decisions of the Council in this area.¹¹⁷ On the other hand, if under certain circumstances, in the context of a consensus among its members (no exercise or threat of veto), the Council does not take action, that should later be capable of being invoked as a prior determination that the situation was not a threat to or breach of international peace and security.¹¹⁸ In other words, shifting foreign policies of the Council members should affect Article 39 determinations, and such determinations must be as objective as possible.¹¹⁹ For example, if lack of participation in or withdrawal from a treaty, which bans certain kinds of weapons, is not held as an indication of an intent to breach the peace, that position should be capable of being relied upon in the future, and the Council may be estopped from making such determination later.¹²⁰

B. Measures Taken by the Security Council in Response to International Crises¹²¹

The second issue is about the limits and legal standards governing the measures that the Security Council takes in response to the threats to or breaches of international peace and secu-

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117. See Herdegen, *supra* note 41, at 143 (warning against making any generalized conclusions regarding actions taken by the Security Council). See generally Fielding, *supra* note 58, at 551 (suggesting that the circumstances under which the Security Council has taken action were never the same since it has responded to a wide array of disputes); Charlotte Ku, *When Can Nations Go to War? Politics and Change in the U.N.*, 24 MICH. J. INT'L L. 1077, 1091 (2003) (discussing the influence international organization decisions have on later disputes and international relations).
 118. See Davidsson, *supra* note 71, at 542 (implying that the Security Council outlines what actions are deemed to constitute a breach of peace). See generally Herdegen, *supra* note 41, at 145 (noting that the Security Council determines whether an international conflict exists and such resolutions justify the behavior of member states); Frederic L. Kirgis, Book Note and Review, 93 AM. J. INT'L L. 970, 971 (1999) (reviewing David M. Malone, *DECISION MAKING IN THE U.N. SECURITY COUNCIL: THE CASE OF HAITI* (1998)) (stressing that precedent is often set by Security Council determinations on international relations).
 119. See Delbruck, *supra* note 107, at 899 (suggesting that Article 39 determinations must be made with an understanding that international relations change over time). See generally Reilly, *supra* note 22, at 963 (noting that the Security Council determines whether an international conflict presently exists when interpreting Article 39); Schachter, *supra* note 23, at 7 (commenting that U.N. delegates must look to past events to determine the way in which the international community will look in the future).
 120. See Arend, *supra* note 79, at 529 (indicating that countries rely on Security Council determinations regarding what constitutes a threat to the peace). See generally Frank, *supra* note 1, at 544 (explaining the reliance that countries have placed on past conventions and decisions by the Security Council); Scott, *supra* note 79, at 44 (discussing the way in which the Security Council determines whether there has been a breach of the peace).
 121. See Simma, *supra* note 49, at 735 (describing some of the measures the Security Council has taken when dealing with international conflict); see also Schweigman, *supra* note 49, at 163 (focusing on the actions the Security Council resorted to in the past when addressing disputes among nations). See generally Bills, *supra* note 23, at 111 (commenting on the measures the Security Council has taken under the authority of the United Nations Charter).

ity.¹²² There are important limitations on the measures that the Council may take, both in the U.N. Charter and in customary international law.¹²³

Several articles of the U.N. Charter contain rules that limit the scope of the Council's power. First, Article 25 of the Charter provides:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.¹²⁴

Accordingly, the members' obligation to abide by the Council's decisions is limited to those decisions that are in conformity with the Charter itself.¹²⁵

Article 24 of the Charter provides:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts *on their behalf*. [Emphasis supplied.]

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.¹²⁶

There are two important clauses in this article. Section 1 says that U.N. members confer the responsibility for the maintenance of peace on the Council, and the Council acts on their

122. See Pickard, *supra* note 56, at 20 (discussing the limitations on the extent to which the Security Council can recommend the use of force in an international conflict). See generally Delbruck, *supra* note 107, at 890 (suggesting there is no one determinative course of action that the United Nations should take in response to international disputes); Greenwood, *supra* note 57, at 10 (discussing the limitations on the Security Council's use of force).

123. See Jose E. Alvarez, *A Symposium on Reenvisioning the Security Council: Foreword: What's the Security Council For?*, 17 MICH. J. INT'L L. 221, 222 (1996) (describing the limitations imposed on the Security Council by the Charter and international law norms). See generally Alvarez, *supra* note 15, at 3 (illustrating that the Security Council is limited by the international law norms as reflected in the U.N. Charter); King, *supra* note 97, at 511 (discussing the limits on the powers of the Security Council).

124. See Franck, *supra* note 102, at 51 (2001) (detailing the requirements of Article 25 of the United Nations Charter). See generally Herdegen, *supra* note 41, at 138 (noting the requirements for compliance with Article 25); James A. Nafziger & Edward M. Wise, *The Status of the United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 428 (1998) (outlining the provisions listed in Article 25).

125. See Lamb, *supra* note 49, at 388; Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUROPEAN J. INT'L L. 89, 92 (1994).

126. See U.N. Charter art. 24, paras. 1–2.

behalf.¹²⁷ This section connotes the derivative nature of the Council's powers. By implication, the Council should not take measures that the U.N. members are not allowed to take, individually or collectively, because the member states did not have the authority to confer such powers on the organization when they were creating it.¹²⁸ In addition, paragraph 2 specifically binds the Council to observe the Purposes and Principles of the Charter when exercising its Chapter VII powers in discharge of its duties.¹²⁹ Purposes of the Charter are set forth in Article 1:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . .¹³⁰

This article makes conformity with the principles of justice and international law a condition for the settlement of disputes among states. Judge Schwebel argued in the *Lockerbie Case* that under Article 1 of the Charter, the Council had unlimited discretion in a certain interpretation of Article 1 of the Charter.¹³¹ According to him, the fact that Article 1 of the Charter mentions international law and justice, not in reference to prevention and removal of threats to international peace but only with regard to the adjustment and settlement of international disputes, means that the determination and removal of threats to peace were not limited by the

127. See U.N. Charter art. 24, para. 1 (granting the U.N. Security Council the responsibility to maintain peace and security); Weston, *supra* note 24, at 517–18 (noting that the primary purpose of the Security Council is to maintain peace and security); Bialke, *supra* note 21, at 11–12 (providing a general discussion of the powers, practices and purpose of the U.N. Security Council).

128. See U.N. Charter art. 24, para. 1 (granting the Security Council the power to act on behalf of U.N. members and thereby limiting the Council's powers to only those that the U.N. membership already has); The American Society of International Law, *Official Comment: International Court of Justice: Case Concerning the Prevention and Punishment of the Crime of Genocide*, 87 AM. J. INT'L L. 505, 507 (1993) (noting that Article 24, section 1 of the United Nations Charter puts limits on the actions that the U.N. Security Council can take.); see also Weston, *supra* note 24, at 517–18 (noting that the powers of the U.N. Security Council can only be changed by the general membership of the United Nations).

129. See U.N. Charter art. 1, para. 2 (stating that the Security Council must act in a manner consistent with the purposes and principles of the United Nations); Nicholas Rostow, *Terrorism, the Legal Implications of the Response to September 11, 2001*, 35 CORNELL INT'L L.J. 475, 477–78 (2002) (noting that despite the directives of Article 24 of the U.N. Charter, tensions arise between the Security Council and the general membership over actions taken by the Council). See generally Major Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL. L. REV. 135, 144 (2002) (providing a general discussion of Security Council action).

130. See U.N. Charter art. 1, paras. 1–4.

131. *Lockerbie I*, 1998 I.C.J. at 171 (dissenting opinion of Judge Schwebel) (noting that the Security Council acts as arbiter with regard to the legality of its own actions); see also Weston, *supra* note 24, at 517–18 (stating that the Security Council often acts as its own arbiter). But see U.N. Charter art. 1, para. 2 (stating that the Security Council must act in accordance with the purposes and principles of the United Nations).

existing law.¹³² This interpretation, however, though textually warranted, is not the only possible interpretation. Perhaps, the phraseology of Article 1 is there only because the application of law to a dispute resolution mechanism is more easily discernible and a more conscious process, than the application of law to the determination and removal of a threat to the peace in an urgent situation.¹³³ An analogy makes this position more clear. In a standoff between a hostage-taker and the police, law is not “applied,” but rather followed. The police may, if the situation requires, even use deadly force. But certainly nobody claims that the police are free from observing the law with respect to the use of force in that situation. Later, when the criminal is on trial, the court will consciously “apply” the law to her situation. Along the same line, it can be argued that the phraseology of Article 1 was not meant to put the actions of the Security Council in removing the threat to international peace beyond the reach of the law.¹³⁴ In other words, Article 1 can be read to require that the U.N. take effective and “legal” collective measures for the prevention and removal of threats to the peace.¹³⁵

In addition, making the Security Council’s decisions free from the application of law would cause a logical inconsistency.¹³⁶ The decisions of the Security Council are legitimate and

132. See U.N. Charter art. 1, para. 1 (granting the Security Council the authority to maintain peace and security throughout the world); *Lockerbie I*, 1998 I.C.J. at 171 (dissenting opinion of Judge Schwebel) (arguing that Security Council decisions are not subject to judicial review); see also Weston, *supra* note 24, at 517–18 (providing a general discussion of the authority of the Security Council).

133. See U.N. Charter art. 1, para. 1 (outlining the purpose of the U.N. Security Council); *Lockerbie I*, 1998 I.C.J. at 171 (dissenting opinion of Judge Schwebel) (noting that the Security Council’s decisions regarding threat removal are not subject to review); see also Weston, *supra* note 24, at 517–18 (noting that the Security Council acts as its own arbiter in certain circumstances).

134. See U.N. Charter art. 1, para. 1 (outlining the authority and purpose of the U.N. Security Council). But see Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 171 (dissenting opinion of Judge Schwebel) (explaining that determinations of the Security Council as to what constitutes a threat to peace may not be judicially second-guessed). See generally Keeler, *supra* note 129, at 144 (providing a general discussion of Security Council Action).

135. See U.N. Charter art. 1, para. 1. (listing “tak[ing] effective collective measures for the prevention and removal of threats to the peace” among the U.N.’s purposes). But see Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 167 (dissenting opinion of Judge Schwebel) (noting the autonomous nature of Security Council decisions). See generally Bialke, *supra* note 21, at 11–12 (providing a general discussion of the powers, practices and purpose of the U.N. Security Council).

136. See U.N. Charter art. 1, para. 1 (1945) (stating that the U.N. is “[t]o maintain international peace and security . . . in conformity with the principles of justice and international law”) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 66 SASKATCHEWAN L. REV. 275, 279 (2000) (quoting U.S. Ambassador to the U.N. Bill Richardson as saying the Security Council has a legal responsibility to maintain peace and security). See generally Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 79, 81 (1995) (positing that decisions of the Security Council are legally binding and have the force of law).

binding on states, in the context of the international system.¹³⁷ Those decisions would not have any binding force in a legal vacuum. More specifically, the decisions of the Council receive their binding force from the Charter, which in turn, is binding in the context of the international legal system.¹³⁸ If the decisions of the Security Council are placed outside the boundaries of this legal system, they will lose their binding force, and the Council inevitably must rely on power and intimidation to enforce its decisions.¹³⁹ In other words, Article 1, which confers on the Council its authority to remove threats to peace, is unable to exempt the Council from the rule of law, lest it contradicts its own conferral of authority.¹⁴⁰ Discretion, as opposed to lawlessness, cannot be exercised *contra legem*.¹⁴¹ It can only be exercised within the

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137. See *Lockerbie II*, 1992 I.C.J. 3, 26–27 (separate opinion of Judge Lachs) (explaining that the Security Council, as one of the main organs of the U.N., has specific powers of binding decisions on states); see also *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 167 (2d Cir. 2003) (stating that the U.N. Charter specifically reserved the authority to make legally binding pronouncements to the Security Council). See generally Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002) (affirming that, pursuant to the U.N. Charter Articles 25 and 48(1), the Security Council can adopt binding decisions to all states).
 138. See U.N. Charter art. 25 (1945) (stating that the member states shall abide by the Security Council decisions when made in accordance with the U.N. Charter) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also U.N. Charter art. 48, para. 1 (1945) (declaring that all or some of the member states of the U.N. must carry out actions as the Security Council decides) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); *Lockerbie I*, 1998 I.C.J. 9, 59 (separate opinion of Judge Kooijmans) (agreeing that the U.N. Charter gave the Security Council the power to take the necessary legally binding measures to counter threats to international peace and security).
 139. See Gardam, *supra* note 62, at 303–04 (concluding that the Security Council is not at liberty to completely disregard the legal restraints set forth in the U.N. Charter); King, *supra* note 97, at 522–23 (suggesting that U.N. organs must remain within proper restraints and if interpretations of mandates are deemed not generally acceptable by member states they should have no binding force); Cassandra LaRae-Perez, Note, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions From an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 172–73 (2002) (asserting that the Security Council's freedom to impose sanctions is limited by Article 39, and that it cannot impose sanctions against the meaning of Article 24(2)).
 140. See Keith Harper, Note, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103, 104–05 (1994) (stating that the Security Council must abstain from actions that the international community will view as illegitimate or *ultra vires*, since its institutional legitimacy depends on the cooperation of the states); Herdegen, *supra* note 41, at 156 (reasoning that since the Security Council powers are based on treaty, it is evident that international law limits the Council's exercise of power through the Charter); Scott, *supra* note 46, at 120 (suggesting that the absence of a provision permitting the Council to act beyond the norms of international law indicates that the Security Council must abide by principles of justice and international law).
 141. See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38 (Jun. 14) (separate opinion of Judge Weeramantry, at para. 141) (maintaining that courts use discretion within the boundaries set by the law); see also Paul H. Brietzke, *Insurgents in the 'New' International Law*, 13 WIS. INT'L L.J. 1, 40 n.86 (1994) (stating that states' discretion in selecting means to fulfill their obligations under the International Covenant of Economic, Social and Cultural Rights are limited to the boundaries of international law); Ruth Lapidoth, *Is There a Role for Equity in International Law?*, 81 AM. SOC'Y INT'L L. PROC. 126, 143 (listing the four different types of equity and stating that each type differs in regard to the degree of discretion allowed).

law.¹⁴² Therefore, the more plausible argument would be to say that Article 1 exempts the U.N. from the bounds of some rules of international law, and in fact grants “discretion” to the Council in dealing with threats to peace.¹⁴³ It follows that the Security Council’s discretion is subject to constraints which can be discovered and developed.¹⁴⁴

On the other hand, the principles of the U.N. are set forth in Article 2 of the Charter:

The Organization and its Members, in pursuit of the Purposes stated in article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

. . .

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁴⁵

142. See *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 160 (Dec. 18) (holding that the delimitation of territorial waters made by the Norwegian Decree of 1935 was in conflict with international laws because, *inter alia*, the principles followed in delimitations are within the authority of law rather than the discretion of each state); see also Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(C) and “General Principles of Law,”* 5 DUKE J. COMP. & INT’L L. 35, 35–36 (1994) (recognizing the necessity to place limits upon judges’ discretion to be exercised within the boundaries of legal rules based on doctrinal legitimacy); Detlev Vagts & Michael Reiterer, *The Regulation of Nationality in International Law*, by Ruth Donner, 81 AM. J. INT’L L. 970, 971 (1987) (book review) (asserting that international law restricts discretion of the states regardless of whether an obligation is outside of treaties).

143. See, e.g., U.N. Charter art. 39 (1945) (allowing the Security Council to “determine the existence of any threat to peace, breach of the peace, or act of aggression” or to “decide what measures shall be taken . . . to maintain or restore international peace and security.”) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT’L L. & FOREIGN AFF. 1, 24–25 (1999) (illustrating the broad range of discretion the Security Council is given by the U.N. Charter); Justus R. Weiner, *The Temporary International Presence in the City of Hebron (“TIPH”): A Unique Approach to Peacekeeping*, 16 WIS. INT’L L.J. 281, 292–94 (1997) (showing the intent of the U.N. to give itself the legal authority and capacity to keep peace and enforce the purposes of Article 1 through the acts of the Security Council).

144. See Roger Normand & Christoph Wilcke, *Human Rights, Sanctions and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT’L L. & CONTEMP. PROBS. 299, 335 (2001) (illustrating that, pursuant to Article 24, the Security Council must “act in accordance with the Purposes and Principles of the United Nations” and thus does not have unlimited authority); Reisman, *supra* note 1, at 97–98 (outlining the existing authority and restraints of the Security Council’s discretion); Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323, 339 (1996) (explaining that the discretion granted to the Security Council is in fact very limited due to the U.N. Charter and subject to the judgment of legality by government and international lawyers).

145. See U.N. Charter art. 2, paras. 1 & 7 (1945) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004).

Under Section 1, considering that the Organization must observe the principles set out in Article 2, in pursuit of its purposes, the Security Council must observe the equality of the members in measures that it takes.¹⁴⁶ Therefore, the Council cannot, for example, permanently relegate one state to an inferior position compared to other states.¹⁴⁷ This condition supports the propositions that permanent or long-term deprivation of sovereign rights of people (organized in states) is unlawful, and also that the Council does not possess the authority to break up a state¹⁴⁸ or determine a disputed boundary.¹⁴⁹ Section 7 states the principle of non-intervention in domestic affairs of states. This section contains a delicate balance between the sovereign rights of states and the responsibility of the Council in maintaining the international peace.¹⁵⁰

146. See Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2000 I.C.J. 182, 205 (Dec. 8) (declaration of Judge Oda) (noting that the Republic of Congo relied on the concept of "sovereign equality" that Belgium violated "the principle of sovereign equality" among the member states of the U.N. based on Article 2, paragraph 1 of the U.N. Charter); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 576 (July 8) (dissenting opinion of Judge Koroma) (explaining that the presupposition of respect for sovereignty and territorial integrity is based on the principle of equality set forth in Article 2, paragraph 1 of the U.N. Charter); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276 (1970), 1971 I.C.J. 16, 78 (June 21) (separate opinion of Vice-President Ammoun) (stating that the U.N. emphasized the principle of sovereign equality by declaring Article 2, paragraph 1 of the U.N. Charter).

147. See U.N. Charter art. 2 (Jun. 26, 1945) (establishing the basic tenet of sovereign equality as a pillar upon which the U.N. is founded) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also Fitzgerald, *supra* note 27, at 321 (noting the ideological assertion of equality within the U.N. contained in the U.N. Charter). See generally Hammer, *supra* note 34, at 263 (arguing a deficiency in the Security Council structure because it impedes the basic principle of sovereign equality and representation).

148. See Schweigman, *supra* note 49, at 172 (confirming that the Security Council must always respect human rights when exercising legislative powers in accordance with international standards); Bowett, *supra* note 95, at 93. See generally King, *supra* note 97, at 509–11 (raising concern over the burgeoning power of the Security Council to meddle in the domestic affairs of states, including dissolution).

149. The Council, however, did that in the aftermath of the first Gulf War, with regard to the boundary between Iraq and Kuwait. See Final Report of the Boundary Demarcation Commission, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25811 (1993) available in *United Nations: Letter from the Secretary-General Transmitting to the Security Council the Final Report on the Demarcation of the International Boundary Between Iraq and Kuwait*, 32 I.L.M. 1427 (1993) (determining the technical international boundary between the Republic of Iraq and the state of Kuwait). The precise effect of this determination is, however, unclear. See Sean Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 243 (1994) (allowing the Security Council to intervene in settling the border dispute between Iraq and Kuwait); see also Szasz, *supra* note 137, at 904 (discussing the expanding power of the U.N. Security Council under Chapter VII to determine the boundary between two states).

150. See U.N. Charter art. 2, para. 7 (1945) (excluding U.N. intervention into the domestic matters of a state while still maintaining Ch. VII responsibility for sustaining international peace) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT'L LEGAL THEORY 1, 24–26 (2001) (reaffirming the balance between the policy of non-intervention in domestic affairs and the ability to provide for international peace through necessary means); Wippman, *supra* note 105, at 437 (striking a balance within the U.N. to honor matters within the realm of domestic jurisdiction while ensuring international peace).

At the center of this balance is the concept of domestic jurisdiction.¹⁵¹ The issues that fall within the scope of domestic jurisdiction are immune from the Council's interference, and a state cannot be forced to submit those issues to settlement.¹⁵² This inviolability, however, should not hamper the Security Council in discharging its duties under Chapter VII.¹⁵³ Whether an issue falls within a state's domestic jurisdiction is determined by different factors, including the Organization's *prima facie* determination, determination by judicial organs, previous state practice, and also the position of the state concerned.¹⁵⁴ Accordingly, under this article the primary principle is non-intervention, and the authority of the Security Council to intervene in order to maintain peace is secondary.¹⁵⁵ This proposition is a source of important

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151. See U.N. Charter art. 2, para. 7 (1945) (establishing that the sphere of domestic jurisdiction is an arena in which the U.N. may not interfere) *available at* <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); *see also* Thomas M. Franck, *The Institute for Global Legal Studies Inaugural Colloquium: the U.N. and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 58 (2001) (excluding U.N. authority to intervene in matters within the domestic jurisdiction of any state). *See generally* Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 247 (2000) (precluding U.N. intervention in matters that are within the domestic jurisdiction of a state).
152. See U.N. Charter art. 2, para. 7 (1945) (removing U.N. authority from the domestic legal sphere, which also strips U.N. authority to require member states to surrender to settlement) *available at* <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); *see also* Bialke, *supra* note 21, at 13 (prohibiting U.N. involvement in issues within the domestic jurisdiction of a state, absent a Chapter VII peace enforcement intervention). *See generally* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 496 (2001) (carving out a portion of U.N. authority to interfere in matters within the domestic jurisdiction of a member state).
153. See U.N. Charter art. 2, para. 7 (1945) (allowing U.N. to fulfill its duties of enforcement measures under Chapter VII) *available at* <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); *see also* Matheson, *supra* note 16, at 84–86 (authorizing exercise by the Security Council to take necessary measures within member states to maintain peace, which does not offend the premise of sovereignty); Alexander Orakhelashvili, Comment, *The Legal Basis of the United Nations Peace-Keeping Operations*, 43 VA. J. INT'L L. 485, 497 (2003) (empowering the Security Council to act within a state under Chapter VII, thereby escaping the prohibitions laid out in art. 2, para. 7).
154. *See* Kirgis, *supra* note 14, at 579 (allowing the U.N. Security Council to intervene domestically concerning matters such as human rights violations and discriminatory restrictions). *See, e.g.*, Frederic L. Kirgis, Jr., *Armed Intervention in Haiti*, AM. SOC'Y INT'L L. (Sept. 1994) (justifying U.N. intervention in Haiti due to international human rights violations, a matter outside the domestic jurisdiction of the member state). *See generally* Schweigman, *supra* note 49, at 170 (declaring the purpose of the Ch. VII exception found in Art. 2(7) is to allow the Security Council to determine whether a threat to peace exists and thereby warrants U.N. intervention).
155. See U.N. Charter art. 2, para. 7 (1945) (prohibiting U.N. intervention in the domestic sphere unless the Security Council finds some threat to international peace) *available at* <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); *see also* Czernecki, *supra* note 57, at 396–98 (respecting state sovereignty unless a violation under Ch. VII is found, which then warrants U.N. intervention); *An Agenda For Peace: Preventive Diplomacy, Peace-making and Peace-keeping: Report of the Secretary-General*, para. 17, U.N. Doc. A/47/277/S/ 24111 (1992) (stressing the importance of sovereign respect unless there is some breakdown in the foundation of international peace and security, upon which intervention is permitted).

limitations on the Council's powers.¹⁵⁶ It means that intervention must be the last resort, exercised at the minimum level necessary to maintain peace, and it must cease as soon as possible.¹⁵⁷ Obviously, some questions remain to be answered: Does the Security Council have the authority to prevent a country from obtaining or developing a certain type of weapon, especially if that country is not at war? Or, can the Council remove a head of a state (assuming that the person is not a convicted war criminal)?

Another source of limitation on the Council's power is Article 51 of the U.N. Charter. Under that article "nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."¹⁵⁸ In other words, the Council cannot deprive a party of its right to use force in self-defense as long as the Council is not addressing the conflict in an adequate way to stop the hostility.¹⁵⁹ For example, a measure that puts a disproportionately larger burden on one side of the

156. See Evans, *supra* note 116, at 215–20 (acting as a legal impediment, Article 2(7) prevents the Security Council from exercising authority domestically unless a threat to international peace exists); see also Fielding, *supra* note 58, at 554 (alluding to the importance of respect for domestic sovereignty to curb the Security Council's power to intervene in the affairs of a member state); Rothert, *supra* note 16, at 261 (enforcing the principle of non-intervention in matters wholly within the domestic jurisdiction of a state unless violations against humanity or self-determination exist, which would then call for Security Council intervention under Chapter VII).

157. See John J. Merriam, Comment, *Kosovo and the Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 126–27 (2001) (stating that the U.N. requires that crisis response has a limited objective that continues for a brief duration in order to distinguish acceptable humanitarian intervention from unacceptable military offensives); see Vep P. Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494, 496 (1990) (stating that even humanitarian interventions by U.N. member states can only be justified by ensuring the operation is limited in scope and duration); Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923, 938–39 (2001) (asserting that the U.N. General Assembly may increasingly accept the idea of intervention when it is in response to egregious crimes against humanity and is immediately discontinued upon completion of its limited goal).

158. See U.N. Charter art. 51, para. 1 (1945) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004) .

159. See Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 249–50 (1999) (defining the scope of self-defense available for a U.N. peacekeeper as it ranges from personal protection to defense of the international mission); Halberstam, *supra* note 89, at 230–31 (discussing whether Article 51 precludes a nation-state from responding to an armed attack if the U.N. Security Council has already responded or is in the process of considering its response); see also Timothy J. Heverin, Comment, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 NOTRE DAME L. REV. 1277, 1285–86 (1997) (considering whether the collective right of self-defense of a sovereign nation allows response with nuclear weapons).

conflict, e.g., an arms embargo that practically affects only one of the parties to the conflict, would violate the Charter.¹⁶⁰

The Council's power is also limited by negative implication from the powers granted (including the implied powers) to the Council in the Charter.¹⁶¹ In other words, the Council does not have the powers that are not explicitly or implicitly granted to it. The powers of the Council are conferred on it in order to remove a threat to or stop a breach of peace and security. This means that the Council cannot make judicial determinations.¹⁶² For example, it cannot hold a state in breach of its obligations toward others (except, perhaps, for aggression, the determination of which involves the recognition of the aggressor), award damages,¹⁶³ or force parties to restore the status quo, unless the new conditions are, by themselves, a threat to

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160. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 325, 439–42 (Sept. 13) (Lauterpacht, J., writing separately) (offering this explanation as an alternative to the possibility that the U.N. indirectly supported acts of genocide in the former Republic of Yugoslavia); Craig Scott, *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 59 (1994) (considering whether the Security Council's arms embargo during the Bosnia and Herzegovina crisis was adequate, thus precluding other nations from intervening to terminate the continuing genocide); see also Schachter, *supra* note 80, at 456–57 (discussing the inadequacy of the Security Council's economic sanctions on Iraq during the Iraqi invasion of Kuwait).
161. See Janev, *supra* note 46, at 155–56 (explaining that when the Security Council is voting on the admission of a new member state it may not consider any factor beyond those expressly set forth in the U.N. Charter); Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 63–64 (1999) (discussing the initial creation of an international criminal tribunal by Security Council resolution justified by the U.N. Charter, which granted authority to restore international peace); Reinisch, *supra* note 45, at 856–58 (stating that the power of the Security Council is bound by many explicit limitations contained within the U.N. Charter, including a framework of social priorities, judgment criteria, and required conformity with principles of international justice).
162. See Alvarez, *supra* note 15, at 20–22 (suggesting that the ICJ will eventually be required to examine the increasing body of law created by Security Council declarations to determine what impact they have had on the U.N. Charter); Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in A.S. Muller et al., THE INTERNATIONAL COURT OF JUSTICE, ITS FUTURE ROLE AFTER FIFTY YEARS, 232 (1997) (stating that while there is no hierarchy between the ICJ, the General Assembly, and the Security Council, there is a functional division that reserves judicial matters for the Court). See generally Kirgis, *supra* note 29, at 519–29 (reporting the questionable authority and controversial role the U.N.'s Security Council's quasi-judicial decisions have played over the decades).
163. Perhaps an important exception is the U.N. Res. 687, where the Council held Iraq liable for the damages resulting from the invasion of Kuwait, and consequently established the United Nations Compensation Commission (UNCC) to award damages to the claimants. See U.N. RES. 687, U.N.S.C., 2981st mtg. (Apr. 3, 1991); see also Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT'L L. 628, 641–42 (2002) (considering whether Security Council-created tribunals can properly award compensation when the U.N. Charter does not expressly grant this power over international finances to the Security Council itself); Schachter, *supra* note 23, at 13 (distinguishing the Security Council's investigation, compliance and enforcement responsibilities with the ICJ's adjudicatory role).

peace.¹⁶⁴ All it can do is remove the threat or stop the hostility. Although threat and breach can be elastic concepts, as mentioned above, there is a limit to the scope of what they cover.

The other general sources of limitation on the Council's authority are the peremptory norms of international law, or *jus cogens*.¹⁶⁵ States are prohibited from taking obligations that violate peremptory norms of international law.¹⁶⁶ Considering that the U.N. Charter is a treaty and member states' obligation to carry out measures ordered by the Council are treaty obligations, these obligations cannot violate peremptory norms of international law.¹⁶⁷ For example, the Council cannot order use of physical pressure on prisoners of war in order to elicit information from them. It must be noticed that *jus cogens* in this context may only have theoretical importance. Although the Council may take *ultra vires* measures, it is improbable that it would flagrantly violate a peremptory rule of international law.

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164. See William J. Aceves, International Decision, *Application of the Vienna Convention on Consular Relations (Paraguay v. United States)* 92 AM. J. INT'L L. 517, 519–20 (1998) (discussing a provisional measure taken by the ICJ by requiring the U.S. not execute a foreign national pending the outcome of the case). See generally Douglas Reichert, *Provisional Remedies in International Litigation: A Comprehensive Bibliography*, 19 INT'L LAW. 1429, 1432 (1985) (noting that interim measures, requiring parties to preserve the status quo, are of recent interest in international litigation). But cf. Andrew K. Schiff, *The War Powers Resolution: From the Halls of Congress to the Hills of Bosnia, Inertia Should Give Way to Post-Cold War Reality*, 11 AM. U. J. INT'L L. & POL'Y 877, 887–88 (1996) (discussing the Security Council's power under Article 42 of the U.N. Charter to authorize member nations to take military action sufficient to restore the *status quo* of another member).
165. See Matthew A. Myers, *Deterrence and the Threat of Force Ban: Does the U.N. Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 145 n.67 (1999) (noting that the fundamental importance of *jus cogens* was recognized by the international community before it was incorporated into the U.N. Charter); Catherine Tinker, *Dispute Resolution and International Law: The United Nations Dialogue Among Civilizations*, 17 N.Y.L. SCH. J. HUM. RTS. 985, 1010–11 (2001) (listing genocide, slavery, torture, and gross violations of human rights among other examples of recognized international peremptory norms); see also Benjamin M. Meier, *Reunification of Cyprus: The Possibility of Peace in the Wake of Past Failure*, 34 CORNELL INT'L L.J. 455, 463–64 (2001) (discussing the Security Council's immediate and unanimous denouncement of Turkey's invasion of Cyprus in 1974, as a violation of international norms).
166. See Vera Gowlland-Debbas, *Exploring the Evolution of Purposes Methods and Legitimacy: Accountability of Intergovernmental Organizations*, AM. SOC. OF INT'L L. PROCEEDINGS (2000) (considering whether it is possible to hold the Security Council liable for obligations imposed on members states determined to be in violation of international law); see also Patricia V. Sellers, *Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 301–02 (2002) (arguing that the U.N.'s specific and repeated denouncement of rape has nearly established that crime as one of the norms of international law). See generally Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145, 145–46 (1994) (tracing the origin of *jus cogens* in international law, including its original incorporation into the U.N. charter and application by the ICJ).
167. See Kahgan, *supra* note 101, at 769 (arguing that there are preemptory norms of international law that are so fundamental that even Security Council resolutions must comply with them); Scott, *supra* note 46, at 126–27 (suggesting that Security Council resolutions that do not conform with *jus cogens* lose their legal force and effect). See generally Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 100 (1997) (interpreting Article 1 of the U.N. Charter as meaning U.N. actions must adhere to the principles of international law).

These rules enable the reviewing forum to determine the validity of the Council's decisions.¹⁶⁸ Even where only broad criteria exist, gradually more accurate and specific rules can develop to clarify the scope of legitimate decision-making by the Council.¹⁶⁹

III. Basis of ICJ's Authority to Invalidate the Security Council's Decisions¹⁷⁰

In the previous Part it was shown that certain, although broad rather than specific, criteria exist that govern the decisions of the Security Council. In this Part, the issue of the basis of the Court's authority to review the conformity of the Council's decisions with those norms will be examined.

Different methods can be used for the purpose of checking the Council's decisions, including setting up a new specialized judicial body such as a constitutional court, allowing the General Assembly to reject decisions, or even requiring Security Council unanimity or at least a higher number of the concurring votes for decisions.¹⁷¹ The most appropriate candidate, how-

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168. See Schweigman, *supra* note 49, at 165 (assessing possible limits the Charter and international law may have on the Security Council resolutions); see also Alvarez, *supra* note 15, at 17 (maintaining that even those who argue for Council supremacy concede that there are limits on the Council's power, such as an absolute embargo denying a targeted population access to medicine or food, violating human rights or peremptory norms); Charles Leben, *The New World Order and the Security Council, Testing the Legality of its Acts*, 90 AM. J. INT'L L. 157, 158 (1996) (book review) (noting Bedjaoui's argument that the Security Council was required to follow the Charter and international law).
 169. For examples of judicial review in the context of other international organizations see Francisco O. Vicuna & Christopher Pinto, *Peaceful Settlement of Disputes, Prospects for the 21st Century (Revised Report Prepared for the Centennial of the First International Peace Conference)*, in THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE, REPORTS & CONCLUSIONS 111 (Frits Kalshoven ed., 2000) (noting the movement in European states to a closer union would be furthered by allowing judicial review by the Court of Justice); see also Alvarez, *supra* note 15, at 11 (contending that the realist position on the lack of susceptibility to review the Council's elastic powers is unsatisfactory when considered in light of how domestic judges faced with similar settings have been able to deal with the challenge of reviewing broad powers).
 170. See generally Schweigman, *supra* note 49, at 270 (arguing that the Court will pass upon the issue of whether a Security Council decision is *intra vires* when a party supports their argument or contests a Security Council decision in making an argument before the Court); Kaiyan Homi Kaikobad, THE INTERNATIONAL COURT OF JUSTICE AND JUDICIAL REVIEW 85 (Malanczuk ed., Kluwer Law International 2000) (2000) (stating that the Court can review a Council decision when the Council requests the Court to give an advisory opinion); Alvarez, *supra* note 15, at 18 (suggesting that a formal Charter amendment is needed for judicial review to occur); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 664 (pointing out that few would dispute the Court's authority to exercise some form of judicial review if the question was incidentally posed before it); Thomas M. Franck, Comment, *The "Powers of Appreciation": Who is the Ultimate Guardian of U.N. Legality*, 86 AM. J. INT'L L. 519, 523 (1992) (arguing that the Court may have to review the legality of a U.N. organ by reference to the Charter in extreme cases).
 171. See Alvarez, *supra* note 15, at 18 (pointing to the General Assembly's power over the U.N. budget, power to create potentially troublesome subsidiary organs, and its ability to refer issues to other organs as providing a potential check on the Council). See generally Hristo D. Dimitrov, Note, *The Bulgarian Constitutional Courts and Its Interpretive Jurisdiction*, 37 COLUM. J. TRANSNAT'L L. 459, 459-60 (1999) (commenting on how the newly created Bulgarian Constitutional Court will provide an avenue for Bulgarians to oppose the government).

ever, is the ICJ. The ICJ is the main judicial organ of the U.N.¹⁷² It is well-equipped to perform this task (being comprised of judges of the highest-level expertise¹⁷³). The ICJ is more independent than the Security Council, because there is no privilege for the powerful countries,¹⁷⁴ and the judges vote in their capacity as members of the Court, rather than as representatives of their national states.¹⁷⁵ Also, the ICJ is a respectable court in the area of resolving public international law disputes,¹⁷⁶ and has extensively contributed to the development of international law.¹⁷⁷

172. Article 92 of the U.N. Charter provides:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

173. Article 2 of the Statute of the Court provides

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Also, Article 4(1) provides

The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration. . . .

174. Customarily, the permanent members of the Security Council always have a judge of their nationality on the bench. This is however, not a legal obligation for other countries.

175. See I.C.J. Statute, art. 2 (proclaiming that the composition of the Court shall be made up of independent judges); see also I.C.J., General Information (explaining that members of the ICJ are considered independent magistrates, not national representatives) available at <http://212.153.43.18/icjwww/igeneralinformation/icjgn-not.html>; Gowlland-Debbas, *supra* note 170, at 643 (characterizing the ICJ as an autonomous adjudicative body).

176. For a list of the cases that the ICJ has decided since 1946, see <http://www.icj-cij.org/icjwww/idecisions.htm>. See also Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 497 (1995) (surveying the first 50 years of the Court).

177. See generally William J. Aceves, *International Decision: LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 218 (2002) (noting the impact the ICJ's rulings in the *LaGrand* case will have on municipal law and practice); Jennings, *supra* note 176, at 503 (stating that there is no doubt that the Court's advisory opinions have contributed greatly to the development and elaboration of international law); Michael Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 435 (1997) (suggesting that the effect of the Court's advisory opinion on the threat or use of nuclear weapons would encourage the sensible integration of rules developed for peacetime circumstances into the structure of the law of armed conflict).

The authority to review the Council's decisions was not granted to the ICJ when the U.N. Charter was drafted,¹⁷⁸ and some commentators,¹⁷⁹ based on this fact, have said that lack of a provision for judicial review of the Council's decision in the Charter prevents exercise of such authority by the Court.¹⁸⁰ This argument, however, is not persuasive. Although the authority of judicial review was not granted in the Charter, such an authority was not explicitly denied to the Court, either.¹⁸¹ In the United Nations Conference on International Organizations (UNCIO) in San Francisco (1945), a proposal from the Belgian delegation for granting the authority of judicial review to the Court was rejected.¹⁸² The parties present at the conference, however, did not decide to ban the Court from exercising judicial review, and left the question undecided.¹⁸³ This is methodologically similar to the issue of the binding force of the ICJ's

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178. See Vicuna & Pinto, *supra* note 169, at 111 (stating that the ICJ does not obtain authority to review Security Council decisions from the U.N. Charter or the Court's Statute); see also Malcolm N. Shaw, *INTERNATIONAL LAW* 1151 (5th ed. 2003) (arguing that the ICJ may examine Security Council decisions in the course of deciding a case or issuing an advisory opinion, however, the ICJ should not have complete judicial review over Security Council decisions). See generally Hugh Thirlway, *The International Court of Justice*, in *INTERNATIONAL LAW* 566 (Malcolm D. Evans ed., 2003) (stating that the scope of ICJ jurisdiction is defined by, and cannot vary from, the U.N. Charter and the Statute of the Court).
179. See Alvarez, *supra* note 15, at 1–2 (reporting that commentators warn against judicial review of Security Council decisions); see also Zubel, *supra* note 37, at 279 (observing that since the ICJ is not given the specific grant of authority it has no power to review Security Council decisions). See generally Roger S. Clark & Madeline Sann, *Coping With Ultimate Evil Through the Criminal Law*, 7 *CRIM. L.F.* 1, 6–7 (1996) (noting that neither the text of the U.N. Charter nor its drafting history confer on the ICJ the right to review Security Council decisions).
180. See Deborah D'Angelo, Note, *The "Check" on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions*, 23 *SUFFOLK TRANSNAT'L L. REV.* 561, 589 (2000) (maintaining that the failure to grant the ICJ judicial review in the U.N. Charter prevents the Court from exercising such power); Antonio F. Perez, *The Passive Viruses and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 *MICH. J. INT'L L.* 399, 404 (1997) (finding that some scholars feel the ICJ has transgressed its powers by seeking to review Security Council decisions). See generally Kirgis, *supra* note 14, at 580 (noting that judicial review was "consciously omitted" from the U.N. Charter, leaving it up to the individual organs of the U.N. to determine the scope and legality of their functions).
181. See Gowlland-Debbas, *supra* note 170, at 664 (maintaining that the U.N. Charter did not rule out judicial review altogether); see also Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 *HARV. INT'L L.J.* 1, 14 (1993) (suggesting that even though the Charter itself denies the ICJ the power of judicial review, other factors must be taken into account). See generally Bassiouni, *supra* note 5, at 407 (noting that the ICJ was not expressly given the power of judicial review in the U.N. Charter, but failing to state whether it was denied that power).
182. See Vicuna & Pinto, *supra* note 169, at 390–91 (noting that the Belgian proposal was rejected at the San Francisco Conference); see also Franck, *supra* note 170, at 520 (stating that the proposal to confer the power of judicial review on the Court was rejected at the Conference); Gowlland-Debbas, *supra* note 170, at 664 (noting that the Conference rejected the proposal to allow for judicial review of disputes over the interpretation of the U.N. Charter).
183. See Bedjaoui, *supra* note 21, at 105 (finding that the question of judicial review was left as a "somewhat open question" at the 1945 Conference); see also King, *supra* note 97, at 523 (stating that the San Francisco Conference left open the question of judicial review). See generally Reisman, *supra* note 1, at 96 (noting that while the Belgian proposal failed in 1945, many states continue to seek judicial review of Security Council actions).

provisional measures that the Court decided in the *LaGrand Case* (1999).¹⁸⁴ For more than half a century it was unclear whether the Court's provisional measures were binding or merely recommendatory. Binding effect of the provisional measures was neither recognized nor denied in the Charter.¹⁸⁵ This, however, changed in 1999 when the Court in the context of the *LaGrand Case* decided that such binding force existed under the Charter and its Statute.¹⁸⁶ Therefore, in order to determine whether it has the authority to invalidate the Council's decisions, the Court must find whether there are separate grounds in the U.N. Charter, the ICJ Statute, or elsewhere to support the exercise of such authority.¹⁸⁷

Considering that the Charter does not prevent the Court from reviewing the Council's decisions, it is important to see whether it shields the Council from the effects of such review, in the form of possible invalidation. The Charter does not provide such protection for the Council, neither explicitly nor impliedly. Chapter V of the Charter sets up the Council, and Articles 24-26 of that chapter describe the functions and powers of the Security Council.¹⁸⁸ These provisions, under Articles 31 and 32 of the Vienna Convention on the Law of Treaties,¹⁸⁹ must be interpreted in light of the objects and purposes of the treaty, i.e., the Charter. The objects and purposes of the Charter are laid out in Article 1.¹⁹⁰ It would be stretching the

184. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 9, 16 (1999) (holding that the German nationals "should" not be executed pending a final trial in the ICJ); see Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 19 CAL. L. REV. 1729, 1731 (2003) (stating that the ICJ determined the binding nature of its provisional measures for the first time in the *LaGrand Case*); Richard J. Wilson, *International Law Issues in Death Penalty Defense*, 31 HOFSTRA L. REV. 1195, 1211 n.14 (suggesting that the most important portion of the *LaGrand* decision is the ICJ's finding that its provisional measures are binding).

185. See Jonathan I. Charney & W. Michael Reisman, *Agora: Breard, The Facts*, 92 AM. J. INT'L L. 666, 672 (1998) (expressing the ambiguity in the Charter concerning the binding nature of provisional measures). See generally Curtis A. Bradley, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 680 n.25 (1998) (finding that it was not clear whether provisional measures were binding); Lori Fisler Damrosch, *Agora: Breard, The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 702 (1998) (indicating that there is disagreement as to the binding nature of the provisional measures).

186. See Linda E. Carter, *Compliance With ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals*, 25 MICH. J. INT'L L. 117, 122 (2003) (stating that the ICJ held provisional measures to be binding on the parties in the *LaGrand Case*); see also Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance With International Law*, 82 N.C. L. REV. 457, 533 n.287 (2004) (noting that the *LaGrand Case* established that provisional orders are binding in nature); Note, *Too Sovereign but not Sovereign Enough: Are the U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2654 (2003) (finding that the *LaGrand Case* ruled for the first time that provisional measures are binding).

187. See Alvarez, *supra* note 15, at 14 (finding that those considering judicial review rely on the history and text of the U.N. Charter for support); see also D'Angelo, *supra* note 180, at 563 (reviewing the U.N. Charter and case law to determine whether the ICJ possesses the power of judicial review). See generally Daniel C. Turack, *Equity and International Law: A Legal Realist Approach to International Decisionmaking*, by Christopher R. Rossi, 4 TUL. J. INT'L & COMP. L. 139, 140-41 (1995) (book review) (finding that the ICJ has implied powers in the U.N. Charter that may be used to interpret the scope of the Court's authority).

188. U.N. Charter arts. 24-26.

189. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331.

190. See U.N. Charter art. 1, paras. 1-4 (1945) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004).

argument to claim that the Charter's object was to achieve the goals mentioned in this article, at any cost, even at the cost of ignoring the law. After all, what would be the justification for responding to threats to or breaches of peace (themselves violations of law), by a different kind of violation of law (by the Council), especially if it is in the form of use of force under Chapter VII?

It is important, however, to determine the foundation on which the Court can base such authority. There are several bases on which the Court can found its authority to invalidate.¹⁹¹ It is possible to argue that judicial review is a general principle of law. This argument, however, has its own shortcomings. Judicial review is not a common practice among all major legal systems of the world.¹⁹² Moreover, where it exists, it is practiced in widely different forms, which makes it hard to deduce a principle out of all the different models.¹⁹³ It is also possible to argue that judicial review of an executive body's measures, as a necessary corollary of the rule of law,¹⁹⁴ is a rule of general international law. This argument, however, seems too idealistic, because the international society is not a democratic society, and it is hard to claim that rule of law has such a mandate in the international system.¹⁹⁵

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191. See U.N. Charter art. 94, para. 1 (1945) (providing that decisions of the ICJ shall be binding on all members of the U.N.) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also D'Angelo, *supra* note 180, at 577–58 (positing that the ICJ's ability to review decisions made by the Security Council could be found from the fact that it has done so in the past, as the Vienna Council provides that all treaties may be interpreted in light of the parties' subsequent behavior in implementation); Frank, *supra* note 1, at 539–40 (suggesting that other sources of authority for the ICJ may include the doctrine of *ultra vires* and invocations of the Court's power in Libyan and Nicaraguan challenges to Security Council resolutions).
192. See George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U.L. REV. 467, 521–23 (1994) (noting that there is no mechanism for judicial review of the Israeli Knesset's policies toward Palestinian landowners in the occupied territories); see also Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: the Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 18 (2002) (identifying China as a country that, despite its having a constitution, has not yet embraced the concept of judicial review). See generally Mohammed Hashim Kamali, FREEDOM, EQUALITY AND JUSTICE IN ISLAM 120–22 (1999) (explaining that the concept of judicial review is at the core of Islamic legal theory).
193. See Vicuna & Pinto, *supra* note 169, at 389 (questioning whether the concept of judicial review is ripe for adaptation in an international context); see also Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 AM. U. J. INT'L L. & POL'Y 1295, 1314–15 (1995) (explaining that Latin America's populist heritage militates against the development of an active practice of judicial review); J. Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective*, 54 OHIO ST. L.J. 559, 562–63 (1993) (explaining that both the socialist and the civil law heritages of Central and Eastern Europe may serve to hinder the development of a strong judicial review institution).
194. See Brownlie, *supra* note 2, at 92 (positing that an independent judiciary is a core ingredient to the rule of law); see also Allen Dillard Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 45 (1997) (explaining that judicial review has been a fundamental concept of constitutional law since early in the 17th century); Joseph C. Cascarelli, *Is Judicial Review Grounded in and Limited by Natural Law?*, 30 CUMB. L. REV. 373, 444 (1999/2000) (arguing that judicial review is a necessary corollary to natural law).
195. See Vicuna & Pinto, *supra* note 169, at 109 (noting that the "community" of states that make up the U.N. is not yet a democracy); see also Alvarez, *supra* note 15, at 2 (noting that the Security Council's power is inherently undemocratic); Fitzgerald, *supra* note 27, at 364 (arguing that the U.N. Security Council was originally designed as an unrepresentative body, and that now it needs to adapt into a body more representative of the U.N. as a whole).

The objects and purposes of the Statute of the Court provide another basis for the authority to invalidate.¹⁹⁶ As the Court mentioned in the *LaGrand Case*, the object and purpose of the Statute is “to enable the Court to fulfill the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute.”¹⁹⁷ By the same token, if the Court, in the context of a case, contentious or advisory, comes across a Security Council decision which it finds invalid, the objects and purposes of its Statute would require the Court to declare such invalidity in order to resolve the dispute.¹⁹⁸ The only other solutions would be to abstain or allow an illegal decision to stand.¹⁹⁹ It must be noticed that potentially the General Assembly or the Council itself can, in the context of an advisory opinion, request the Court to clarify the scope of its authority and make it known whether it can invalidate the Council’s decisions.²⁰⁰

196. See Watson, *supra* note 181, at 39–40 (positing that there is room in the Statute of the ICJ for some form of judicial review of Security Council resolutions); see also Roberts, *supra* note 42, at 289 (arguing to construe the ICJ statute and the jurisdiction that it provides as independent and abrogative of the U.N. Charter provisions limiting ICJ jurisdiction); but cf. D’Angelo, *supra* note 180, at 567–68 (arguing that there is no language in the ICJ’s statute that provides for jurisdiction over anything but legal claims between member states).

197. See Press Release, International Court of Justice (June 27, 2001) (ruling that the ICJ could exercise jurisdiction in order to fulfill the function provided it in Article 59) available at http://212.153.43.18/icjwww/ipresscom/ipress2001/ipresscom2001-16bis_20010627.htm (last visited Feb. 16, 2004); see also ICJ Statute, art. 59 (1946) (providing binding ICJ jurisdiction for litigation between member states); Howard S. Schiffman, Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention, 8 CARDOZO J. INT’L & COMP. L. 27, 54–55 (2000) (suggesting that, although there is no concept of *stare decisis* for the ICJ, a decision issued by the ICJ on an Article 59 issue could be peremptorily binding in the future on the states involved in the litigation).

198. See Gowlland-Debbas, *supra* note 170, at 669 (noting that the ICJ has pointedly not withheld from itself the yet-unrealized power to review and declare invalid Security Council resolutions); see also Franck, *supra* note 170, at 521–22 (drawing significant parallels between the U.S. Supreme Court’s holding in *Marbury v. Madison* and the ICJ’s holding in the *Lockerbie* case); Obiora Chinendu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT’L & COMP. LAW 117, 131–32 (1997) (noting that the majority and minority opinions in the *Lockerbie* case are in agreement in viewing the ICJ as a viable and needed check to the Security Council’s power).

199. See D’Angelo, *supra* note 180, at 586–87 (discussing the *Lockerbie* case, where the ICJ invalidated a Security Council resolution based solely on a technicality); see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 21–22 (June 21) (holding that Security Council resolution 284 is not invalid, as claimed by Namibia) (hereinafter “*Namibia*”). See generally Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia), 1993 I.C.J. 325, 439–40 (Sept. 13) (separate opinion of Judge Lauterpacht) (refusing to invalidate a Security Council resolution, notwithstanding the strong possibility that the resolution violated the doctrine of *jus cogens*).

200. See U.N. Charter art. 96, para. 1–2 (1945) (stating that the General Assembly and the Security Council have the authority to request an advisory opinion from the International Court of Justice on legal questions) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); I.C.J. Statute, art. 65, para. 1 (1945) (noting that the Court can give an advisory opinion at the request of any body that is so authorized according to the U.N. Charter); see also Stephen M. Schwelb, Note, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J. INT’L L. 869, 873 (1984) (implying that Article 96 of the U.N. Charter and Article 65(1) of the ICJ Statute authorizes the Secretary-General and the Secretariat to request an advisory opinion via the General Assembly).

IV. Jurisprudence of ICJ in Its Relations with the Security Council²⁰¹

The Court has already passed on the legal effects of the Security Council's decisions on several occasions, but it has never struck any down.²⁰² For example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)* (1970),²⁰³ in response to South Africa's objection to the validity of Council Resolution 284 (1970) in which the Council asked the Court for the advisory opinion, reviewed and upheld the validity of that resolution.²⁰⁴ On the merits, while stating in dictum that it did not have the power of judicial review, the Court nevertheless, in the exercise of its judicial function, and since objections had been advanced as to the validity of Security Council Resolution 276 (1970), considered them in the course of its reasoning before determining the legal consequences arising from that and other resolutions, terminating South Africa's Mandate in Namibia.²⁰⁵

In *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*,²⁰⁶ Bosnia claimed that the arms embargo imposed on the parties by Security Council Resolution 713 deprived Bosnia of means

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201. See generally Schweigman, *supra* note 49, at 51–53 (assessing the limits of the Security Council's authority); Liz Heffernan, *The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice*, 28 STETSON L. REV. 133, 135–37, 169–170 (1998) (implying that the Security Council's concerns over ICJ procedures result in putting the ICJ's reputation at risk); H. Vern Clemons, Comment, *The Ethos of the International Court of Justice is Dependent Upon the Statutory Authority Attributed to its Rhetoric: A Meta Discourse*, 20 FORDHAM INT'L L.J. 1479, 1494–95 (1997) (indicating that members of the U.N. Security Council are not willing to recognize the compulsory jurisdiction of the ICJ).
 202. See Herdegen, *supra* note 41, at 145–46 (suggesting that although the ICJ has judicial discretion in reviewing decisions made by the Security Council, it is not vested with any power to strike down decisions); cf. U.N. Charter art. 92 (1945) (providing that the International Court is the "principal judicial organ" of the U.N.) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004). See generally Alvarez, *supra* note 15, at 1–2 (noting that non-permanent members of the Security Council feel that the Security Council is an imperialist body with no check by the ICJ).
 203. See *Namibia*, 1971 I.C.J. 16 (June 21).
 204. See *Namibia*, 1971 I.C.J. 16 (June 21) (stating that the Security Council properly seized on a request for an advisory opinion via Council's Resolution 284); see also P. Mwet Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 D.C. L.J. INT'L L. & PRAC. 159, 184–85 (1998) (rejecting South Africa's objection to the Security Council's request for an advisory opinion on the ground that abstention from voting does not constitute a bar to the adoption of resolutions). See generally Tadashi Mori, *Namibia Opinion Revised: A Gap in the Current Arguments on the Power of the Security Council*, 4 ILSA J. INT'L & COMP. L. 121, 123–24 (1997) (declaring that the Security Council has mandatory powers implied from its responsibility to maintain peace and security).
 205. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276, 1970 I.C.J. 359 (Aug. 5) (requesting an advisory opinion of the Court with regard to the Rules of Court, Article 82, para. 2; see also D'Angelo, *supra* note 180, at 579 (acknowledging that although the ICJ did not have the power of judicial review, it gave an opinion on the resolution's validity). But see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 43–35 (June 21) (asserting ICJ's authority to review U.N. organs' actions gives power of judicial review).
 206. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 I.C.J. 596 (July 11) (hereinafter "*Bosnia*").

to defend itself against foreign aggression.²⁰⁷ Bosnia argued that by such an effect, the resolution violated Bosnia's inherent right of self-defense, under customary international law and the Charter, as provided for in Article 51.²⁰⁸ The Court, however, dismissed the case on jurisdictional grounds, and did not take the opportunity to address the issue.²⁰⁹

The Court recently came close to pronouncing its position on the issue of declaring a Council's resolution invalid in the *Lockerbie Case*.²¹⁰ In the provisional measures phase (1992),²¹¹ Libya asked the Court to order the United States and the United Kingdom to refrain

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207. See Nikolai K. Tarasov, *International Court of Justice: Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 87 AM. J. INT'L L. 505, 506–07 (1993) (requesting that Security Council resolution 713 be construed so as not to deprive Bosnia of a means to defend itself); see also Ziyad Motala & David T. Butle Ritchie, *Self-Defense in International Law, The United Nations, and The Bosnian Conflict*, 57 U. PITT. L. REV. 1, 2 (1995) (noting that Security Council Resolution 713 prevented Bosnia-Herzegovina from obtaining arms necessary to defend itself in the war waged by Serbian forces). *But see Bosnia*, 1996 I.C.J. 596, 601 (July 11) (stating that the Security Council resolution 713 shall not impair the self-defense of Bosnia and Herzegovina).
208. See U.N. Charter art. 51 (1945) (recognizing a member state's inherent right of self-defense) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); S.C. Res. 713, U.N. SCOR., 309th Sess., U.N. DOC. S/RES/713 at 3 (1991); see also Moor, *supra* note 61, at 871 (stating that the arms embargo explicitly prevented Bosnia from exercising its inherent right to self-defense under Article 51).
209. See *Bosnia*, 1996 I.C.J. 596, 615–16 (July 11) (deciding that the Court is unable to uphold any of the additional bases of jurisdiction invoked by Bosnia and Herzegovina); see also Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 6 (Mar. 3) (recalling that according to Article 65 the Court may give an opinion on any legal question); Certain Expenses of the United Nations, 1962 I.C.J. 151, 155 (July 20) (explaining that Art. 65 authorizes the Court to give an advisory opinion on any legal question as well as the discretion to decline to answer a legal question that it is competent to answer).
210. See *Lockerbie III*, 2003 I.C.J. (Sept. 10) (discontinuing the proceedings in which the Court came close to pronouncing its position on the issue of declaring Article 7 of the Montreal Convention invalid) available at <http://212.153.43.18/icjwww/idoctet/iluk/iluk2frame.htm> (last visited Feb. 26, 2004). See generally Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law and Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 506 (2003) (noting Libya's reliance on Article 7 of the Montreal Convention in the absence of an extradition treaty to prosecute its own nationals and the United States and United Kingdom's argument that this was not a valid excuse for refusing to surrender the Libyan suspects).
211. See *Lockerbie II*, 1992 I.C.J. 114, 114 (introducing Libya's request for provisional measures and citing Articles 41 and 48 of the Statute of the Court and Articles 73 and 74 of the Rules of Court); cf. Martinez, *supra* note 2, at 521 (suggesting that it was in the Provisional Measures phase that the ICJ came close to reviewing the legality of a Security Council resolution) with Watson, *supra* note 5, at 875 (commenting that in the Provisional Measures phase, while the majority shied away from exercising judicial review over a Security Council resolution, the justices argued in concurring and dissenting opinions that the ICJ should consider whether the resolution was valid).

from violating Libya's rights, under the Montreal Convention.²¹² Such decision could have had important consequences for the Council, if it wanted to take measures in the near future. The Council preempted the Court by issuing Resolution 748 (1992), immediately after the oral arguments before the Court, but before the Court reached its decision.²¹³ The Court took the new resolution into account in its deliberations, and relying on the presumptive validity of the Council's resolutions²¹⁴ and the priority of obligations under the Charter over other obligations,²¹⁵ did not issue any provisional measures. Several judges, however, commented on the possibility of the Court reviewing the legality of the Council's resolution.²¹⁶ Among them, Judge Shahabuddeen's observation is widely quoted:

The question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the

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212. See International Civil Aviation Organization: Convention to Discourage Acts of Violence Against Civil Aviation, Sept. 23, 1971, 10 I.L.M. 1151, 1155 (mandating the circumstances in which a dispute between two or more states concerning the Montreal Convention may be referred to the ICJ); see also Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 673 (2003) (recalling that Libya asked the Court to take provisional measures to preserve Libya's rights and to order the United States to stop violating Libya's rights under the Montreal Convention); cf. Shigeru Oda & Edward Valencia-Ospina, *Official Document: International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 86 AM. J. INT'L L. 638, 641 (1992) (stating Libya's allegations regarding threats made by the U.S. to take actions that were impermissible under the Montreal Convention).
213. See Reisman, *supra* note 1, at 88 (indicating that the Security Council issued Resolution 748 after oral argument but before judgment was rendered); cf. Lillich, *supra* note 63, at 12 (recounting the ICJ's holding that Resolution 748 preempted its jurisdiction under the Montreal Convention). See generally United Nations: Security Council Resolution Deciding that Libya Must Comply with Previous Requests and Imposing Certain Sanctions, Letters Regarding the Venezuelan Diplomatic Mission in Libya, and Secretary-General Report, Mar. 31, 1992, 31 I.L.M. 749, 750 (resolving that Libya must comply with Resolution 731 and must cease all forms of terrorist action and assistance).
214. See *Lockerbie II*, 1992 I.C.J. at 14 (noting Libya's observation that the Security Council employed its power to characterize the situation for purposes of Chapter VII as a pretext to avoid applying the Montreal Convention, thus relying on the presumptive validity of the Council's resolutions). But cf. Herdegen, *supra* note 41, at 138 (discussing the implications of the presumptive validity of Security Council resolutions for U.N. member states). See generally Brownlie, *supra* note 2, at 93–94 (explaining that the ICJ has stated the U.N. members have a *prima facie* obligation to accept and carry out the decisions of the Security Council).
215. See U.N. Charter art. 103, para. 1 (1945) (ruling that obligations of the members of the U.N. under the U.N. Charter shall prevail over their obligations under any other international agreement) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102h (1987) (restating the priority of obligations under the Charter over other obligations mandated in Article 103 of the U.N. Charter); Richard H. Lauwaars, *International Law: The Interrelationship Between United Nations Law and the Law of other International Organizations*, 82 MICH. L. REV. 1604, 1605 (1984) (interpreting the scope of Article 103's prescription that obligations under the U.N. Charter take priority over other obligations).
216. See Frank, *supra* note 1, at 538–39 (inferring that several judges entertained the possibility of the Court reviewing the legality of the Council's resolution since five out of sixteen judges voted against the majority opinion); see also Roberts, *supra* note 42, at 302 (commenting that there were eleven separate opinions written regarding the Council's resolution, which reflects the novelty of the issues it presented). See generally *Lockerbie II*, 1992 I.C.J. 114, 124 (recounting the Security Council's Resolution 748 in an order compelling Libya to comply with the resolution).

legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?²¹⁷

In the preliminary objections phase of the *Lockerbie Case* (1998), the United States, relying on Security Council Resolutions 748 (1992) and 883 (1993), claimed that Libya's case was non-admissible and moot.²¹⁸ The Court, over the strong dissent of the American judge,²¹⁹ rejected the United States' objections, and assumed jurisdiction to hear the case on the merits.²²⁰ The Court, by this opinion, implied that it had the authority to hear an argument that a Security Council decision violated international law.²²¹ As Judge Bedjaoui put it in his declaration with Judges Renjeva and Koroma, "it is not enough to invoke action under Chapter VII of the Charter to immediately and automatically put an end to every judicial debate about the

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217. See *Lockerbie II*, 1992 I.C.J. at 142 (observing the expansive power of the Security Council and questioning whether there are any legal issues beyond the Security Council's competency after Resolution 748); see also Gowlland-Debbas, *supra* note 170, at 662 (summarizing the question raised by Judge Shahabuddeen in his dissent as follows: "whether a decision of the Security Council may override the legal rights of States, and, if so . . . [a]re there any limits to the Council's powers of appreciation? . . . and what body, if other than the Security Council, is competent to say what those limits are?"); Zubel, *supra* note 37, at 268–69 (quoting Judge Shahabuddeen's opinion supporting the denial of provisional remedies).
 218. See *Lockerbie I*, 1998 I.C.J. 115, 155 (questioning admissibility, whether the Montreal Convention applies to the facts at issue in the case, and mootness, whether the positions of the parties in the case give rise to a dispute under the Convention); see also David, *supra* note 11, at 111–12 (summarizing the U.S.'s allegations that Libya's case was non-admissible and moot); Zubel, *supra* note 37, at 274 (characterizing as "more difficult" and "murky" the Court's response to the question raised by the U.S. regarding whether Resolutions 731 and 748 had rendered Libya's case non-admissible and moot).
 219. *Lockerbie I*, 37 I.L.M. 587, 619 (Schwebel, J., dissenting) (arguing that the Court's conclusions on the admissibility of Libya's applications are unpersuasive); see Zubel, *supra* note 37, at 276 (mentioning Judge Schwebel's argument that the Court should accept and carry out the decisions of the Security Council). See generally Frank, *supra* note 1, at 538–44 (reviewing the opinions and dissents in the *Lockerbie* case).
 220. *Lockerbie I*, 37 I.L.M. at 608 (concluding that they had jurisdiction to hear the case on its merits); see Daum, *supra* note 31, at 139–42 (discussing the Court's ruling on jurisdiction). See generally Stephen Breen, *Serback for Lockerbie Trial*, THE SCOTSMAN, Feb. 28, 1998, at 7 (assessing the Court's decision that it had jurisdiction to hear the case).
 221. See D'Angelo, *supra* note 180, at 591 (stating that the Court's decision to hear the *Lockerbie* case on the merits suggested that the Court had the power to review and render Security Council Resolutions null and void); Gowlland-Debbas, *supra* note 170, at 648–60 (analyzing the relationship between the International Court of Justice and the Security Council in the wake of the *Lockerbie* case); Roberts, *supra* note 42, at 299–310 (noting that the *Lockerbie* case was the first time a significant portion of the Court indicated that it could exercise judicial review over the Security Council's decisions).

Security Council decisions.”²²² This case was recently withdrawn from the Court by the parties.²²³ Some commentators, before the withdrawal, had predicted that because the underlying issue between the parties had been resolved, the Court might dismiss the case.²²⁴ This was not, however, necessarily the case. Although Libya surrendered the suspects (who were tried in the Netherlands²²⁵), and agreed to provide compensation to the families of the Lockerbie incident victims,²²⁶ the issues were still capable of litigation. Libya could have asked the Court to declare that Council Resolutions 748 and 883 were invalid and asked for damages.²²⁷

In any case, the issue will not go away, and as time goes by more cases will arise, in which states will call on the ICJ to declare the Council’s decisions invalid. Hypothetically, assuming jurisdiction were available, a future government of Iraq could bring a case against the United States and United Kingdom before the ICJ and request the Court to declare that the determination of Iraq’s non-compliance with Council Resolution 687 (1991) in Resolution 1441 (2002) of the Council was invalid because of a lack of a threat to the international peace or

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222. See Reisman, *supra* note 1, at 86–97 (discussing the role of Chapter VII of the Charter in the Court’s decision in the *Lockerbie* case). See generally Alvarez, *supra* note 15, at 1 (analyzing whether the International Court should review Security Council decisions).
223. *Lockerbie III*, 2003 I.C.J. (Sept. 10) (order, directing the case to be removed from the docket of the Court); Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 2003 I.C.J. [forthcoming] (Feb. 26, 2004) (stating that the parties have withdrawn from Court) available at http://212.153.43.18/icjwww/idoctet/ilus/ilusorder/ilus_iorder_20030910.pdf (last visited Feb. 26, 2004). See Bassiouni, *supra* note 5, at 407–08 (explaining that *Lockerbie* was withdrawn from the International Court of Justice because the interested parties agreed to a change of venue); Murphy, *supra* note 4, at 991 (noting that Libya withdrew its case in the ICJ against the U.K. and the U.S. at the joint request of both parties).
224. See generally *Libya in Talks on Lockerbie*, HERALD SUN (Melbourne), Aug. 13, 2003, at 34 (noting that the issues between the parties were near resolution because Libya was willing to admit responsibility for the Lockerbie bombing); D’Angelo, *supra* note 180, at 591 (arguing that once the parties resolved the issues the Court was precluded from deciding issues related to the Council resolutions); Matthew L. Wald, *Libya is Offering to Pay \$2.7 Billion for Pan Am Blast*, N.Y. TIMES, May 29, 2002, at A1 (stating that the U.S. and the U.K. are negotiating an admission of responsibility).
225. See Michael P. Scharf, *The Lockerbie Trial Verdict*, ASIL INSIGHTS (stating the verdict rendered by the trial court in the Netherlands) available at <http://www.asil.org/insights/insigh61.htm> (last visited Feb. 26, 2004); Murphy, *supra* note 4, at 908 (noting that Libya surrendered the nationals accused of the bombing for trial in the Netherlands). See generally Daum, *supra* note 31, at 131 (discussing the decision around trying the suspects in the Netherlands).
226. Libya has not accepted responsibility for the Lockerbie incident, but has proposed to pay the compensation for the independent actions of a rogue government agent, as a condition for the permanent removal of the U.N. sanctions. See BBC News, *U.N. Lifts Libya Sanctions* (analyzing the decision to lift sanctions on Libya) available at <http://news.bbc.co.uk/1/hi/world/africa/3199551.stm> (last visited Feb. 26, 2004). See Murphy, *supra* note 4, at 989–91 (analyzing the settlement whereby Libya agreed to make the payments to the victims of Flight 103); see also Keith Sealing, *Thirty Years Later: Still Playing Catch-Up with the Terrorists*, 30 SYRACUSE J. INT’L L. & COM. 339, 346 (2003) (providing the terms and amount of the payments Libya was to make to victims).
227. See Kennedy, *supra* note 4, at 902–924 (discussing Resolution 748 and analyzing the ICJ’s power to declare the resolution invalid). See generally David, *supra* note 11, at 103–06 (describing Resolutions 748 and 883); Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT’L L.J. 57, 81–87 (2001) (noting that the Security Council invoked its Chapter VII powers and passed Resolution 748 three days after the oral argument on Libya’s application for provisional measures before the International Court of Justice).

security. In light of the subsequent failure of the American and British forces in retrieving these weapons, this argument seems more realistic and compelling.²²⁸

V. The Effect of Exercise of the Power of Invalidation by the ICJ on the Security Council²²⁹

An opinion by the Court declaring a decision of the Council illegal will have important consequences for the Council. It is true that the Council would not be a party to the dispute and the Court's opinion would not be directly binding on it (Statute of ICJ, Article 59).²³⁰ This fact, however, would not change the reality that the hypothetical measure, according to the ICJ, violates international law.²³¹ The conflict between the two organs can happen in two different forms. First, the case may be brought before the Court after the international crisis is resolved and the Council is not seized of the issue any longer. In this situation, there will not be any real conflict, because the Council would not be directly involved in the decision of the Court. If the Court decides that the action complained of was illegal, then the U.N. and the

228. See David Kay, Statement on The Interim Progress Report on the Activities of the Iraq Survey Group (ISG) Before the House Permanent Select Committee on Intelligence, the House Committee on Appropriations, Subcommittee on Defense, and the Senate Select Committee on Intelligence (Oct. 2, 2003) (outlining the difficulties in locating Iraqi weapons of mass destruction) available at <http://www.whitehouse.gov/infocus/iraq/kay-20031008.html> (last visited Feb. 22, 2004). In the same context, the hypothetical Iraqi government can ask the Court whether the American and British reading of Resolution 678, which assumed a continuous authorization of the use of force, was correct. In answering this question, the Court will have the opportunity to determine whether the Council can authorize the use of force indefinitely, or alternatively, whether such authorization must be limited to a specific case. If the ICJ rejects the interpretation of the U.S. and U.K., that will be another reason for the illegality of the use of force under Chapter VII. See also Jon B. Wolfsthal, *The Mystery of Saddam's Banned Arms*, INT'L HERALD TRIB., Apr. 7, 2003, at 10 (arguing that the failure to find weapons of mass destruction will result in loss of U.S. credibility regarding its motives for entering Iraq). See generally *The Failure to Find Iraqi Weapons*, N.Y. TIMES, Sept. 26, 2003, at A24 (discussing David Kay's interim report, which states that the U.S. has yet to find weapons in Iraq, and suggests that no weapons are even there).

229. See generally, Bowett, *supra* note 95, at 90; Schweigman, *supra* note 16, ch. 5; Alvarez, *supra* note 6, at 21.

230. See *Lockerbie I*, 1998 I.C.J. 9, 80–81 (stating that for the ICJ to adjudicate concerning the legality of the Council's decision through proceedings brought by states would be to determine the Council's right without giving it the opportunity of a hearing and thus conflict with fundamental judicial principles); Richard B. Bilder & Charles Leben, *Nouvel Ordre Mondial et Controle de la Legalite des Actes du Conseil de Securite*, 90 AM. J. INT'L L. 157, 159 (1996) (book review) (recognizing that allowing the ICJ to rule on the lawfulness of the actions of the Security Council would violate Article 59 of the Statute of ICJ and that former President of ICJ Bedjaoui believed that the greater the power international agencies have, the more necessary it is to allow such review of legality).

231. See also Gowlland-Debbas, *supra* note 170, at 670 (discussing specific limitations of the International Court of Justice in declaring United Nations resolutions invalid). See generally Herdegen, *supra* note 41, at 138 (noting the additional possibility that a member nation may be sued for its compliance with an invalid Security Council resolution); Watson, *supra* note 181, at 7 (considering whether the World Court has the necessary and exclusive jurisdiction to declare United Nations resolutions invalid).

states carrying out that action could potentially be responsible for the damages that the complainant has suffered.²³²

On the other hand, the more difficult issue would be when the Court and the Council are seized of the issue simultaneously.²³³ Although the Charter explicitly prevents the General Assembly from making statements when the Council has the case under investigation,²³⁴ there is no such provision for the ICJ. In this situation, if the two organs were to reach contradictory results, at first one might conclude that the obligation to obey both decisions is an obligation under the Charter (Articles 25 and 94, respectively, with regard to the Council's and Court's decisions), and neither has priority over the other.²³⁵ To this argument, however, one can respond that, considering that role of the ICJ,²³⁶ its decision in a dispute over legality/validity of a certain measure must prevail. The Council's responsibility is to deal with crises of international peace and security. It, however, does not have any competence to decide upon the legality of an issue.²³⁷ Therefore, if the ICJ were to declare a certain decision of the Council invalid, the obligation to follow the ICJ's decision (under Article 94) will have priority over the obliga-

232. See generally International Court of Justice General Information (providing general information about the International Court of Justice's history, proceedings, and rules) available at <http://212.153.43.18/icjwww/igeneralinformation/ibook/Bbookframepage.htm> (last visited March 26, 2004); D'Angelo, *supra* note 180, at 591 (2000) (noting the issues the Court may decide); Roberts, *supra* note 42, at 286 (discussing the International Court of Justice's power of judicial review).

233. Schweigman, *supra* note 49, at 217 (questioning the effect of an issue reaching the Court and the Council at the same time).

234. U.N. Charter art. 12, para. 1.

235. See Gowlland-Debbas, *supra* note 170, at 658 (arguing that in adjudicating a claim brought to both bodies, neither the ICJ nor the Security Council need defer to the other and both can exercise jurisdiction concurrently); see also Frank, *supra* note 1, at 537 (noting that, in the *Lockerbie* case, the ICJ ruled that the Security Council decision preempted any injunctive relief sought from the ICJ because of Libya's status as a permanent member state of the United Nations); D'Angelo, *supra* note 180, at 592–93 (arguing that giving the ICJ power to review Security Council decisions would dangerously undermine the Security Council's ability to maintain worldwide peace and stability).

236. ICJ is the "principal judicial organ of the United Nations" (U.N. Charter art. 92), and "[L]egal disputes should as a general rule be referred by the parties to the [ICJ]." See U.N. Charter art. 36, para.3 and art. 92, para. 1 (stating that the ICJ is the "principal judicial organ of the United Nations" and "legal disputes should as a general rule be referred by the parties to the ICJ") available at <http://www.un.org/aboutun/charter> (last visited Mar. 25, 2004); see also Franck, *supra* note 170, at 520 (affirming the role of the ICJ as the United Nations' "principal judicial organ"); Ernst-Ulrich Petersmann, *Institutions for International Economic Integration: Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 460 (1997) (referring to the ICJ as the "principal judicial organ" of the United Nations).

237. See Frank, *supra* note 1, at 541–42 (discussing the dichotomous roles of the Security Council and the ICJ; the Security Council's role is political, and the ICJ's role is legal); Herdegen, *supra* note 41, at 146–47 (indicating that the ICJ has authority to invalidate Security Council resolutions based on severe legal defects). See generally *Lockerbie II*, 1992 I.C.J. 3, 26–27 (separate opinion of Judge Lachs) (maintaining that the ICJ and the Security Council have separate functions, and that both should act in harmony with each other while performing its individual role).

tion to abide by the Council's decision (under Article 25).²³⁸ For example, if the ICJ were to decide that state X is not in violation of a treaty, or a Council resolution, the Council's decision to the contrary must yield. If the Council were to maintain its position, in the face of an adverse decision from the Court, it would by implication hold the untenable position that there is no single correct opinion about the law, and that each organ is free to adhere to its own view, even if it is incompatible with the position of other organs of the same institution.²³⁹

In addition, although the Council is not obligated to enforce the ICJ's decisions, it must not undermine them.²⁴⁰ Under Article 94(2) the party in whose favor the opinion was issued "may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment."²⁴¹ This clause implies that if the Council does not deem enforcement necessary, it must adopt a hands-off approach.²⁴² This position is further supported by interpreting Chapter XIV of the Charter on the ICJ, in light of the objects and purposes of the Charter and the Court's Statute, which require the Court's effectiveness in resolving international disputes.²⁴³ Accordingly, the Security Council may not adopt an approach that undermines the effectiveness of the ICJ, or disregards

238. See Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders*, 92 AM. J. INT'L L. 683, 685 (1998) (indicating that the U.S. is bound to comply with binding ICJ decisions due to its submission to compulsory jurisdiction conferred by Article 94(1)). See generally Herdegen, *supra* note 41, at 138 (demonstrating that states are obligated to abide by an ICJ finding that a Council resolution is invalid); John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 170 (1998) (commenting on the ICJ's task of defining the scope of the Council's decisions and thus implying the ICJ's authority over the Security Council).

239. See Herdegen, *supra* note 41, at 138 (noting the irony that states must abide by an ICJ declaration invalidating a Council resolution or risk liability). See generally U.N. Charter art. 94, para. 2 (1945) (laying out the recourse for a party who seeks to have a judgment enforced) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004); Noyes, *supra* note 238, at 170 (describing the work of the ICJ).

240. See Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited*, 23 CAN.-U.S. L.J. 261, 274 (1997) (indicating that the Security Council is neither obligated nor likely to enforce certain ICJ decisions); see also Valentina Okaru-Bisant, *Institutional and Legal Framework for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 331, 345 (1998) (illustrating that the U.N. Security Council has the authority and political clout to enforce ICJ determinations). See generally U.N. Charter art. 94, para. 2 (1945) (stating that the Security Council has discretion over whether or not to adjudicate an issue) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004).

241. See U.N. Charter art. 94, para. 2 (1945) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004).

242. See U.N. Charter art. 94, para. 2 (1945) (stating the authority, but not the obligation of the Security Council to enforce a judgment) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004). See generally Brown, *supra* note 55, at 236 (speaking to the Security Council's power of enforcement); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 800 (2001) (noting that the Security Council has the power to employ economic sanctions to enforce compliance with the ICJ decisions).

243. See *Germany v. United States of America (LaGrand Case)* General List No. 104 (2001 I.C.J.) (finding that in accordance with the objects of the U.N. Charter, Germany was entitled to challenge noncompliance with an ICJ order) available at <http://212.153.43.18/icjwww/idocket/igus/igusframe.htm> (last visited Mar. 01, 2004); see also Alvarez, *supra* note 15, at 1 (questioning the validity and effectiveness of the ICJ's power to review Security Council decisions). See generally U.N. Charter art. 94, para. 2 (1945) (establishing the parameter of Security Council enforcement action or non-action) available at <http://www.un.org/aboutun/charter/> (last visited Feb. 19, 2004).

the ICJ's decision and renders it ineffective or irrelevant. In other words, after the ICJ makes its decision, the Council may be indirectly bound. Perhaps this explains why the Council in the *Lockerbie Case* (1992)²⁴⁴ rushed to preempt the Court, before the Court could make a provisional measure that could have potentially prevented the Council from taking other measures against Libya.

The important point under this analysis is that if the Council takes a measure, the Court still can review that decision in the future.²⁴⁵ If, however, the Court issues its opinion while the Council is still reviewing the case, the Council must accept that opinion.²⁴⁶

Conclusion

The questions of the proper scope of the Security Council's discretion and the guardian of that scope are as old as the Charter itself. Occasionally, scholars have commented on it, and the Court has decided cases about it. The new conditions of the international system, however, have given a new life to those questions and increased their importance. Although the parties to the *Lockerbie Case* withdrew their dispute from the Court, sooner or later the Court will have to deal with this problem, which has a great potential for changing the structure of the collective security system, under the U.N. Charter. There are rules governing the decision-making of the Security Council, although they are in the form of broad criteria rather than specific rules.²⁴⁷ Moreover, there are grounds on which the ICJ can base the authority to hear chal-

244. See *Germany v. United States of America (LaGrand Case)* General List No. 104 (2001 I.C.J.) (demonstrating the described preemption taken by the Court) available at <http://212.153.43.18/icjwww/idocket/igus/igus-frame.htm> (last visited Mar. 1, 2004); see also Zobel, *supra* note 37, at 268 (demonstrating the rush to the Security Council orchestrated to preempt the ICJ from acting on Libya's application). See generally *Lockerbie II*, 1992 ICJ at 142 (demonstrating the ICJ's implicitly binding nature on the Council).

245. See Symposium, *Institutions for International Economic Integration*, 17 NW. J. INT'L L. & BUS. 398, 464 (1997) (on the power of the ICJ to review the validity of the acts of the Security Council); see also Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 287 (2001) (noting that the ICJ is not precluded from hearing a case about the Security Council's responsibility and overall purpose). But cf. D'Angelo, *supra* note 180, at 591 (arguing that the ICJ should decline to review Council resolutions because of overarching political stability and security concerns).

246. See Herdegen, *supra* note 41, at 145 (positing that non-binding Security Council resolutions cannot trump ICJ jurisdiction to review the matter); see also Reinisch, *supra* note 45, at 865 (explaining that the Court's assessment of the legality of Council resolutions is binding on the Council). See generally D'Angelo, *supra* note 180, at 578 (noting that the rules governing the ICJ create a basis for review of Security Council resolutions).

247. See Reinisch, *supra* note 45, at 855 (commenting on the broad scope of Security Council decision making). See generally D'Angelo, *supra* note 180, at 562 (discussing the international communities' questioning of the Security Council's broad authority); Noyes, *supra* note 238, at 170 (describing the wide scope of Security Council decisions and outlining the potential for abuse).

lenges to the Security Council's decision under these criteria.²⁴⁸ It follows that the ICJ can potentially invalidate and hold illegal the Council's decisions.²⁴⁹ Such an opinion would be binding on states, and the Council would have to follow suit.²⁵⁰ By the withdrawal of the *Lockerbie Case* from the Court's consideration, it remains to be seen whether or in what context the Court will decide to exercise that authority.

248. See Shaw, *supra* note 178, at 1149 (positing that the ICJ, as the principal judicial department of the U.N., would seem to be the logical candidate to review Security Council resolutions); see also Herdegen, *supra* note 41, at 137 (calling on the ICJ to enforce "constitutional" restraints on Security Council actions). See generally Gowlland-Debbas, *supra* note 170, at 664–65 (discussing indirect judicial control, by the ICJ, as a method of hearing challenges to Security Council resolutions).

249. See Herdegen, *supra* note 41, at 159 (suggesting that the ICJ can invalidate a Security Council resolution for violating international law norms); see also A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 37 (1995) (stating that some scholars have suggested the ICJ can invalidate Security Council decisions for violating *jus cogens* rules). See generally D'Angelo, *supra* note 180, at 579–80 (discussing a case where the ICJ potentially could have invalidated a Security Council resolution but refused to find it *ultra vires*).

250. See Statute of the International Court of Justice, art. 60, June 26, 1945, 59 Stat. 1031, T.S. 993 (stating that judgments of the ICJ are "final and without appeal") available at http://212.153.43.18/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Feb. 25, 2004); see also Statute of the ICJ, art. 59, June 26, 1945, 59 Stat. 1031, T.S. 993 (implying that ICJ judgments are binding upon the parties) available at http://212.153.43.18/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Feb. 25, 2004). See generally Thirlway, *supra* note 178, at 579 (asserting that decisions of the ICJ are binding upon the parties, and are final without appeal).

Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles That Transnational Corporations May Face

By Anoosha Boralessa*

Introduction

The International Center for the Settlement of Investment Disputes (ICSID) was created by the Washington Convention on the Settlement of Investment Disputes between states and nationals of other states.¹ It is an arbitral institution principally for arbitration between states (subjects of international law) and investors (subjects of national law), with respect to investment disputes.² It was established in the decolonizing 1960s to encourage transnational corporations (TNCs) to invest in new states, even though the latter, who were just appearing on the international scene, were translating political sovereignty into economic sovereignty by expropriating the assets of TNCs.³ The incentive ICSID offered investors was a fair method of dispute resolution (i.e., one where the state party would not also adjudicate the dispute), one where the dispute would be withdrawn from the jurisdiction of the host state and given to an “a-national” institution.⁴

1. Note that inter-state disputes and inter-investor disputes are excluded from the jurisdiction of the Center. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270 (hereinafter “ICSID” or “the Convention”) (indicating that the ICSID was formed under treaty); Don Greenfield & Bob Rooney, *Aspects of International Petroleum Agreements*, 37 ALBERTA L. REV. 352, 379 (1999) (describing the creation of the ICSID); see also Shane Spelliscy, Note, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 AM. REV. INT’L ARB. 95, 119 n.80 (2001) (stating that the ICSID was established at the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States).
2. See Greenfield & Rooney, *supra* note 1, at 379 (stating that the ICSID arbitrates disputes primarily amongst national and state entities); see also Nsonuruna J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1, 5 (2003) (commenting on the ICSID’s function of arbitrating investment disputes between states and nations). See generally Lucien J. Dhooze, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 488 (2001) (explaining that the ICSID is an arena for states and investors to arbitrate their disputes).
3. New states were dissatisfied with the concession agreements they had inherited from TNCs (home states of the West). As a result they tried to redress the situation by passing laws implementing nationalization programs.
4. See Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 ECOL. L. Q. 53, 95 (2000) (opining that ICSID provides an incentive to the involved parties); Udombana, *supra* note 2, at 5 (noting that ICSID offers a party the incentive of not having to exhaust local remedies before seeking arbitration). See generally Mark A. Luz & C. Marc Miller, *Globalization and Canadian Federalism: Implications of the NAFTA Investment*, 47 MCGILL L.J. 951, 969 (2002) (stating that the ICSID provides parties with direct access to dispute resolution).

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After a slow start, the facilities of ICSID are now increasingly known in the international business community and used with greater frequency,⁵ especially following the financial crisis in Argentina.⁶ Thus, ICSID has an excellent opportunity to establish itself as an efficient investor state dispute resolution provider. It is vital that it does this due to the emergence of other competing institutions, notably the International Chamber of Commerce (ICC),⁷ which has an international Court of Arbitration. Central to this goal is establishing the effectiveness of the method for enforcing awards rendered.⁸ If this enforcement mechanism is inadequate, then

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5. See John K. Ryans, Jr., *A Solution to Foreign Contract Disputes*, 107 WTL 65, 79 (1976) (noting that while the membership of ICSID grew at a steady pace, the number of cases brought to ICSID remained small for many years; in the first twenty years there was only a small trickle of cases, one or two a year, which could be attributed in part to the fact that information relating to ICSID proceedings was not available to the public); see also William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 552 (2000) (indicating that the ICSID Arbitration Rules are well-known in the international litigation community). See generally 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, 919 n.40 (2003) (explaining parties not in the Washington Convention may also bring claims at the ICSID as the Additional Facility).
 6. The Argentinean economy, which had enjoyed strong growth in the early 1990s, went into recession in 1998 when the economy of Brazil, its largest trading partner, slowed down. While it began to recover in late 1999 (after implementing structural reforms), this recovery ended when the new government imposed a large tax increase which took effect in January 2000. This situation was further exacerbated when the government imposed further tax increases in April and August 2001. This resulted in December 2001 in the government freezing bank deposits and defaulting on its debts to the foreign private-sector creditors. A political crisis then ensued: Argentina had five presidents within two weeks. President Duhalde, who took office in January 2002, decreed a series of measures that upset well-established property rights. He devalued the peso, forcibly converted dollar loans and deposits into pesos, in such a manner as to impose large losses on banks and void many contracts. Investors relying either on dispute settlement mechanisms contained in their investment agreements or in BITs took their disputes to be settled by arbitration by ICSID.
 7. See UNCTAD, *Dispute Settlement: Investor-State UNCTAD Series on Issues on International Investment Agreements*, IIA Issue Paper Series 2003 at 15–16 (noting that apart from ICSID, ICC arbitration clauses have been used; it is also noted that regional arbitration centers have also been established especially in developing regions that may be of value in relation to investor-state disputes) available at www.unctad.org (last visited Mar. 11, 2004); see also Edwin J. Nazario, Note, *The Potential Role of Arbitration in the Nuclear Non-Proliferation Treaty Regime*, 10 AM. REV. INT'L ARB. 139, 158 n.94 (1999) (commenting on the emergence of institutions competing with the ICSID such as the ICC); Jill A. Pietrowski, Note, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 36 AM. U. L. REV. 57, 65 (1986) (contrasting the different developments of ICC and ICSID arbitration).
 8. See Schmidt, *Arbitration Under the Auspices of the International Center for Settlement of Investment Disputes: Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica*, 17 HARV. INT'L L. J. 90, 104 (1976) (suggesting that from the perspective of the investor, any method of resolving conflict with the host state must display three characteristics to be meaningful: one of these is that there is a reasonable possibility of enforcing a decision in the investor's favor); Greenfield & Rooney, *supra* note 1, at 379 (citing the ICSID convention which formulates the method for enforcing awards).

both the investor and the host state may find that a successful claim before an arbitral tribunal could lose its financial significance.⁹

It has been noted recently that enforcement of ICSID awards has not presented any real problems.¹⁰ The issue of enforcement rarely arises for two reasons: first, most ICSID cases settle before an award is rendered;¹¹ and second, TNCs and states are operating in a state of auto-regulation.¹² The forces that put pressure on the recalcitrant party to comply include the desire to maintain a good reputation within the relevant constitutive community, be it commercial or public.¹³ An additional force on states is the desire to avoid the inconvenience of diplomatic protection by investors' home states by agreeing to direct settlement of procedures with investors.¹⁴ Thus, these forces propel states acting rationally to comply despite the amount to be paid under the award.¹⁵ Second, in the rare cases where the issue of enforcement arises, the

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9. See Greenfield & Rooney, *supra* note 1, at 380 (positing that only nationals or signatory states may employ ICSID enforcement mechanisms, thus leaving other non-members without recourse). *Contra* Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 AM. REV. INT'L ARB. 307, 325 n.212 (2000) (reiterating various courts' decisions to set aside ICSID rulings, thus creating inadequate mechanisms for enforcement). See generally Patricia McKinstry Robin, Comment, *The Bit Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 956 (1984) (opining on the ICSID's method for enforcing awards).
 10. See Julian D.M. Lew et al., *COMPARATIVE INTERNATIONAL ARBITRATION*, 803 (Kluwer Law International, ed. 2003); see also Vincent O. Orlu Nmeihelle, *Enforcing Arbitration Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 29 (2001) (finding that absent a material problem, ICSID awards are generally enforced). See generally Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 287 (2001) (listing various available enforcement methods).
 11. See Kenneth I. Juster, *The Santa Elena Case: Two Steps Forward, Three Steps Back*, AM. REV. INT'L ARB. 371, 381 n.7 (1999) (concluding that many parties to ICSID cases settle before an award is granted); Nmeihelle, *supra* note 10, at 47 (writing that most ICSID cases are settled during the arbitration proceeding). See generally 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, 927 (2003) (explaining the option of independent arbitration, such as that provided by the ICSID).
 12. See Juster, *supra* note 11, at 386 (describing how the TNCs operate). See generally Gruner, *supra* note 11, at 923 (explaining the need for independent arbitration).
 13. See Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319, 344 (1985) (recognizing that parties engaged in ICSID litigation have an incentive and an expected willingness to comply with enforcement of the award). See generally Nmeihelle, *supra* note 10, at 21 (refining the assumption of mutual cooperation built into the settlement mechanisms of the ICSID); Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 658 (1993) (reiterating the obligation of parties to comply with the award).
 14. See Delaume, *supra* note 13, at 344 (recognizing that parties engaged in ICSID litigation have an incentive and an expected willingness to comply with enforcement of the award). See generally Nmeihelle, *supra* note 10, at 21 (refining the assumption of mutual cooperation built into the settlement mechanisms of the ICSID); Vandeveld, *supra* note 13, at 658 (reiterating the obligation of parties to comply with the award).
 15. See Vandeveld, *supra* note 13, at 658 (examining one of the forces compelling parties to comply with awards); see also John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831, 902 (1994) (describing one of the author's above-mentioned forces propelling states to act despite award amounts). See generally Gregory W. MacKenzie, *ICSID Arbitration as a Strategy for Leveling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT'L L. & COM. 197, 197 (1993) (discussing the states' obligation to comply with ICSID determinations and pay out the award).

courts of the enforcing state (provided it is a party to ICSID) have no discretion to deny the existence of the award by the exercise of judicial review.¹⁶ Thus, the enforcing state is reduced to an automaton: it is prohibited from questioning the award, but must simply translate the decision of the arbitrator into a money judgment, however repugnant it may find it.¹⁷ In this respect the ICSID mechanism seems much more efficient than the regime under the New York Convention (NYC),¹⁸ which provides grounds, both procedural or substantive, on which the national court of the enforcement state can have a second look at the award and refuse to enforce it.¹⁹

However there have been occasions where problems with compliance have occurred.²⁰ Indeed, one reason why U.S. TNCs are reluctant to have recourse to ICSID is due to its inability

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16. See Knull & Rubins, *supra* note 5, at 552 (stating that once an award has been rendered, the enforcing state may not grant an appeal or any remedy other than expressly provided by the ICSID Convention); Nmehielle, *supra* note 10, at 29 (indicating that once an award is granted all contracting states must treat it as if it was “a final judgment of a court in that State”). See generally Mark A. Luz, *NAFTA, Investment and the Construction of Canada: Will the Watertight Compartments Spring a Leak?*, 32 OTTAWA L. REV. 35, 49 (2000/2001) (explaining the procedure available if an enforcement issue arises).
 17. See Georges R. Delaume, *Decision: Decisions of Regional and Foreign Courts: France—Recognition of ICSID Awards—Sovereign Immunity* 86 AM. J. INT’L L. 138, 139 (1992) (acknowledging that ICSID awards are binding, even despite any possible contradictions of public policy); ICSID, *supra* note 1, at art. 54 (articulating the rigid requirement for courts to enforce arbitral awards as if such award resulted from a final judgment of that court); see also George R. Delaume, *Recognition and Enforcement of State Contract Awards in the United States: A Restatement*, 91 AM. J. INT’L L. 476, 484 (1997) (clarifying the simplicity in recognizing an ICSID award).
 18. See Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 5217 (June 10, 1958) (hereinafter “the NYC”) (ratifying a treaty which would encourage countries to recognize and enforce foreign arbitral awards). See *Benvenuti & Bonfant Co. v. Gov’t of the People’s Republic of Congo*, CA Paris, 20 I.L.M. 878 (1981) (stating that the problem of whether an arbitral award is binding, which is present in the NYC, was eliminated by procedure in the ICSID); Amr. A. Shalakany, *Arbitration and The Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 442 (2000) (acknowledging that under the NYC, courts may review the merits of a case and set aside the foreign arbitral award).
 19. See U.N. Committee on Int’l Trade Law: Model Law on Int’l Com. Arb., ch. VII, art. 34 (June 21, 1985) (allowing a party to defend any enforcement against them, while limiting their means of attacking the award itself); *Parson & Whittemore Overseas Co. v. Societe Generale de L’Industrie Du Papier*, 508 F.2d 969, 974 (1974) (arguing that the only ground a court should use in denying enforcement of an arbitral award is whether such enforcement would violate its “basic notions of morality and justice”). See generally Shalakany, *supra* note 18, at 442, citing January Paulsson, *The New York Convention’s Misadventures in India*, MEALEY’S INTL. ARB. REP. 18, 19 (1992) (stating that by reviewing an arbitral award on the merits, the Indian Supreme Court was “sabotaging the international arbitration project”).
 20. See Annual Meeting of the Administrative Council of the International Center for Settlement of Investment Disputes (noting that in one case the contracting host state refused to comply with the award (in addition to not paying its full share of the expenses of the proceedings)); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of the International Dispute Resolution*, 84 AM. J. INT’L L. 104, 111–12 (1990) (attributing a failure in compliance to jurisdictional issues). See generally Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1025–26 (2000) (assuming that states will avoid conflict with a foreign investor in an attempt to keep their image untarnished in view of the World Bank).

ity to enforce compliance with awards.²¹ Furthermore, the fact that enforcement has not been problematic does not mean that it will not be. Indeed, at least with respect to Argentina, against which 17 TNCs have filed action,²² this may become a live issue. If some or all of these awards are decided against Argentina, it is unlikely, given Argentina's bankrupt position, that even if it wanted to, it could comply with the award.²³ For award creditors, further down the line, the likelihood of finding assets which have not been used to pay off previous creditors may be minimal.

In light of the above, it is the aim of this paper to evaluate the effectiveness of the enforcement mechanism under ICSID, by examining the enforcement of an award rendered against the Republic of Argentina in the U.S. and U.K. ICSID's effectiveness will be tested by comparison to the mechanism provided under the NYC, which is used to enforce the awards of ICSID's main competitor, the ICC.²⁴

First, we will briefly consider the background to the establishment of ICSID, examine key features of ICSID which help one understand the enforcement mechanism, and then explain how 17 cases were filed against the Republic of Argentina. In Part 2, we will examine the unique enforcement mechanism under ICSID which essentially provides for the automatic enforcement of awards made under their auspices by courts of all member states, subject only to specific rules concerning immunities of sovereign property from attachment in enforcement proceedings. In Part 3 we examine the obstacles to enforcement with a focus on Article 55, which provides that sovereign immunity contained in national laws can operate as a procedural bar to the enforcement of an ICSID award rendered against the Republic of Argentina in the

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21. See generally Nmehielle, *supra* note 10, at 21 (realizing that the problem with enforcing arbitral awards is that state immunity is not superseded by the ICSID); Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 797 (1983) (approving a decision from the Court of Appeals of Paris, which distinguished enforcing an award from executing an award).
 22. See *Pending actions in ICSID involving Argentina*, available at www.worldbank.org/icsid/cases/pending.htm (last visited Mar. 11, 2004); see also Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 139 n.35 (2003) (attributing commencement of cases against Argentina to their abandoning of the dollar and adoption of the peso); CMS Gas Transmission Co. v. Republic of Argentina, 42 I.L.M. 788, 789 (2003) (turning on the suspension of a tariff by Argentina for a product that CMS had invested in).
 23. See Christina L. Whittinghill, *The Role and Regulation of International Commercial Arbitration in Argentina*, 38 TEX. INT'L L.J. 795, 808–13 (2003) (concluding that arbitration will make Argentina an attractive forum for international investors, though failing to mention Argentina's poor financial condition); see also Lydia Chavez, *Argentina and Chile in Accord on Beagle Channel*, N.Y. TIMES, Oct. 5, 1984, at A1 (noting that Argentina rejected a binding arbitral agreement and declared it a nullity); Larry Rohter, *In Footsteps of Evita: Argentina's New First Lady*, N.Y. TIMES, Feb. 1, 2002, at A3 (citing the admission by the first lady of Argentina that the country is bankrupt).
 24. See the NYC, note 18 (describing that it will only be used to enforce an ICC award where enforcement proceedings are brought in states party to the NYC other than the state where the award was made); Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 587 (1994) (acknowledging that a main advantage of ICSID over ICC is that it is more cost-effective); Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491, 592–93 (1998) (opining that Congress may prefer the ICC over ICSID because ICC does not have an automatic enforcement provision and awards under such a body are subject to public policy review).

U.K. and the U.S. (the forum states). The U.S. and the U.K. have been chosen as hypothetical states of enforcement because they are principal commercial centers and therefore likely places where Argentina may have its assets. Attempts to enforce pecuniary obligations arising from awards are therefore more likely in these centers than elsewhere.²⁵ In order to identify the obstacles to the enforcement of ICSID awards we will look at the treaty articles themselves and the cases in which these treaty articles have been tested. Having examined the obstacles, we will then suggest options that a practitioner representing a TNC could take to circumvent them.

Part I. The History of ICSID

ICSID was created when new states, just appearing on the international scene after decolonization, and the Latin American states en bloc, were reluctant to submit their disputes with foreign investors to arbitration.²⁶ This was due to their concern²⁷ that arbitration has tended to resolve international trade and investment disputes in favor of the economic interests of the North.²⁸ To fully protect their sovereignty, they preferred to submit these disputes to their own

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25. See Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* 1147 (Cambridge Univ. Press, ed. 2001); Jon Jeter, *Most Argentines Back Their President, Not Debt*, WASH. POST, Feb. 28, 2004, at E01 (stating that the U.S. has frozen many Argentinean assets). Cf. Delaume, *supra* note 17, at 141 (arguing that Liberian assets were immune from seizure by the U.S. because they were sovereign rather than commercial).
 26. See Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 177 (1995-1996) (attributing reluctance to the unenforceability of arbitration clauses in place between a sovereign and an investor in a time of dispute); L. Michael Hager, *The Emerging International Law of Development*, 85 AM. J. INT'L L. 743, 744 (1991) (reviewing F.V. Garcia-Amador, *A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* (1990)) (stating that though the reluctance of arbitration was felt in developing countries, such reluctance was concentrated in Latin America); Christopher K. Dalrymple, Note, *Politics and Foreign Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L.J. 161, 186 (1996) (exemplifying the unattractiveness to Latin American countries by stating that not a single such country ratified the ICSID when it was signed in 1964).
 27. The Calvo Doctrine has its source in a number of statements made by the Argentine diplomat and international jurist Carlos Calvo (1824-1906) in his major work, *Droit International Theorique et Pratique* (5th ed. 1896). The doctrine was espoused by most Latin American states. According to this doctrine, foreigners should be treated on the same footing as nationals, and state intervention in the affairs of another states should not be permitted. Accordingly, foreign states should waive their right to diplomatic protection, to protect their nationals. Investor-state arbitration is antithetical to the philosophy underlying this doctrine since it grants foreign investors a legal status different from that of investors having the nationality of the host country. It nevertheless bears some similarity in that it entails the waiver of diplomatic protection.
 28. See Jan Paulsson, *The Third World Participation in International Investment Arbitration*, 2 ICSID REV., FOREIGN INVESTMENT L.J. 19, 21(1987) (conceding that at the beginning of this century and until the 1950s, arbitration conducted by various international tribunals or commissions evidenced a bias against developing countries); Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 782 (2002) (noting that historically, the Mexican government believed the settlement of boundary disputes through international claims commissions and the international adjudicatory process to be suspect because the commissions were seen as an ill-disguised mechanism by which the U.S. imposed its will upon its weaker southern neighbor and furthered its own interests; accordingly, Mexico refused to participate in such a process and embraced the rationale of the Calvo Doctrine, providing for the national treatment of foreign investors and exclusive reference to local remedies for the resolution of foreign investment disputes). See generally David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L L. 521, 527 (1985) (historically skeptical of international arbitration, Latin American countries were also bound to the Calvo Clause, which grants a country freedom from outside interference and meddling).

national courts, where they would be settled by national law.²⁹ This would appear justifiable: The movement into host states by the TNCs clearly brings them within the territorial sovereignty and control of the host states.³⁰ It therefore follows that any transaction made is a domestic transaction governed by domestic law.³¹

TNCs were in turn quite reluctant about this last solution for several reasons. First, they feared that this would result in a state being both a party to the dispute and the judge of this dispute (which dispute would be resolved in accordance with rules which that state had made and could change at any time).³² To the TNCs, this appeared hardly fair: With respect to the rules the state made, TNCs had little confidence in them, considering them inadequate or simply unfair; with respect to the judiciary, they feared this would be biased toward the state.³³

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29. See generally Whitney Debevoise & Richard Hearne, *The Climate for Arbitration Gets Warmer; Multilateral Agreements Smooth the Way*, N.Y.L.J., June 1, 1993, at S4 (confirming that national courts would preside over arbitration disputes within their jurisdiction); Paul E. Mason & Welber Barral, *Current Trends Affecting International Arbitration in Latin America*, 6 LATIN AM. L. & BUS. REPT. 2 (1998) (noting the concern of international investors who want arbitrated disputes to be decided untainted by local biases); Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFFALO L. REV. 1145, 1175 (2003) (recognizing the movement away from the Calvo Doctrine and toward arbitration).
 30. See Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 485 (2001) (defining "host state" to be the state where a foreign investment project is based). See generally Cristina Baez, et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, n.131 (1999-2000) (contending that multinational corporations can greatly improve a less developed country by providing great political and financial power). Cf. James D. Nolan, *A Comparative Analysis of the Laotian Law on Foreign Investment, the World Bank Guidelines on the Treatment of Foreign Direct Investment, and Normative Rules of International Law on Foreign Direct Investment*, 15 ARIZ. J. INT'L & COMP. LAW 659, 678 (1998) (indicating that a state has the absolute right to regulate entry of transnational corporations because of its sovereign status).
 31. See generally James W. Weller, *International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 HOFSTRA L. REV. 323, 342-44 (1987) (arguing that corporations would prefer an application of international law by an impartial body rather than the domestic law of the host state). Cf. Tony A. Freyer, *Prevention and Settlement of Economic Disputes between Japan and the United States: Part III: Dispute Avoidance and Dispute Settlement: Restrictive Trade Practices and Extraterritorial Application of Antitrust Legislation in Japanese-American Trade*, 16 ARIZ. J. INT'L & COMP. L. 159, 163-64 (1999) (noting that multinational corporations are bound by the laws of the host state); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. J. 851, 908 (2003) (arguing that domestic courts may apply international law and international arbitration bodies may apply domestic law of the host state).
 32. See generally Edith Brown Weiss, *The ILC's State Responsibility Articles: Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 812-14 (2002) (noting that the ICSID provides a method for states and foreign investors to resolve their disputes voluntarily); Georges R. Delaume, *The Internationalization of Law and Legal Practice*, 63 TUL. L. REV. 575, 591 (1989) (acknowledging that the ICSID Convention envisioned that in the absence of any express choice of law, the law of the contracting state would be recognized as paramount within its own territory but nevertheless subject to control by international law); Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience*, 8 NAFTA L. & BUS. REV. AM. 501, 501 (2002) (discussing issues on ICSID jurisdiction in recent cases).
 33. See Paulsson, *supra* note 28, at 44-45. See generally 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, 1278 (1995) (discussing the relationship between transnational corporations and nation-states); *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, 5 D.C.L. J. INT'L L. & PRAC. 417, 451-55 (1996) (summarizing the proposed reforms in arbitral rules).

Even if the judiciary was not deemed biased, it was considered unsophisticated, congested and slow. Finally, the principle of sovereign immunity (SI) from suit and enforcement precluded TNCs from suing states and enforcing these judgments.³⁴

To hurdle these obstacles, a TNC had two solutions: it could remain in the national legal order and negotiate a waiver of sovereign immunity from suit and enforcement;³⁵ or it could transcend the municipal plane and resolve the dispute on an international level.³⁶ This could be done indirectly by espousing a claim of one of its nationals and lifting it to the international level through the mechanism of diplomatic protection.³⁷ While there have been cases of abuses of diplomatic protection,³⁸ states were often unwilling to step into the disputes for political rea-

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34. See generally Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 (2000) (providing that states are not immune from the jurisdiction of foreign courts when commercial activities are concerned); 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, 400 (2003) (arguing that the arbitral decision in *Mondev* was a hollow victory for the U.S. based upon technical grounds); Wiltse, *supra* note 29, at 1145 (remarking that the nation-state has traditionally dominated international relations and law).
 35. See Jonathan I. Miller, *Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1313, 1370 (1994) (noting that a claim of sovereign immunity by a foreign state invoked uncertainty on the private litigant who could not be certain that the issue would be decided on the merits). See generally David Lopez, *Dispute Resolution Under NAFTA: Lessons From the Early Experience*, 32 TEX. INT'L L.J. 163, 163 (assessing various methods of transnational dispute resolutions); Nmehielle, *supra* note 10, at 24 (arguing that the ICSID Convention allows the politics of national sovereignty to affect enforcement of awards).
 36. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (indicating that a rule of international law is one that has been accepted by the international community in the form of customary law, international agreement, or derived from the general principles common to the major legal systems in the world); see also Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 48 (2001) (recognizing that in ratifying NAFTA, the United States, Canada, and Mexico created effective procedures for resolving international disputes). See generally Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003) (opining that the globalized economy has brought an increase in the volume of transnational disputes).
 37. See *Nottebohm Case Second Phase* ICJ Report 1955 (limiting the availability of this diplomatic protection by requiring that for private parties, nationality must be effective) available at <http://212.153.43.18/icjwww/idecisions/summaries/ilgsummary550406.htm> (last visited on Mar. 9, 2004); *Barcelona Traction Case Second Phase*, ICJ Rep. Feb. 5, 1970 (requiring that only states in which the corporation was registered would stand for it) available at <http://212.153.43.18/icjwww/idecisions/summaries/ibtsummary700205.htm> (last visited on Mar. 9, 2004). See generally Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA*, 25 ST. MARY'S L.J. 1147, 1161–68 (1994) (analyzing the use of diplomatic protections in international tribunal).
 38. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INVESTMENT L.J. 1, 1 (1986) (noting that Latin America was subject to abuses of diplomatic protection). See generally F. V. Garcia-Amador, *Current Attempts to Revise International Law—A Comparative Analysis*, 77 AM. J. INT'L L. 286, 286 (1983) (expressing that the Drago Doctrine was enunciated in response to abusive exercises of diplomatic protection); Gabriel Cavazos Villanueva & Luis F. Martinez Serna, *“Energy Law, Free Trade Agreements, and Law Reform in Latin American”: Private Parties in the NAFTA Dispute Settlement Mechanisms*, 77 TUL. L. REV. 1017, 1027 (2003) (recognizing that the Calvo Doctrine is aimed to protect foreign investors from the abuse of diplomatic protection by stronger countries).

sons.³⁹ This could also be done directly through a period when state contracts (SK) are so-called internationalized and elevated to the level of a treaty. Indeed two theories were devised by which SKs could be so elevated. Under the first theory, the lack of international personality in the TNC could be supplied *pro tanto* by the host state evincing a willingness to treat the TNC as its equal.⁴⁰ Under the second theory, party autonomy enabled the parties to choose international law as the governing law.⁴¹

So, due to the inability of investors to straddle these hurdles, the World Bank, via its president, would intervene to settle investment disputes. The World Bank had an interest in resolving such disputes, as its purpose was to promote private investment and to facilitate the investment of capital for productive purposes.⁴² It recognized that disputes between investors and states regarding expropriations acted as a powerful disincentive to private capital flows to developing countries and that an effective dispute resolution method was needed.⁴³

Accordingly, the board of governors of the World Bank initiated a study in 1962 to determine the feasibility of establishing an institution designed to facilitate the settlement of dis-

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39. See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 11 RECUEIL DES COURS 136, 331 (Sijthoff & Noordhoff Int. ed., 1968); Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 303 (2002) (analyzing the various reasons that states are unwilling to participate in international dispute resolution); Christopher N. Camponovo, Comment, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 184 (1996) (suggesting that states are fearful of the erosion of national sovereignty in the area of international investments).
 40. See A.F.M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. L. REV. 1, 10 (2001) (examining the conferment of international personality upon transnational corporations). See generally Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 762 (1983) (stating that some commentators find that it is immaterial what fictional entity has formal international personality, because regardless, many transnational corporations will continue to be participants in the international legal system); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. L. REV. 241, 241 (2001) (discussing the international personality of individuals in international law).
 41. See generally Delaume, *supra* note 21, at 784–86 (describing the ICSID as international arbitration machinery); Juster, *supra* note 11, at 375 (explaining what law will be applied when there is a conflict between international law and state law); Maniruzzaman, *supra* note 40, at 1 (examining the application of international law in conflicts between states and foreign private individuals).
 42. See ICSID, *supra* note 1 (declaring that the Bank's overriding consideration in creating the ICSID was the belief that a specially designed institution to facilitate the settlement of investment disputes between governments and foreign investors would help promote increased international investment); see also MacKenzie, *supra* note 15, at 219 (acknowledging that the ICSID was developed to promote the capital flow of investment). See generally Jeremy J. Sanders, *The World Bank and the IMF: Fostering Growth in the Global Market*, 9 CURRENTS: INT'L TRADE L.J. 37, 37–39 (2000) (reviewing the purposes behind the creation of the World Bank).
 43. See Andres Rigo Sureda, *Two Views on ICSID Arbitration*, 13 WORLD ARB. & MEDIATION REP. 166, 166 (2002) (detailing the World Bank proposal, in 1947, to establish a group of technical experts with the mission to recommend the equitable settlement of debt defaulted during the previous decade, and in 1951, the Bank's attempt to mediate the expropriation of Anglo-Iranian Oil, with which the president of the bank in his personal capacity helped); R.E. Asher & E.S. Mason, *THE WORLD BANK SINCE BRETTON WOODS*, at 339–40, 595 (Brookings Institution 1973) (outlining the World Bank's desire to establish a systematic way to deal with requests for mediation in international disputes). See generally Jennifer N. Weidner, Note, *World Bank Study*, 7 BUFF. HUM. RTS. L. REV. 193, 193 (2001) (noting that the World Bank is not without criticism).

putes between governments and TNCs through arbitration or conciliation.⁴⁴ It was believed that such an agency could foster increased international investment for development projects.⁴⁵ To relieve the World Bank and its president in a personal capacity from mediating and conciliating investment disputes between governments and TNCs⁴⁶ (and thereby risking breaching the articles of association of the World Bank),⁴⁷ the World Bank created by treaty “a subsidiary” to which it delegated the function of dispute resolution. While ICSID is an autonomous international institution,⁴⁸ it is still considered part of the World Bank family. Indeed its structure enables the World Bank to maintain control⁴⁹ and the institution is financially dependent on

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44. See ICSID, *supra* note 1 (stating the purposes behind the establishment of the ICSID). See generally Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 270 (1994) (noting that there was an expansion of TNCs in the 1960s); Shalakany, *supra* note 18, at 434 (describing the advantages of arbitration).
 45. See Report of Executive Directors, *reproduced at* 4 I.L.M. 488, 524 (1965) (reporting that the Executive Directors believed that countries that became parties to the Convention would stimulate the flow of private international investment into their territories); Wiltse, *supra* note 29, at 1168–70 (describing the positive features of investor-state dispute settlement mechanisms). See generally George Thomas Ellinidis, *Foreign Direct Investment in Developing and Newly Liberalized Nations*, 4 DET. C.L. J. INT'L L. & PRAC. 299, 299 (1995) (noting that the World Bank created agencies that provide the opportunity to obtain political risk insurance, thereby increasing investment).
 46. See Excerpt from Address by President Eugene R. Black to the Annual Meeting of the Board of Governors, Vienna, 19 Sept. 1961 (Doc. 2) in ICSID: THE HISTORY OF THE CONVENTION, Vol. 2. Part I (1968) pp. 3–4 (noting that the establishment of the Center which started in the 1960s was partly the result of the experiences and difficulties encountered by the World Bank in the settlement of major investment disputes in the 1950s resulting from incidents of nationalization). See generally Picciotto, *supra* note 22, at 133–40 (reviewing the relationship between transnational corporations and international law); Mark E. Wadzyk, *Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?*, 17 WIS. INT'L L.J. 553, 554 (1999) (discussing the background of the World Bank).
 47. See Irene A. Belot, Note, *The Role of the IMF and the World Bank in Rebuilding the CIS*, 9 TEMP. INT'L & COMP. L.J. 83, 85 (1995) (outlining the purposes of the World Bank stated in Article 1, paras. (i) and (ii) of its Articles of Agreement); see also Sanders, *supra* note 42, at 38 (explaining that Article 1 of the World Bank's Articles of Agreement tell us the purpose of the World Bank's creation). See generally Articles of Agreement of the International Monetary Fund (entrusting the IMF, whose Articles of Agreement were modeled on the World Bank's Articles of Agreement, with specific functions and responsibilities concerning economic growth, reconstruction, and development, and prohibiting it from interfering in the political affairs of member states or being influenced by political or non-economic considerations) available at <http://www.imf.org/external/pubs/ft/aa/aa01.htm> (last visited Mar. 11, 2004).
 48. See ICSID, *supra* note 1, at art. 1 (establishing the Center as a separate institution, while Article 18 established its status as an institution with international legal personality); see also Delaume, *supra* note 13, at 333 (referring to the autonomous character of the ICSID and its independence from interference by the domestic courts of contracting states); William W. Park, *Tax Council Policy Institute Symposium: The Future of International Transfer Pricing: Practical and Policy Opportunities: Article: Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 846 (2002) (describing the ICSID as an autonomous international organization affiliated with the World Bank).
 49. See ICSID, *supra* note 1, at art. 4 (structuring the ICSID with an administrative council, composed of one representative designated by each member state; unless a member state makes a contrary designation, its governor for the World Bank sits *ex officio* on the ICSID administrative council and illustrates the close links between the World Bank and the ICSID, since all of ICSID's members are also members of the Bank, and unless a government designates otherwise, its Governor for the Bank sits *ex officio* on the ICSID's Administrative Council). See generally Whittinghill, *supra* note 23, at 808 (referring to the ICSID as an ancillary branch of the World Bank).

the World Bank.⁵⁰ Private parties hoped that states would be induced to accept this new scheme because (a) it was an international arbitral institution linked with the World Bank;⁵¹ and (b) it contained features respectful of contracting states' sovereignty.⁵² TNCs embraced ICSID for two reasons: first, ICSID firmly establishes that a private individual or corporation has a treaty right (independent of his government) to proceed directly against a foreign state in an international forum.⁵³ Having conferred upon the individual this right, it takes away from the individual his or her right to claim diplomatic protection from their home state, unless the host state fails to comply with the arbitral award.⁵⁴ Second, ICSID establishes an arbitral system free from interference by national courts reviewing *au fond* or procedurally the awards rendered and national laws prescribing the framework in which the arbitral process was

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50. See ICSID, *supra* note 1, at art. 17 (demonstrating the financial dependence of the ICSID on the World Bank, since the expenses of the ICSID Secretariat are financed out of the bank's budget, although the costs of individual proceedings are borne by the parties involved); cf. Bruce Zagaris, *Financing Participation in Caribbean Basin Investments and Trade*, 17 U. MIAMI INTER-AM. L. REV. 97, 115 (1985) (characterizing the ICSID as the non-financial associate of the World Bank); Johanna Rinceanu, *Enforcement Mechanisms in International Environmental Law: Quo Vadunt? Homo Sanus in Natura Sana*, 15 J. ENVTL. L. & LITIG. 147, 159 (2000) (labeling the ICSID as the non-financial associate of the World Bank).
 51. See Jocelyn A. Acqua & Carolyn B. Lamm, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. J. INT'L L. & ECON. 711, 733 (2003) (including ICSID in a description of the functions of international arbitral associations); see also Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 122 (1999) (listing the ICSID among international arbitral institutions); Steve Louthan, Note, *A Brave New Lochner Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT'L L. 1443, 1454 (2001) (indicating that the ICSID is an international arbitral institution).
 52. States' sovereignty was well-protected, at first, states were free to ratify or abstain from ratifying the Convention; and second, rules governing the submission of cases to arbitration appeared respectful of their consent. See ICSID, *supra* note 1, at arts. 25–27 (requiring a state to notify ICSID, either at the time of ratification or any time thereafter, of the class or classes of disputes that it would or would not consider arbitral under ICSID's auspices; providing that domestic law should be applied together with international law to resolve a dispute when the parties are unable to reach an agreement and paralyzing, temporarily, the right of diplomatic protection from an investor's home state).
 53. These include the Mixed Arbitral Tribunals established after World War 1 to adjudicate claims of Allied nationals against Germany and its allies. See *AGIP Co. v. Congo*, Nov. 30, 1979, 21 I.L.M. 726, 735 (entered into force in July of 1982) (establishing that a private individual or corporation has a right to proceed against a foreign state in the ICSID); see also Christopher M. Koa, Note, *The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China Through the International Center for Settlement of Investment Disputes*, 24 N.Y.U. J. INT'L L. & POL. 439, 459 (1991) (recognizing that in concluding a dispute with a private individual, the state exercises sovereign powers from the moment that consent is freely given); Schwarcz, *supra* note 20, at 1024 (commenting that the ICSID provides facilities for arbitration of investment disputes between contracting states and nationals of other contracting states).
 54. See ICSID, *supra* note 1, at art. 27 (stating that when a host state consents to the submission of a dispute with an investor to the Center, thereby giving the individual direct access to an international jurisdiction, the investor should not be in a position to ask his state to espouse his case and that state should not be permitted to do so and take away from a national the right to receive diplomatic protection from his own state regarding a dispute to which the state has consented to submit to arbitration); W. Michael Reisman, *Panel Discussions on Enforcement of Foreign Judgments and Arbitration: The Views from Mexico and the United States: Control Mechanisms in International Dispute Resolution*, 2 U.S.-MEX. L.J. 129, 132 (1994) (recalling that under ICSID, capital-exporting states agreed not to exercise diplomatic protection).

conducted.⁵⁵ ICSID is administered by the Center alone on the basis of the Convention and the ICSID arbitration rules in force at the time of the parties' consent to arbitration.⁵⁶ This freedom was thought necessary to convince TNCs that any dispute they had with host states was not slowed down by national courts reviewing the award. In this way investors would be more inclined to invest in developing states.⁵⁷

It is at the enforcement stage that the ICSID system loses its independence: as ICSID, like all other international bodies, lacks enforcement powers, it must depend on the national courts to enforce its awards.⁵⁸ National courts' ability to do so may in turn be fettered by national legislatures.⁵⁹ Thus, while the locus of arbitration is legally irrelevant (to the extent that it does not

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55. See ICSID, *supra* note 1, at art. 42 (freeing the ICSID from interference by national courts reviewing the ICSID's laws and procedures); see also John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278, 284 (1989) (instructing that an ICSID tribunal must decide a dispute in accordance with rules of law agreed upon by the parties, and if there is no such agreement, the tribunal applies the law of the contracting state party to the dispute and applicable rules of international law). See generally Juster, *supra* note 11, at 374 (instructing that international law can complement national law by filling in any gaps that may exist in the national law).
 56. See ICSID, *supra* note 1, at art. 44 (requiring that any arbitration proceeding shall be conducted in accordance with the ICSID arbitration rules in force at the time of the parties' consent to arbitration); cf. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 789 (1989) (prescribing that only Articles 41 to 47 of the Convention may not be suspended by agreement of the parties, while other ICSID procedural norms may be set aside by the parties). See generally Delaume, *supra* note 21, at 784 (arguing that ICSID arbitration constitutes a self-contained machinery that functions totally independent from domestic legal systems).
 57. See Jack I. Garvey, *Regional Free Trade Dispute Resolution as Means for Securing the Middle East Peace Process*, 47 AM. J. COMP. L. 147, 186 (1999) (distinguishing the arbitration process the ICSID provides to foreign investors as "a distinctly international arbitration process" to support investment in developing economies); see also Nmehielle, *supra* note 10, at 23–24 (suggesting that the ICSID's purpose is to create a level playing field; to ensure foreign investors protection from actions of host countries and to ensure host countries of foreign investments); Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355, 454 (1993) (articulating the ICSID's purpose, which is to encourage foreign investment in developing countries).
 58. See ICSID, *supra* note 1, at art. 54 (relying on the contracting states to recognize awards rendered by the ICSID and to enforce an obligation imposed by the award as if it were a final judgment of the state's own court); see also Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures under the New York Convention*, 80 AM. J. INT'L L. 24, 34 n.77 (1986) (distinguishing the ICSID from the New York Convention, since the ICSID mandates that a foreign arbitral award that it issues must be enforced by the courts in any contracting state); Nmehielle, *supra* note 10, at 31 (restating Article 54, which requires the execution of judgments in the contracting states in which execution is sought by the ICSID).
 59. See ICSID, *supra* note 1, at art. 69 (ruling that each contracting state must take legislative measures necessary to effect the ICSID's provisions in its territories); see also 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, 1338 (1997) (explaining that contracting states must implement the ICSID Convention through domestic legislation). See generally International Center for Settlement of Investment Disputes, *About ICSID* (2004) (commenting that all ICSID contracting states, whether or not they are parties to a given dispute, are required to recognize and enforce ICSID arbitral awards) available at <http://www.worldbank.org/icsid/about/about.htm> (last visited Mar. 10, 2004).

trigger the application of the national arbitration laws),⁶⁰ the place of *enforcement* is all-important. It is to the issue of enforcement that we shall now turn.

Part II. Mechanism For Enforcement and Recognition of ICSID Awards

1) Introduction

Once the award is issued, Argentina is under a public international law obligation to comply with it.⁶¹ However, if it fails to comply with this solemn duty, the Convention empowers the TNC to enforce the award in all contracting states (not only the state party to the dispute), including the U.K. and the U.S.⁶² Since ICSID does not have the ultimate means of enforcement and thus must rely on national courts of the forum state(s), the Convention obligates the latter state(s) to recognize and enforce such awards. The regulatory framework of enforcement is contained in three articles: 54, 55 and 56.⁶³ The aim of Part II is to critically evaluate the recognition/enforcement mechanism with a view to ascertaining its effectiveness when compared

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60. See Shihata, *supra* note 38, at 7 n.31 (arguing that in the case of ICSID the place of arbitration is legally immaterial and its determination is one of pure convenience); see also W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 11 n.53 (1995) (reasoning that the location of arbitration is insignificant since member states are bound by the Convention to recognize ICSID awards). See generally Shane Spelliscy, Note, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 AM. REV. INT'L ARB. 95, 114 (2001) (contrasting the ICSID from other international arbitral courts, since in other courts the locus of arbitration does play a role in the confirmation of an arbitral award).
 61. See ICSID, *supra* note 1, at art. 53(1) (binding the parties to an ICSID arbitration with a duty to comply with an ICSID award); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 688 (2003) (citing Article 53(1)'s requirement that a contracting state that is a party to an ICSID proceeding is obliged to comply with an ICSID award); see also Delaume, *supra* note 13, at 343 n.101 (discussing that a contracting state that is a party to an ICSID arbitration proceeding is obliged to comply with the award granted).
 62. See ICSID, *supra* note 1, at art. 27(1) (stating that diplomatic protection may be exercised if the arbitrating state fails to comply with an award rendered against it); see also Jack J. Coe, Jr., *International Commercial Arbitration: Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1417 (2003) (articulating the effect of Article 27(1), to empower the TNC to enforce the award in all contracting states, not merely a state that is a party to the suit); Delaume, *supra* note 21, at 801 (outlining the sanctions for noncompliance with an ICSID award, namely that the contracting state party to the dispute may enforce the award against the investor and its property).
 63. See ICSID, *supra* note 1, at art. 54 (proposing that a contracting state must recognize an ICSID award and enforce any pecuniary obligations the award imposes); see also Settlement of Investment Disputes, Mar. 18, 1965, art. 55, 17 U.S.T. 1270, 1292, 575 U.N.T.S. 159, 194 (dealing with the exception to Article 54 in preserving the law of a state on state immunity). See generally Valentina Okaru-Bisant, *Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 331, 347 n.116 (1998) (clarifying that while the ICSID system is not subject to the control of national courts, national courts may assist in the recognition and enforcement of ICSID awards).

with awards issued under the auspices of the ICC which are enforced under the NYC.⁶⁴ In considering this question, the stages of recognition and enforcement should be kept distinct. Little reference will be made to Article 55, which essentially details when the enforcement mechanism will break down; this will be the focus of the following part.

2) Voluntary Compliance Is the Norm

As a preliminary point it should be noted that, in contrast to inter-state arbitration, voluntary compliance has been the norm in ICSID arbitration.⁶⁵ This is driven by legal and non-legal reasons. With respect to the legal motor, a state has undertaken in advance a solemn international obligation to comply with the award, and therefore, as Broches tried to argue in the drafting sessions, the question of enforcement is somewhat academic.⁶⁶ A further legal stick beating a debtor state to comply is the revival of the right to diplomatic protection by the investor's state of nationality under Article 27.⁶⁷ With respect to the non-legal incentives, a state's non-compliance may lead to a loss of its credibility in the international business community.⁶⁸ A state may be willing to comply with the award, motivated by a desire to show commitment to the creation of a good investment climate: compliance with awards can bolster a country's reputation for good governance and thereby lower perceived political risks for investors,

64. See *Victrix Steamship Co. v. Salen Dry Cargo*, 825 F.2d 709, 713 (2d Cir. 1987) (holding that the ICSID preempts state laws and leaves to the states the subject of enforcement of foreign arbitration awards governed by its terms); see also Pedro Menocal, *We'll Do it for You Anytime: Recognition and Enforcement of Foreign Arbitral Awards and Contracts in the United States*, 11 ST. THOMAS L. REV. 317, 347 (1999) (instructing that the New York Convention allows courts to refuse the enforcement of a foreign arbitral award on public policy grounds). See generally Delaume, *supra* note 13, at 333 (referring to the autonomous character of the ICSID and its independence from interference by the domestic courts of contracting states).

65. See Aron Broches, *Awards Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 REV. FOREIGN INV. L.J. 287, 289 n.6 (1987) (attributing non-compliance with the award to the fact that inter-state arbitration takes place outside any institutional or conventional framework which provides remedies against allegedly improper or invalid awards); see also Hazel Fox, *States and the Undertaking to Arbitrate*, 37 ICLQ (1988) (considering that the sole deterrent is the disapproval of world opinion). See generally Nmehielle, *supra* note 10, at 35 (stating that a state must accept all consequences of arbitration including compliance with an unfavorable award).

66. See Broches, *supra* note 39, at 303; see also ICSID, *supra* note 1, at art. 26 (stating that consent to arbitration under ICSID is undertaken to the exclusion of any other remedy). See generally Delaume, *supra* note 21, at 784–85 (indicating that states undertake a truly international arbitration exclusive of domestic interaction and alternative remedies).

67. See ICSID, *supra* note 1, at art. 27 (recognizing the right to diplomatic protection by the investor's state of nationality); Delaume, *supra* note 21, at 791 (providing that when an investor and a contracting state have agreed to ICSID arbitration, the state whose national is party to the agreement may not give the national diplomatic protection); see also The United Kingdom and Bangladesh Treaty, June 19, 1980, CMND. 8013, art. 8(2) (paralleling Article 27(1) by providing for the suspension of diplomatic protection unless the dispute is held not to fall within the scope of the ICSID or one of the contracting parties does not comply with an ICSID award).

68. See Shihata, *supra* note 38, 115–16. See generally Stewart Shackleton, *Footing the Bill*, LEGAL WEEK GLOBAL, Jan. 24, 2003 (acknowledging that investments covered by international law and BITs include most forms of business assets that foreign investors may undertake).

enhancing its ability to participate and benefit fully from the global economy.⁶⁹ Argentina may consider this of particular importance as it is emerging from a financial crisis. Second, if a continuing business relationship exists between the parties, it may be in the loser's interests to perform the award since by failing to do so it risks losing further business from the winner.⁷⁰ Third, non-compliance may cause fear of jeopardizing its ability to obtain further World Bank and IMF loans.⁷¹ In this regard, it should be pointed out that to cope with the crisis, the IMF has, in the face of much criticism, granted to Argentina low-interest loans. Indeed Argentina is currently negotiating another such loan.⁷² Fourth, a state which gains a reputation for permitting its ministries or agencies to ignore awards unjustifiably, risks a refusal by reputable international contractors to tender for projects within its territory.⁷³

While this has been the norm in the past, changing conditions may mean that this will not be the case in the future. In the case of Argentina it should be noted that it is now emerging from a difficult period in its financial history; thus it may feel that its short-term interests are better served by attending to other domestic issues rather than ensuring that foreign private

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69. See Solita Collas-Monsod, *Calling a Spade . . . ; Chutzpah*, BUS. WORLD, Oct. 23, 2003, at 4 (finding that states which are a part of the ICSID process are more attractive to foreign investors); Carolyn B. Lamm & Abby Cohen Smutney, *The International Centre for Settlement of Investment Disputes: Responses to Problems and Changing Requirements*, 12-11 MEALEY'S INT'L. ARB. REP. 11 (1997) (recognizing that by providing specialized facilities for the arbitration of investment disputes, the climate for foreign investment improves); Waelde, *Law, Contract & Reputation in Business: What Works?*, BUS. LAW INT'L (2002) (noting that governments which fail to accept such disciplines can be regarded as higher-risk environments and may accordingly be penalized in the risk calculus that is undertaken by businesses prior to making investments abroad).
70. See Redfern & Hunter, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, 48 (London, Sweet & Maxwell, 1999). But see David J. Branson, *Annulments of "Final" ICSID Awards Raise Questions About the Process*, THE NAT'L L.J., Aug. 4, 1986, at 25 (acknowledging that arbitration awards are annulled). See generally Alejandro Escobar, *Public/Administrative: Border Patrols*, THE LAWYER, Nov. 11, 2002, at 29 (indicating that ICSID arbitration is central to promoting international investment and therefore the world economy).
71. See Stephen Fidler, *Struggling to Forge An Argentina Debt Deal*, FIN. TIMES (London), Sept. 22, 1988, at 3 (indicating that granting a loan to Argentina in the past was risky). See generally George Graham, *New Focus on Ensuring Soundness of Banking*, FIN. TIMES (London), Oct. 2, 1996, at 4 (naming Argentina as having suffered in the banking sector and blaming the crisis on management within the country).
72. See Argentina—Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, para. 3 (2003) (acknowledging Argentina's desire to obtain a loan from the IMF) available at <http://www.imf.org/External/NP/LOI/2003/arg/03/index.htm> (last visited Mar. 11, 2004). But see *Argentina Expects Inflation to Decline*, N.Y. TIMES, Sept. 22, 2003, at 4 (stating that the IMF approved a loan with Argentina).
73. See REDFERN & HUNTER, *supra* note 70, at 418 ; see also Koa, *supra* note 53, at 445 (indicating that one of the ICSID Convention's goals is to advance economic development by establishing confidence between governments and foreign investors). See generally Ibrahim F. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, With Particular Reference to ICSID and MIGA*, 1 AM. U.J. INT'L & POL'Y 97 (1986) (noting that the World Bank encourages international investment by private investors).

creditors are paid.⁷⁴ In such circumstances, the convention provides an enforcement mechanism.⁷⁵

3) Recognition and Enforcement Mechanism

a) Recognition as What and by Whom?

Article 54 provides that each contracting state must recognize and enforce ICSID awards as if they were final judgments.⁷⁶ Thus, both the U.S. and the U.K. must recognize and enforce ICSID awards as final judgments of local courts.⁷⁷ However, while it is mandatory that the award must be treated for purposes of recognition like a final decision of a local court (even if this means that other arbitral awards would not be), the U.S. and the U.K. have total discretion

74. See *Lights, Camera—and Desperation!*, TORONTO STAR, Aug. 11, 2002, at C2 (acknowledging Argentina's record unemployment rate); see also Rommer M. Balaba, *Democracy's Role in Human Progress*, BUS. WORLD, July 30, 2002, at 9 (noting that Latin America in general has focused on democracy as a means of developing the economy in places such as Argentina); Carlos S. Menem, *Argentina's Election*, N.Y. TIMES, Apr. 26, 2003, at A18 (indicating that both poverty and debt have increased in Argentina).

75. See ICSID, *supra* note 1, at arts. 53–55 (stating the procedure of recognition and enforcement of awards); see also Nmehielle, *supra* note 10, at 21–22 (identifying that the ICSID is of great importance in settling investment disputes between countries). But see Broches, *supra* note 39, at 303 (noting that it was generally felt at the drafting sessions that these provisions were for the benefit of states wishing to enforce awards against investors, as it would rarely be the case that an investor would need to have recourse to forced execution against a state).

76. The idea of making awards enforceable in third contracting states was opposed when the convention was being drafted. See Schreuer, *supra* note 25, at 83 (noting that compromise suggestions were made to treat awards in third states like foreign rather than domestic judgments or to allow third states to refuse recognition and enforcement on the ground that the award was contrary to the local public policy; however, eventually these suggestions were voted down and the full enforceability of awards in all state parties to the Convention was preserved); ICSID, *supra* note 1, at arts. 54(1), 55, 56 (stating that a state shall recognize an award as binding within its territories as if it were the final judgment of a court in the state); see also Georges Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 815 (1981) (noting that the procedures provided by the Convention eliminate problems of enforcement).

77. See R. Doak Bishop, et al., *Strategic Options Available When Catastrophe Strikes the Major International Energy Project*, 36 TEX. INT'L L.J. 635, 653 (2001) (referring to the United States; however, stating in general that a party to an ICSID arbitration must recognize an ICSID award as a final judgment of a court in that state). But see *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia (LETCO v. Liberia)*, 650 F. Supp. 73 (S.D.N.Y. 1986) (maintaining that recognition of arbitral awards as an enforcement measure is different from execution). See generally Alford, *supra* note 61, at 692 (noting that an ICSID award is final and binding on the forum where it is enforced).

regarding both the authority appointed to recognize the award⁷⁸ and the judgments of which courts within their system the ICSID awards are equalized with.⁷⁹

b) Choice in U.K. and U.S.

Both the U.S. and the U.K. have designated courts to recognize ICSID awards.⁸⁰ Indeed, these have been the route of most contracting states, although there is variation as to whether a single court is designated or a certain type of court, for example, courts of first instance or supreme courts.⁸¹ In the U.S. a further issue arose as to whether state or federal courts should be charged with this task.⁸² As the U.S. wanted federal courts to have this task, its delegate, Mr. Lowenfield, at the drafting sessions, insisted on the insertion of the second sentence of Article 54(1) which permits states with federal constitutions to enforce awards through federal courts.⁸³ Thus, as the legislation implementing the Convention establishes, federal district courts, the lowest U.S. federal courts, have exclusive jurisdiction over enforcement actions and

78. See generally 22 U.S.C. § 1650(a) (indicating that under the ICSID, in regard to the United States, the President may appoint representatives under the Convention to enforce awards); C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L L. 259, 261 (1991) (declaring that because an international agreement was not incorporated in U.K. law, U.K. courts did not have jurisdiction to appoint a receiver).

79. See Renato Nazzini, *The Law Applicable to the Arbitral Award*, 6 INT'L ARB. L. REV. 183 (2002) (noting that the U.S. has discretionary powers vested in domestic courts provided by Article V(1) of the Convention in recognizing awards). See generally Joel C. Beauvais, Note, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 251 (2002) (stating that under the Convention, awards are to be treated as equivalent in the court of the state in which they are sought to be enforced); Nmehielle, *supra* note 10, at 35–36 (positing that the language of Articles 54 and 55 of the Convention is broad, such that recognition of an award may differ according to different domestic courts).

80. See John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. L. 101 (2000) (stating that when a party desires to confirm an award in the United States under the Convention, jurisdiction falls within the district court); cf. *M&C Corp. v. Erwin Behr GmbH & Co.*, KG, 87 F.3d 844, 848–49 (6th Cir. 1996) (determining that Article V of the New York Convention also recognizes a party's right to object to confirmation on specified grounds and therefore Behr's challenge to the award is also within the jurisdiction of the district court).

81. See Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention (listing the courts designated for recognition of ICSID awards, noting that Belgium, for example, is an exception, as it has nominated the Ministry for Foreign Affairs) available at <http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm> (last visited Mar. 7, 2004); Nmehielle, *supra* note 10, at 31–33 (describing recognition of ICSID awards by American and French courts); see also Kresimir Sajko, *Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States*, 6 CROAT. ARB. Y.B. 129, 139–40 (1999) (asserting that contracting states, such as France and the U.S., have designated courts to recognize ICSID awards).

82. See Philip Le B. Douglas, *Resolving Project Disputes*, 734 PRAC. L. INST. 47, 98–99 (1996) (indicating that only federal courts have authority to recognize and enforce ICSID awards); see also 22 U.S.C.S. § 1650a(b) (stating that U.S. district courts shall have exclusive jurisdiction over ICSID arbitration awards). See generally Delaume, *supra* note 17, at 142 n.3 (asserting that federal courts generally have the authority to enforce ICSID awards).

83. See ICSID, *supra* note 1, at art. 54(1) (stating that a contracting state's federal court may enforce an ICSID award); see also Nmehielle, *supra* note 10, at 30 (summarizing Article 54(1) as conferring authority to federal courts to review ICSID awards). See generally Aqua & Lamm, *supra* note 51, at 715 (indicating that federal courts have sole jurisdiction to review arbitration proceedings under U.S. law).

proceedings, regardless of the sum in dispute.⁸⁴ The enabling legislation in the U.K. appoints the High Court as the recognizing authority.⁸⁵

c) To Which Judgments Are ICSID Awards Put on an Equal Footing?

The reference to a final judgment of a domestic court puts ICSID awards on the same footing with any domestic judgments that are not subject to review.⁸⁶ A final court decision is one against which no ordinary remedy is available.⁸⁷ Even a judgment of a lower court may be final if it is not subject to review or if the time limit for an appeal or another remedy has expired.⁸⁸ In the U.S., legislation called the Convention on the Settlement of Investment Disputes Act was passed providing that the pecuniary obligation imposed by the convention award shall be enforced and that award shall be given the same full faith and credit as if it were a final

84. See ICSID, *supra* note 1, at sec. 3(a)–(b) (1966) (giving exclusive jurisdiction over arbitration awards to district courts of the U.S.); see also 9 U.S.C.S. § 203, ch. 2 (stating that proceedings arising under the New York Convention are subject to original jurisdiction in federal courts, regardless of the amount in controversy). See generally Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 616 (2000) (summarizing the authority of federal district courts to review proceedings arising from the New York Convention).

85. See Arbitration (International Investment Dispute) Act 1966, ch. 41, sec. 1(2) (2003) (Eng.) (conferring original jurisdiction for the registration of New York Convention awards to the high courts of England); see also Arbitration (International Investment Dispute) Act 1966, ch. 41, sec. 2(1) (2003) (Eng.) (stating that an arbitration award arising under the New York Convention shall have the same force as a judgment of the High Court). See generally Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention (listing the High Court as the authority in England and Wales for recognition and enforcement of ICSID awards) available at <http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm> (last visited Mar. 7, 2004).

86. See *Luteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981) (holding that the court's decision was final and therefore not subject to review); see also Dalrymple, *supra* note 26, at 186 (asserting that contracting states are required to treat ICSID awards as if they were the final judgments of their domestic courts). See generally Orville McKenzie, Note, *Deportation of Criminal Aliens and the Termination of Judicial Review by the Anti-Terrorism and Effective Death Penalty Act of 1996*, 4 ILSA J. INT'L & COMP. L. 297, 307 (1997) (indicating that any order of deportation, under the Anti-Terrorism and Effective Death Penalty Act of 1996, is final and not subject to review by any court).

87. See Adrian U. Dorig, *The Finality of U.S. Judgments in Civil Matters as a Prerequisite for Recognition and Enforcement in Switzerland*, 32 TEX. INT'L L.J. 271, 276 (1997) (defining a "final decision" as one which is no longer subject to ordinary judicial remedy); 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, 116–17 (1997) (suggesting that a decision is final when no appeal or other judicial remedy is available). See generally Willard L. Boyd III, Comment, *Exhaustion of Administrative Remedies in Iowa After LeaseAmerica Corp. v. Iowa Dep't of Revenue*, 69 IOWA L. REV. 755, 762 (1984) (discussing finality in the context of administrative agencies, as a decision where all administrative remedies have been exhausted).

88. See Scott D. Camassar, *Immigration Law—The Pendency of a Motion to Reopen Before the Board of Immigration Appeals and Its Effect on Appellate Court Jurisdiction: Rejecting the "Suspended Finality" Approach in Deportation Cases*, 17 W. NEW ENG. L. REV. 109, 111 (1995) (suggesting that an otherwise reviewable decision, in a deportation proceeding, is final if the alien fails to appeal within 90 days); see also Hon. Philip J. Padovano, *Motion Practice in Florida Appellate Courts*, 32 STETSON L. REV. 309, 326 (2003) (indicating that in Florida, a lower court's decision shall be final if a party fails to file a timely appeal). See generally Timothy B. Smith, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Civil Procedure*, 65 GEO. WASH. L. REV. 653, 654 (1997) (stating that appellate courts have jurisdiction to review final decisions of district courts).

judgment of a court of general jurisdiction of a state.⁸⁹ The CSIDA also stated that the Federal Arbitration Act should not apply.⁹⁰ By doing so, it makes it clear that the normal review procedures for arbitral awards at the stage of their enforcement is inapplicable in the case of ICSID awards.⁹¹ In the U.K., upon registration of the award in the High Court, the awards are to be recognized as High Court judgments.⁹²

d) What Must the TNC Do?

The TNC simply needs to supply a copy of the award, which must not be subject to a stay of enforcement, certified by the secretary-general of ICSID to the court or authority desig-

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89. See ICSID, *supra* note 1, at sec. 3(a) (stating that arbitration awards are to be given “the same full faith and credit” as would be given to a final judgment of a domestic court); see also Karyn S. Weinberg, *Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes*, 12 B.U. INT’L L.J. 180, 225 (1994) (comparing judgments awarded under ICSID to decisions of U.S. courts, both requiring full faith and credit). See generally Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 308 (1998) (discussing the Full Faith and Credit Clause as requiring courts to give full faith and credit to the decisions of every other state).
90. See ICSID, *supra* note 1, at section 3(a) (asserting that the Federal Arbitration Act is not applicable to awards given under the authority of ICSID); see also Delaume, *supra* note 17, at 489 n.12 (noting that the Federal Arbitration Act does not apply to enforcement of ICSID awards). See generally *Mar. Int’l Nominees Establishment v. Guinea*, 693 F.2d 1094, 1104 n.14 (D.C. Cir. 1983) (discussing Congress’ declaration that the Federal Arbitration Act shall not apply to ICSID awards).
91. See Schreuer, *supra* note 25, at 1333–34 (discussing the general review procedure for arbitration awards); see also Lisa Sopata, Note, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: International Arbitration and Antitrust Claims*, 7 NW. J. INT’L L. & BUS. 595, 600 (1986) (indicating that the normal review process under the Federal Arbitration Act is limited judicial review of arbitral awards). See generally Acqua & Lamm, *supra* note 51, at 737 (suggesting that U.S. courts generally will not modify arbitral awards except when the arbitrator acts with “manifest disregard of the law”).
92. See Arbitration (International Investment Dispute) Act 1966, ch. 41, sec. 2(1) (2003) (Eng.) (stating that a registered award must be given the same force and effect of a judgment of the High Court); see also Andrea Giardina, *La Mise En Oeuvre Au Niveau National des Arrêts et Des Décisions Internationaux*, IV RECUEIL DES COURS 165, 233 (Hague Acad. Int’l L. ed., 1968) (noting that the need to submit a certified copy of the award to the High Court does not contradict the automatic nature of recognition, as it is already obtained in accordance with Article 54(1), but submitting a certified copy to the competent court serves the exclusive purpose of availing oneself of the ICSID award before such a court, if necessary). See generally Weinberg, *supra* note 89, at 225 (describing the standard of review for ICSID awards in England).

nated.⁹³ This entitles it to leave for recognition and enforcement.⁹⁴ The Convention offers no grounds on which the district court may refuse such recognition, not even a public policy defense.⁹⁵ Indeed, failure to enforce may engage the responsibility of the forum state.

This procedure under ICSID has two clear advantages over the NYC, which is used to enforce awards rendered by the ICC, for two reasons.⁹⁶ First, all the TNC needs to present to the court is a copy of the judgment, whereas under the NYC it must present a copy of the judgment as well as a copy of the arbitration agreement.⁹⁷ Second, under the NYC there is a detailed list of grounds on which recognition and enforcement may be refused,⁹⁸ whereas under ICSID, the court's function is restricted to ascertaining the authenticity of the award

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93. See ICSID, *supra* note 1, at art. 54(2)–(3) (stating that the contracting state must supply a copy of the certified award to a competent court or other authority); see also Stephen D. Mau, *Hong Kong's Experience with the New York Convention: An Introduction*, 9 TRANSNAT'L LAW. 393, 404 (1996) (commenting that to enforce an ICSID award, the party must produce a duly authenticated, or duly signed and certified, copy of the award). See generally Miljenko Gjunio, *Croatian Arbitration Law: Courts of Law and Arbitration Under the Croatian Law on Arbitration*, 9 CROAT. ARB. Y.B. 191, 217 n.30 (2002) (noting that under the New York Convention, a party seeking enforcement of an arbitral award must supply a certified copy of the award).
 94. See Delaume, *supra* note 21, at 799 (discussing the simple procedure for gaining recognition and enforcement of ICSID awards); see also Nmehielle, *supra* note 10, at 30, 48 n.37 (remarking that a party may seek enforcement and recognition after supplying a certified copy of the award to a competent court). See generally *France: Court of Appeals of Paris Judgment Concerning Recognition and Enforcement of Award in Context of ICSID Convention*, 20 I.L.M. 878 (1981) (translating Benvenuti & Bonfant S.A.R.L. v. Congo, 108 J. DU DROIT INT'L 843 (CA Paris 1981), the first case concerning the recognition and enforcement of ICSID awards).
 95. See ICSID, *supra* note 1, at art. 53(1) (proclaiming that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention); see also Reisman, *supra* note 56, at 803 (discussing Article 53(1), which indicates that ICSID awards are not subject to appeal unless authorized by the Convention). See generally Kalas & Herwig, *supra* note 4, at 134 n.260 (summarizing Article 53(1) as binding on the parties and not subject to appeal).
 96. See the NYC, *supra* note 18 (noting that this agreement was implemented in the U.S. in 1970 by Chapter 2 of the Federal Arbitration Act; it was in 1970 that the U.S. acceded to the NYC); Spelliscy, *supra* note 1, at 112 (explaining that one of the advantages of the ICSID is that it takes the power of review away from national courts); see also Delaume, *supra* note 13, at 343 (describing the procedural requirements of the ICSID as simple and expedient).
 97. See the NYC, *supra* note 18, at art. 4 (providing that a party applying for recognition and enforcement of a decision under the Convention must provide a copy of the judgment and a copy of the arbitration agreement); see also Jan Paulsson, *Arbitration Without Privity*, ARB. INT'L 2000 at 232 (noting that there may not always be an arbitration agreement, as a TNC may activate ICSID arbitration by relying on national investment laws or treaties); R. Doak Bishop & James E. Etri, *International Commercial Arbitration in South America* (noting that Venezuela, a party to the ICSID, recently modified its laws to comply with ICSID rules) available at <http://www.kslaw.com/library/pdf/bishop3.pdf>, at 11-20 to 11-21.
 98. See the NYC, *supra* note 18, at art. 5 (enumerating that a national court may refuse to recognize an award if the party against whom enforcement is sought can show that one of the seven exclusive grounds for refusal enumerated in Article V(1) of the NYC has occurred). 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, 212 (1999) (arguing that there are valid and compelling reasons to keep the nonenforcement clauses in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

confirmed by the ICSID secretary-general, subject to *no* exceptions.⁹⁹ This obligation is highly unusual and has not always been respected.¹⁰⁰

Thus, by equating ICSID awards to domestic judgments, as opposed to foreign, and thereby eliminating all review, which is an obstacle to enforcement under the NYC, ICSID awards have a higher degree of finality than ICC awards.¹⁰¹

However, the issue is raised as to whether efficacy is achieved at the price of erosion of state sovereignty. Third-party states, such as the U.S. and the U.K. in our example, independent of the dispute must recognize and enforce a judgment irrespective of public policy or international public policy, and thereby risk damaging their relationships with Argentina.¹⁰²

At the drafting session, it was concluded that this cost was not too high.¹⁰³ There was little difficulty in gaining acceptance of the general principle that awards should be *res judicata* in national courts, as it was argued and accepted that the internal remedies provided by the Con-

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99. See ICSID, *supra* note 1, at art. 54 (providing that an award under ICSID shall be, in terms of enforceability, tantamount to a decision in the highest court of the jurisdiction); see also Delaume, *supra* note 17, at 141–42 (noting that the mandatory nature of awards under ICSID has been bolstered by recent decisions in the United States and France). But see Nmeihelle, *supra* note 10, at 47 (arguing that enforcement of awards under ICSID is still hampered by states' recourse to sovereign immunity).
100. See Judgement of December 23, 1980 (Benvenuti & Bonfant S.A.R.L. v. Government of the People's Republic of Congo), 108 J. DU DROIT INT'L 365, (1981) (granting an exequatur based on the fact that the award "contains nothing that is contrary to French law and *ordre public*"); see also Delaume, *supra* note 13, at 343 (explaining that the ICSID Convention, despite its advantages over other international arbitration models, still does not provide a way to make an award enforceable against a state invoking sovereign immunity as a defense); Delaume, *supra* note 21, at 800 (noting that Article 55 of ICSID, which provides that national courts will oversee enforcement of awards, could be problematic in that these national courts are still bound to recognize the defense of sovereign immunity).
101. See Delaume, *supra* note 17, at 484 (explaining that the advantage of ICSID is that, instead of being an appealable court order, it is more like an executory title to damages); see also Alford, *supra* note 61, at 691 (making an award under ICSID equivalent to a decision of the highest court of the land has instilled a certain degree of unity between national and international courts). But cf. Carbonneau, *supra* note 28, at 798 (arguing that ICSID has not yet developed a mechanism by which to circumvent the issue of nonenforceability of awards against parties claiming sovereign immunity; thus, it cannot rival the ICC in international prominence).
102. See Rachel Engle, Comment, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L LAW. 323, 335 (2002) (explaining that criticism of ICSID-type enforceability of awards is based on the belief that no international arbitral system should be above national courts); see also William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 707–8 (1989) (arguing that international treaties requiring enforcement of awards should provide a nonwaivable right to the forum country of judicial review of the award if its enforcement would violate international public policy). See generally Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When is Arbitration a Fiction?*, 24 FORDHAM INT'L L.J. 1122, 1168–69 (2001) (noting that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows a national court to avoid enforcement of an award if it would derogate public policy).
103. See Knull & Rubins, *supra* note 5, at 554 (noting that the drafters of ICSID put a premium on finality and enforcement of arbitration decisions); see also Nmeihelle, *supra* note 10, at 36 (explaining that two important goals of the ICSID drafters were independence of the arbitration process and easy enforceability of awards in national courts); Reisman, *supra* note 56, at 751 (arguing that an overriding concern for the drafters of ICSID was autonomy of the arbitration process from local courts).

vention¹⁰⁴ essentially subsumed within them the grounds for review under the NYC, albeit more restrictively drafted.¹⁰⁵ Initially, however, a view was expressed that an exception to this general principle should be carved out for public policy.¹⁰⁶ In other words, states need not recognize or enforce an award where to do so would conflict with *public policy*.¹⁰⁷ However, Broches successfully defeated this view, arguing that such an exception would have to be granted to all states, including the state that was the party to the dispute, and this would be a dangerous erosion of the binding character of the award.¹⁰⁸ Even if this exception were not extended to state parties to the dispute, it would be dangerous to extend it as to a third-party state such as the U.K., which has within its public policy the Act of State Doctrine.¹⁰⁹ The Act of State Doc-

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104. See ICSID, *supra* note 1, at arts. 49–52 (detailing the internal remedies provided, such as supplementation and rectification, interpretation, revision and annulment); *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, at paras.16–17 (2002) (outlining the requirements for an order of rectification, and applying them to deny claimants' request) available at <http://www.worldbank.org/icsid/cases/genin-sp.pdf>; see also Peter D. Trooboff, Decision, *International Investment Disputes—Res Judicata Effect of Partially Annulled ICSID Award*, 83 AM. J. INT'L L. 106, 111 (1989) (explaining that a court is still required to treat an un-annulled portion of an ICSID award as *res judicata*).
 105. Compare ICSID, *supra* note 1, at art. 52(1)(e) with the NYC, *supra* note 18, at art. 5(1)(B). But see Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. FOREIGN INVESTMENT L.J. 1986 at 327.
 106. See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 912 (D.D.C. 1996) (deciding that to honor the Cairo Court of Appeals' refusal to enforce an award would be violative of public policy of favoring enforcement and finality of awards); see also Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1194 n.9 (2003) (arguing that the Cairo Court of Appeals' decision not to enforce the award issued in the *Chromalloy* case was due to political and juridical reasons). See generally Russel J. Weintraub, *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, 204–5 (1998) (arguing in favor of a public policy exception to enforcement of awards).
 107. See Chan, *supra* note 98, at 199 (explaining that enforcement of awards under the NYC can be avoided if it would violate either domestic or international public policy); see also Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1311 (2000) (cautioning against broad interpretation or application of the public policy exception to enforcement of awards). See generally Christine L. Davitz, *U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From The Bremen's License to the Sky Reefer's Edict*, 30 VAND. J. TRANSNAT'L L. 59, 67 (1997) (stating that the NYC mitigated congressional concerns regarding enforcement of all awards by inserting the public policy exception).
 108. See Randall Peerenboom, *Seek Truth From the Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 289 (2001) (noting that foreign investors are particularly nervous about the People's Republic of China's application of the public policy exception); see also Iris Goldner, *States and State-Controlled Corporations in International Commercial Arbitration*, 7 CROAT. ARB. Y.B. 159, 163 (2000) (outlining the dangers of a foreign investor litigating against a state within its jurisdiction); Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 43–44 (1998) (enumerating difficulties faced by foreign investors in arbitration against a state).
 109. See U.S. Arbitration Act, 28 I.L.M. 396 (1989) (excluding, through the 1988 amendments, the application of the Act of State Doctrine as a defense to enforcement of an arbitration agreement or award); see also Chan, *supra* note 98, at 156–57 (explaining that, in the *Chromalloy* case, the U.S. District Court for the District of Columbia reasoned that a decision by a foreign court did not amount to an "act of state," forming a basis for nonrecognition of the foreign decision); Ramsey, *supra* note 108, at 1–2 (explaining that the "state act doctrine" precludes courts normally from questioning the validity of an act of a foreign state committed within its own territory).

trine may arguably prompt the view that it is contrary to public policy to exercise enforcement jurisdiction with respect to the actions taken by a foreign state within its own territory.¹¹⁰

Another benefit, outweighing the negative consequences of stripping the courts of their review power, is that of internationalizing and thus harmonizing the grounds for annulment, while at the same time ensuring the legitimacy of the process. The latter is an important objective as it has been pointed out that investment arbitration has been heavily criticized for what is perceived to be a threat to sovereignty granted to already-too-powerful corporations as well as a secretive and therefore non-democratic process.¹¹¹

While the internal mechanism could be criticized as not being a sufficiently alert guard of due process so that finality can be achieved, arguably this is in line with a recent trend, which can be seen in a number of European countries: enactment of statutes which are intended to narrow the scope of judicial control over transnational arbitration and to increase the finality of

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110. See Michael Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, 1988 U. ILL. L. REV. 519, 556–57 (1988) (describing the phrase “comity of nations” as a mutual understanding among states to give full faith and credit to acts of other states, including judicial decisions, where doing so does not violate local public policy); see also Charles H. Brower, II & Honorable Marianne D. Short, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLINE L. REV. 723, 725–26 (1997) (commenting that one reason for the “comity of nations” practice is the realization that frustration of foreign decisions would only complicate U.S. foreign policy). But see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693–94 (1976) (carving out an exception to the Act of State Doctrine when what is involved is purely commercial activity).
111. See Walde & Weiler, *Investment Arbitration Under the Energy Charter Treaty in the light of new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation* 48 (unpublished, on file with author); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 391 (2003) (expressing that sovereignty concerns may curtail the development of investment arbitration); see also 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, 542 (2002) (noting the fear that a host state’s sovereignty is diminished if investment arbitration is given binding effect).

transnational awards from judicial interference.¹¹² French,¹¹³ Belgian,¹¹⁴ Dutch,¹¹⁵ and Swiss¹¹⁶ laws all strictly limit the intervention of the domestic courts in the arbitration proce-

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112. See Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 580 (1990) (noting several European nations which have significantly shielded arbitration awards from their domestic judicial process); see also Carl Baudenbacher & Imelda Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8 COLUM. J. EUR. L. 1, 2 (2002) (discussing the trend of allocation of judicial authority to international arbitration authorities in the European Community); Steven M. Boyd et al., *Current Concerning the Settlement of Disputes Involving States by Arbitration and the World Court*, 83 AM. SOC'Y INT'L L. PROC. 568, 573 (1989) (stating that many European countries have enacted statutes to limit judicial interference in transnational awards in order to increase the conclusive nature of these awards).
113. See, e.g., Lecuyer-Thieffry & Thieffry, *supra* note 112, at 580 (noting that the French statute limits judicial involvement regarding both the arbitration proceeding and the arbitration award); see also France: International Arbitration Provisions of Decree Amending Code of Civil Procedure, May 14, 1981, 20 I.L.M. 917 (reporting several restrictions on the judicial interference of international arbitration awards). See generally William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1294 (2003) (finding that France allows judicial interference of international arbitration awards only under certain statutorily specified circumstances).
114. See Lecuyer-Thieffry & Thieffry, *supra* note 112, at 580 (finding that the Belgian Law on International Arbitration goes as far as to completely prohibit judicial review in certain circumstances); see also Belgium: Statute on the Setting Aside of Arbitral Awards, Mar. 27, 1985, 25 I.L.M. 725 (stating that Belgium courts are generally restricted from setting aside arbitration awards that are international in character); William W. Park, *Award Enforcement Under the New York Convention*, 688 PRAC. L. INST. 573, 595 (2003) (expressing that Belgium allows for arbitration between foreign parties without any judicial interference).
115. See Lecuyer-Thieffry & Thieffry, *supra* note 112, at 580 (expressing significant limitations concerning the review of arbitration awards in the Dutch statute); see also Emmanuel Gaillard, Introductory Note, *Netherlands: New Statute on Arbitration*, July 2, 1986, 26 I.L.M. 921 (noting that the Dutch statute follows the "liberalizing" trend toward international arbitration); Conrad K. Harper, *The Options in First Options: International Arbitration and Arbitral Competence*, 771 PRAC. L. INST. 127, 132 (1998) (stating that the Netherlands has restricted judicial intervention in arbitration).
116. See Lecuyer-Thieffry & Thieffry, *supra* note 112, at 580 (finding that the Swiss laws significantly limit judicial intervention in the arbitration award and proceedings); see also Swiss Federal Act on Private International Law, Dec. 18, 1987, ch.12, arts. 176-194 (hereinafter "Swiss PIL Act"), reprinted in Blessing, *The New International Arbitration Law in Switzerland, a Significant Step Towards Liberalism*, 5 J. INT'L ARB. 9 (Part II 1988); Filip De Ly, *The Place of Arbitration in the Conflict of Law of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 73 (1991) (noting that transnational parties may exclude judicial review of arbitration awards).

ings themselves and in the reviews of the awards, once rendered.¹¹⁷ The pro-enforcement policy adopted by the U.S. courts achieves a similar effect.¹¹⁸

e) Articles 54(3) and 55: No Automatic Obligation to Execute

While it has been concluded in the previous section that the enforcement mechanism under ICSID is more efficient under the ICC, it is not optimal due to the impact of Article 54(3), which subjects execution and principles of sovereign immunity to the local law of the country where sought.¹¹⁹ This means that the award will only be enforced if such a judgment could be enforced.¹²⁰ If that judgment could not be enforced, then the award is not subject to enforcement, either.¹²¹ The net effect is that *prima facie* the ICSID automatic recognition and enforcement mechanism is more effective than the regime under the NYC, as it prevents the

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117. See Lecuyer-Thieffry & Thieffry, *supra* note 112, at 580 (stating that France, Belgium, the Netherlands and Switzerland place substantial limitations on the review of arbitration awards and proceedings); see also Baudenbacher & Higgins, *supra* note 112, at 2 (finding that European countries have restricted judicial intervention in arbitration proceedings over the past decade). See generally Theodore C. Theofrastous, Note, *International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate*, 31 CASE W. RES. J. INT'L L. 455, 473 (1999) (noting that the Netherlands, Belgium, France and Switzerland have modified their laws concerning international arbitration).
 118. See Ved. P. Nanda & David K. Pansius, 2 LITIG. OF INT'L DISP. IN U.S. CTS. § 11:18 (2004) (finding that the United States Supreme Court stated the need of U.S. domestic courts to decline the review of transnational commercial arbitration awards, even if a different result would have been achieved in the domestic courts); see also Baudenbacher & Higgins, *supra* note 112, at 2 (stating that the U.S. and European countries are on a similar trend of deferring authority to private arbitral organizations). See generally Dan C. Hulea, Note, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 343 (2003) (noting that the U.S. confers great deference to the parties in an arbitration context).
 119. See Coe, *supra* note 62, at 1451 (noting that ICSID awards are subject to the sovereign immunity restrictions of the state where enforcement is sought); see also Michele Flores, Note, *A Practical Approach to Allocating Environmental Liability and Stabilizing Foreign Investment in the Energy Sectors of Developing Countries*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 141, 156 (2001) (stating that the sovereign immunity of the contracting state may affect the enforcement of an ICSID award); Nmehielle, *supra* note 10, at 22 (finding that Article 54 raises concerns about the effectiveness of the enforcement of ICSID arbitral awards due to the function of domestic courts concerning sovereign immunity issues).
 120. See, e.g., Terrence F. MacLaren, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS: JOINT VENTURES § 17:33 (2004) (noting that in Korea, foreign arbitration judgments are only enforceable after the Korean court declares the validity of the judgment). But see MacKenzie, *supra* note 15, at 219 (finding that consent to arbitration under ICSID precludes a state's sovereign immunity claims through threat of sanctions). See generally Gabrielle Kaufman-Kohler, *International Commercial Arbitration: Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1320 (2003) (stating that ICSID awards are enforced as if they were local judgments).
 121. See Coe, *supra* note 62, at 1451 (finding that enforcement of ICSID judgments is subject to a state's sovereign immunity rules); see also Timothy C. Evered, *Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union*, 3 BUFF. J. INT'L L. 153, 174 (1996) (noting that sovereign immunity may place a barrier on the enforcement of international commercial arbitration awards); Joanne K. Lelewer, Note, *International Commercial Arbitration as a Model for Resolving Treaty Disputes*, 21 N.Y.U. J. INT'L L. & POL. 379, 393 (1989) (stating that there have been problems regarding the enforcement of ICSID awards due to sovereign immunity).

forum state from refusing recognition and enforcement on the grounds of public policy.¹²² However, Article 54 does not require them to go beyond that and to undertake forced execution of awards if, under national law, final judgments could not be so executed.¹²³ So all will hinge on the national laws on sovereign immunity as to whether a TNC can obtain the money due to it under the award.¹²⁴ Naturally, a TNC will seek out the forum which most facilitates forced execution.¹²⁵ This partly defeats the purpose of a multilateral convention like ICSID, which ensures that ICSID awards are executed consistently.¹²⁶ The obstacles posed by Article 55, as well as the other articles, will be discussed in more detail in the following part.

Part III. Obstacles to Enforcement of ICSID Awards

1) Introduction

We have shown in the previous part that where circumstances may arise in which Argentina cannot comply with the award, a TNC is empowered to levy execution against the assets of the state of Argentina.¹²⁷ The scope of this part is to identify and evaluate the potential obstacles that a TNC may face when attempting to activate the recognition and enforcement mechanism under ICSID against the assets of Argentina in the U.K. and the U.S.

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122. See Karen Halverson, *Is a Foreign State a "Person"? Does It Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 180 n.270 (2001) (noting that Article 5 of the NYC permits a court to refuse enforcement of an arbitral award on public policy grounds); see also Knull & Rubins, *supra* note 5, at 552 n.71 (expressing that unlike the NYC, the ICSID has no "annulment" provision based on public policy); Peter Stumberg, *The International Regulation of Foreign Direct Investment: Obstacles & Evolution*, 31 CORNELL INT'L L. J. 491, 593 (1998) (stating that the NYC allows domestic courts to deny enforcement of an award if it is against public policy, while ICSID awards are considered binding and not subject to appeal).
123. See ICSID, *supra* note 1, at art. 54 (noting that a recognition order obtained from a court still has economic value, allowing parties to institute execution proceedings against the state in the future and having the ability to compel compliance to the extent that the outstanding order of recognition is able to deter the state from bringing assets into its jurisdiction, which will prove enough of a barrier to the state's conduct to compel the payment of the arbitration award); Choi, *supra* note 26, at 213 (finding that a state has economic incentives to honor an enforcement order).
124. See Flores, *supra* note 119, at 156 (stating that sovereign immunity may affect the enforcement of an award under the ICSID when state property is involved); see also Kenneth S. Jacob, Note, *Reinvigorating ICSID With a New Mission and with Renewed Respect for Party Autonomy*, 33 VA. J. INT'L L. 123, 134 (1992) (finding that the issue of whether sovereign immunity bars the execution of an ICSID award is decided entirely by the domestic laws of the state where enforcement is sought); Koa, *supra* note 53, at 489 (finding that the ICSID leaves open the possibility for a state to enforce its sovereign immunity against the execution of an award).
125. See ICSID, *supra* note 1, at art. 54 (requiring each contracting state to recognize an award rendered by ICSID). See generally Delaume, *supra* note 17, at 484 (stating that the process of recognizing an award decreed by the ICSID is extremely simple).
126. See Giardina, *supra* note 92.
127. See ICSID, *supra* note 1, at art. 54 (requiring each contracting state to recognize an award rendered by ICSID). See generally Delaume, *supra* note 17, at 484 (noting the ease of the process for enforcing an award decreed by the ICSID).

2) Location of the State's Assets

Often it is difficult to locate the assets of a state. While a private inspection agency may be employed, such an agency may find it difficult to locate the commercial assets of the state mainly due to privacy and confidentiality in banking law.¹²⁸

3) Execution Against the Assets of a State and Not State-Controlled Entities

An award rendered against Argentina, while enforceable against the assets of one of its provinces (in accordance with the unitary theory of a state),¹²⁹ would not be enforceable against one of its subdivisions or agencies, nor state-controlled entities that are not designated as constituent subdivisions or agencies under Article 25-1.¹³⁰ Thus, in the same way a victorious state could not pierce the corporate veil of a subsidiary and look to the assets of the group as a whole for enforcement, a TNC cannot peep behind the veil of state personality and look to the assets of more-or-less autonomous public entities (which do have some connection to the state) to widen the range of assets possibly subject to execution.¹³¹

4) Only Pecuniary Obligations Are Enforceable

While the U.S. and U.K. courts must recognize any type of obligation under the award, and such obligation will enjoy *res judicata* effect once recognized, their duty to enforce is lim-

128. See generally Ernest R. Larkins, *Multinationals and Their Quest for the Good Tax Haven: Taxes are But One, Albeit an Important, Consideration*, 25 INT'L LAW. 471, 477, 478-79 (noting the use of bank secrecy laws in evading tax consequences); Jennifer A. Mencken, Note, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. INT'L & COMP. L. REV. 461, 461 (1998) (discussing problems that arise from the banking secrecy laws); William W. Park, *Scholarship in Banking Law: Legal Policy Conflicts in International Banking*, 50 OHIO ST. L.J. 1067, 1068 (1989) (surveying the pros and cons of secrecy laws in banking institutions).

129. See ICSID, *supra* note 1, at art. 54(3) (stating that the execution of an award is subject to the law concerning judgments in the state where the execution is sought). See generally Delaume, *supra* note 17, at 485 (noting that Article 54 requires contracting states to recognize an ICSID award as if it were a final judgment made by one of its own courts and the possibility that an award may be different in each contracting state). Interview with Professor Alejandro Garro, Columbia Law School (explaining that before foreign courts, provincial assets ought to be answerable for the obligations of the provinces of Argentina; he supports the view whereby immunity from execution or enforcement of a province parallels that of a nation).

130. *Accord* ICSID, *supra* note 1, art. 25(1) (allowing the party on the host state's side to be a constituent subdivision or agency designated to the Center by that state); see also Benvenuti and Bonfant v. Banque Commerciale, 1 ICSID REPORTS 373, 373 (July 21, 1987) (dismissing an action to enforce an award by attaching funds owned by a state entity); Kalas & Herwig, *supra* note 4, at 90 (noting that Article 25(1) requires the state to consent to ICSID jurisdiction before a subdivision or agency consents to jurisdiction).

131. See Georges R. Delaume, *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, 8 ICSID REV. 29, 32; see, e.g., Benvenuti, 1 ICSID REPORTS at 115 (upholding the decision of the Cour d'appel de Paris that the Banque Commerciale Congolaise—the "BCC"—though dependent on the state (Congo) could not be regarded as an emanation of the state, and therefore an investor from France could not enforce an ICSID award rendered against the state by seizing the property of the BCC); see also Kalas & Herwig, *supra* note 4, at 90 (stating that 25(1) mandates that a state must consent to jurisdiction over a subdivision or agency before ICSID jurisdiction can be had).

ited to pecuniary obligations imposed by the award.¹³² This means, in the case of an award granting specific performance, one cannot enforce a final, dispositive award, directing the parties to perform their respective obligations under the contract.¹³³ This limitation has caused few problems, as the cases so far published have involved situations where the investment relationship has broken down and therefore the ICSID tribunals have framed the obligations imposed by the awards in pecuniary terms.¹³⁴ This is not to say that future awards will not: the tribunal may use its power to impose non-pecuniary obligations upon the host states—for example, specific performance (i.e., the restitution of seized property) or desistance from imposing unreasonable taxes.¹³⁵ Tribunals imposing such non-pecuniary obligations should keep the impossibility of enforcement in mind, and weigh it against the obligation, implicit in all international arbitration, to deliver an enforceable award.

From the perspective of the enforcing state, Schreuer notes that the limitation to pecuniary obligation deals with the difficulty that may arise if the award provides for some forms of relief that are unknown to the law of the country where enforcement is sought.¹³⁶ For example, if the award ordered that Argentina change its laws to stop imposing unreasonable taxes, the U.K. and the U.S. lack the long-arm jurisdiction to invade Argentina's fiscal sovereignty and compel it to do so.¹³⁷ Article 54(3) provides that execution shall be governed by the law of the

132. See ICSID, *supra* note 1, at art. 54(1) (stating that each contracting state must recognize and enforce pecuniary obligations in awards granted by the ICSID); see also *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 77 (1986) (finding jurisdiction over the enforcement of an award involving pecuniary obligations); Schreuer, *supra* note 25, at 1129 (assuring that the draft to the Convention did not contain the restriction to pecuniary obligations; however, there were misgivings about the feasibility of enforcement of non-pecuniary obligations arising out of awards and this limitation was only introduced because the German executive director insisted on retaining some discretionary power on the basis of the forum's *ordre public*, though strongly opposed by the other Executive Directors, resulting in a compromise proposal to restrict the obligation to enforce pecuniary obligations under awards).

133. See ICSID, *supra* note 1, at art. 54(1) (stating that each contracting state must recognize and enforce pecuniary obligations in awards granted by the ICSID); see also Delaume, *supra* note 17, at 485 (noting that Article 54 requires contracting states to recognize an ICSID award as if it were a final judgment made by one of its own courts and the possibility that an award may be different in each contracting state); Schreuer, *supra* note 25, at 1129.

134. See *Technicas Medioambientales Tecmed S.A. v. Mexico*, 43 I.L.M. 133 (2004) (awarding pecuniary damages); see also *Marvin Feldman v. Mexico*, 42 I.L.M. 625, 669 (2003) (providing a monetary award); *Liberian Eastern Timber Corp.*, 650 F. Supp. at 77 (upholding a prior judgment to enforce pecuniary obligations provided by an award from ICSID).

135. See generally Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and Mercosur*, 17 NW. J. INT'L L. & BUS. 850, 890 (1997) (stating that Chapter 11 of NAFTA provides that an arbitral decision can include restitution of property); Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 734–35 (1993) (noting that an arbitral tribunal can award restitution of property).

136. See ICSID, *supra* note 1, at art. 54(1), 55 (noting that pecuniary obligations in awards granted by the ICSID must be recognized and enforced and proclaiming that "Article 54 shall not be construed as derogating from the law in force in any Contracting State relating to immunity of the State or of any foreign State from execution"); see also Schreuer, *supra* note 25, at 1129.

137. See ICSID, *supra* note 1, at art. 54(1), 55; see also Schreuer, *supra* note 25, at 1129.

state where execution is sought.¹³⁸ Since enforcement of a pecuniary obligation is available under every legal system, this provision eliminates the problems that could arise from different procedures for the enforcement of judgments.¹³⁹ Furthermore, there is a qualitative difference between a monetary judgment and compelled performance. An enforcing jurisdiction executes the relatively limited, mechanical task of transforming an award into a domestic money judgment. In contrast, practical difficulties would arise in enforcing a non-money award.¹⁴⁰

5) Conservatory Measures (CMs)

In light of the above, then, the first step to a successful enforcement is an award rendered in monetary terms. The second step is to locate assets of that state, not assets of state-controlled enterprises, which may eventually serve as objects for the execution of an award if favorable, or if not, will enhance the possible settlement of dispute.¹⁴¹

The third step the TNC must take is to take conservatory measures to prevent Argentina from removing or dissipating such assets, before a decision on the merits has been rendered.¹⁴²

138. See ICSID, *supra* note 1, at art. 54(3) (stating that execution of the award is governed by the state where the court is executing such award).

139. See Broches, *supra* note 39, at 627; Delaume, *supra* note 17, at 485 (stating that the ICSID may be settled differently depending on the enforcement provisions in an individual state); see also Delaume, *supra* note 76, at 815 (noting that even with this limitation to enforcement, the ICSID awards still receive more favorable treatment than enforcement options under other conventions).

140. See 2 ICSID: THE HISTORY OF THE CONVENTION, 346 (1968) (referencing Ambassador Summers of Canada); see also *Discussion Following the Remarks of Mr. Price and Mr. McIlroy*, 27 CAN.-U.S. L.J. 333, 341–42 (2001) (asserting that specific relief is not a prohibited remedy under the ICSID); Delaume, *supra* note 76, at 807–8 (stating that both common law and civil law states acknowledge the remedy of specific performance in circumstances where monetary compensation would not be adequate).

141. See Delaume, *supra* note 131, at 42 (emphasizing that there need not be a nexus between state assets and the awarded relief). See generally Markham Ball, *Assessing Damages in Claims by Investors Against States*, 16 ICSID REV. 408, 413–15 (2001) (discussing the difficulty in determining an international standard of compensation and the recent trend toward a fair market value standard); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM J. INT'L L. 104, 113 (1990) (noting that national courts are rarely used to enforce awards determined by the ICSID).

142. The typical pre-award attachment is the provision of a bank guarantee for compliance with an award on account of the debtor. See generally Bishop, *supra* note 77, at 655 (considering various provisional remedies available under international conventions that allow parties to freeze assets during binding arbitration); Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 124–27 (1999) (comparing and contrasting the four sets of rules which govern application of interim measures by major international dispute tribunals); David L. Zicherman, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667, 667–68 (1989) (discussing the importance of temporary injunctions and pre-judgment attachments in preventing a defendant from removing its assets from the host country).

Removal of assets has been problematic in proceedings against states.¹⁴³ The issue a TNC will be faced with is whether to request CMs from the ICSID tribunal or the U.K. or U.S. national courts.

a) Conservatory Measures by the ICSID Tribunal

Under Article 47, unless the parties otherwise agree, the Arbitral Tribunal may, if it considers the circumstances so require, recommend but not order any provisional measures which should be taken to preserve the respective rights of either parties.¹⁴⁴ The use of the word recommendation was used so as not to offend a state's sovereignty and immunity from execution.¹⁴⁵ However, this lack of binding force of CMs has at least on the face of the Convention

143. *But see* Paul D. Friedland, *ICSID and Court-Ordered Provisional Remedies: An Update*, 4 ARB. INT'L 161, 161–65 (1988) (arguing that provisional measures are rarely needed during arbitration with a state, since states usually have investments in the host nation that exceed the amount at stake in arbitration, making it unlikely they would dissipate assets to avoid award enforcement). *See generally* Nicholas J. Shaw & Robert H. Smit, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT'L ARB. 275, 298–99 (1997) (discussing the limitations on ICSID tribunals that may prevent arbitrators from granting injunctions to freeze assets not directly related to the active dispute); Weintraub, *supra* note 106, at 208 n.247 (referring to the international provisional remedies of the Mareva injunction and the Anton Pillar order used to freeze the assets of a foreign party during dispute arbitration).

144. *See* Pierre Lalive, *The First "World Bank" Arbitration* (Holiday Inns v. Morocco)—*Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 136 (1980) (demonstrating that such recommendations were granted in *Holiday Inns v. Morocco*, however, the tribunal stated that it lacked the power to grant injunctions); *see also* Bishop, *supra* note 77, at 655 (stating that an ICSID tribunal's recommendations have substantial persuasive effect). *See generally* International Center for the Settlement of Investment Disputes Arbitration Tribunal: *Award in the Case of AGIP Co. v. Congo*, Nov. 30, 1979, 21 I.L.M. 726 (1982) (showing a specific example in arbitration when Congo's Minister of Energy recommended that parties resume negotiations rather than transfer assets and close installations).

145. *See* 2 ICSID: THE HISTORY OF THE CONVENTION, 655 (1968). (explaining that the Convention's *travaux préparatoires* indicate that the drafters chose the word "recommend" instead of the word "prescribe," principally because they did not want interim awards to be enforceable against nations in the same way as final settlement awards); *see also* D.A. Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?*, 30 TEX. INT'L L.J. 71, 80–81 (1995) (asserting that the strength of the recommendation is ultimately left to the discretion of the arbitrators themselves). *See generally* Delaume, *supra* note 76, at 794–95 (noting that the risk of offending a state's sovereignty may be removed by having the arbitrators expressly agree to waive the right to assert that defense during ICSID arbitration).

been perceived by some¹⁴⁶ as a shortcoming in practice,¹⁴⁷ because it means that their enforcement could be problematic.

However, this shortcoming can be dismissed for the following reasons: first, a recent ICSID award (*Casado & Fondation Allende v. Chile*¹⁴⁸) held that CMs, even though recommended, are to be binding on the parties in the dispute. Second, such recommendations in practice have more than a hortatory value, given the possibility of drawing negative inferences from non-compliance and the economic pressure exerted by the World Bank as the sponsoring institution.¹⁴⁹

While the precedent set by *Casado* and the possibility of World Bank sanctions establish the binding nature of recommendations, there is still the problem of execution if a state is

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146. See Malcom Forster, *Provisional Measures "Recommended" by ICSID Tribunals to Be Binding on the Parties*, FRESH-FIELDS BRUCHAUS DERINGER PUB. INT'L L. NEWS, Mar. 2003, at 2 (discussing the deliberate language choice that resulted in the perception that the Convention lacked binding authority) available at http://www.freshfields.com/practice/pil/publications/pil_news/200304.pdf (last visited Mar. 11, 2004). See generally Dana H. Freyer & Hamid G. Gharavi, *From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13 ICSID REV. 101, 102–3 (1998) (discussing the difficulty in interpreting the term "binding" in international litigation); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L L. & COM. 1, 21 (1997) (showing that the non-binding effect of recommendations may be countered by the increasing number of nations that are making arbitration mandatory for international commercial disputes).
147. See Videotape: *Litigating the Merits of an Arbitral Award—The Heart of Your Arbitration* (David D. Caron) Study Guide at 2 (noting that a Dutch attorney refused to recommend that a client use ICSID because of its exclusive and weak provision for interim measures); see also Rubins, *supra* note 9, at 345 (noting the lack of power in ICSID tribunals to order interim provisions unless a non-enforcing state is involved in the dispute). But cf. Delaume, *supra* note 76, at 784–85 (submitting that the states' use of binding waivers of sovereign immunity, providing access to state assets, has caused international commercial arbitration to become a more popular form of dispute resolution).
148. See *Casado & Fondation Allende v. Chile: Award on Conservatory Measures, 25 September 2001*, 16 ICSID REV. 565 (2001) (printed in Spanish and French, with a brief introduction in English) (holding that the negotiating history of the ICSID Convention and the choice of words "recommend" must follow contemporary principles of international law; relying *inter alia* on the decision of the International Court of Justice in *La Grand*, holding that provisional measures are binding on the parties despite ambiguous statutory language). See generally Forster, *supra* note 146, at 2 (stating that the *Casado* tribunal relied on a decision by the International Court of Justice in *LaGrand*, holding that provisional measures granted in international arbitration were binding on the parties); Jean-Christophe Liebeskind, Victor Pey Cassado and Foundation President Allende v. Chile, *ICSID Decision of 25 September 2001 in Case No. ARB/98/2*, 21 ASA BULLETIN, 337, 337–41 (2003) (explaining that the Arbitral Tribunal declared they could recommend suspension of a domestic proceeding, however it was unnecessary in the present case, as the proceeding did not contain a final judgment).
149. See Redfern & Hunter, *supra* note 70, at 418; see also Shenkin, *supra* note 24, at 586–87 (claiming that the threat of binding arbitration forces many parties to ICSID to negotiate settlements). See generally Alford, *supra* note 61, at 691–92 (discussing the full faith and credit obligation incorporated into the ICSID convention in order to help ensure that foreign investors comply with awards).

unwilling to comply.¹⁵⁰ In *Casado*, the tribunal was mindful that interim recommendations are not self-executing and that, unless the parties comply with them in good faith, assistance may be required from state authorities.¹⁵¹ However, CMs are commonly requested in circumstances where such good faith is in doubt.¹⁵²

It is questionable on what basis a national court must enforce such measures: Is it enforceable through state courts in the same manner as an arbitral award under Articles 53–55?

This is doubtful. The tribunal's ruling clearly suggests that the Convention requires state authorities to give effect to provisional measures recommendations at least as far as the authorities of the state party to the proceedings are concerned.¹⁵³ This may not be so for third-party states that are unconnected with the proceedings.¹⁵⁴ The tribunal also stated that if a party is

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150. While this precedent is not strictly binding, it would be inaccurate to claim that cases decided by ICSID tribunals would not *influence* future tribunals. ICSID tribunals have repeatedly referred to and relied upon previous decisions, but have also pointed out they are not bound by these decisions. *See* ICSID, *supra* note 1, at art. 53(1) (providing language that may be read as excluding the applicability of binding precedent for subsequent ICSID cases); *see also* Nmehielle, *supra* note 10, at 24 (stating that host state compliance with ICSID awards precludes the international investor from involving his state in the dispute). *See generally* Delaume, *supra* note 17, at 139–40 (demonstrating a French court's struggle in waiving its right to recognize a foreign award).
151. *See* Abigail D. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 773, 791 n.139 (1988) (quoting Judge Lauterpacht of the International Court of Justice regarding a state's obligation to give recommendations good-faith consideration). *See generally* Paul E. Mason, *Seven Keys to Arbitration in Latin America*, 19-2 MEALEY'S INT'L ARB. REP. 11 (2004) (stating that suggestion that some parties may merely "go through the motions" when they are subject to compulsory arbitration has prompted some South American nations to consider non-compulsory mediation); William K. Slate, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 54 (1996) (discussing the benefits of arbitral institutions to nations and international investors).
152. *See* Stephen J. Toope, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS*, 236 (Grotius Publ'ns Ltd., ed. 1990) (discussing the additional problem that arises due to the fact that provisional remedies are not enforceable by an ICSID tribunal). *See generally* Dhooze, *supra* note 2, at 488–89 (noting additional complications to arbitration for the U.S. as the only member of NAFTA to also be an ICSID signatory); Rubins, *supra* note 9, at 332–33 (noting the role of the courts in assisting arbitral tribunals enforce interim awards and suggesting that some courts have required a showing that there has been a denial of justice).
153. *See* *Casado & Fondation Allende v. Chile: Award on Conservatory Measures*, 25 September 2001, 16 ICSID REV. 565 (2001) (reported only in Spanish and French); *see also* William J. Aceves, *International Decision: LaGrand (F.R.G. v. U.S.) Judgment, International Court of Justice, June 27, 2001*, 96 AM. J. INT'L L. 210, 218 (2002) (discussing the binding effect of provisional measures granted by the International Court of Justice); *cf.* Elizabeth Kingma & Bruce Zagaris, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT'L L. REV. 445, 492–93 (1991) (stating that the European Convention has traditionally provided provisional measures during the investigative stage of international disputes); *with* Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803, 816 (1993) (stating that the International Court of Justice has been providing provisional measures with increasing frequency in recent years).
154. *See* ICSID, *supra* note 1, at art. 43 (stating that a tribunal may only recommend or order interim relief after consulting with the parties to the arbitration; *see also* Rubins, *supra* note 9, at 345 (stating that the ICSID tribunals have increased power to order interim provisions when a non-enforcing state is involved in the dispute); *cf.* Patricia A. Essoff, Note, *Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards For Provisional Measures*, 15 FORDHAM INT'L L.J. 839, 842–43 (1991) (discussing limitations on the International Court of Justice to grant provisional measures only affecting member states).

unwilling to comply with interim measures so recommended, adverse inferences may be drawn against it on the merits of the case, including costs.¹⁵⁵

Even assuming that the order can be enforced on the basis of these provisions, attachment is a matter of days or even hours: it takes some time to convene arbitrators, render the order, and enforce the award in the state court.¹⁵⁶ Compounded with the fact that the other party will be notified, this may allow the state to take steps to safeguard assets from attachment.¹⁵⁷

b) Conservatory Measures by National Courts

If a TNC wishes to make an application for CMs from the domestic courts, it may face two distinct obstacles: 1) the exclusive nature of the ICSID arbitration under Article 26 which in principle excludes the intervention of courts during the proceedings;¹⁵⁸ and 2) sovereign immunity from execution ("SI").¹⁵⁹

Article 26 reads that consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other

155. On this point the tribunal followed the 1979 ICSID award in *AGIP v. Congo*. See ICSID, *supra* note 1, at Rule 39 (codifying the importance of provisional measures and the necessity for compliance); see also ICSID, *supra* note 1, at art. 46 (allowing the Tribunal to issue provisional measures, with which compliance is necessary to conduct the arbitration). See generally Slate, *supra* note 151, at 59–62 (noting that arbitrators may grant interim measures that they deem necessary in respect to the subject matter).

156. See Brower & Tupman, *supra* note 58, at 24–25 (explaining the time expenditures associated with attachments, which may delay the overall arbitration); see also Greenfield & Rooney, *supra* note 1, at 381 (stating pre-award attachments may be authorized through state courts, which is a lengthy process and may delay the resolution of the arbitration). See generally Adriano Gardell, S.p.A. v. Côte d'Ivoire, No. ARB/74/1, (ICSID Aug. 29, 1977) (noting the three-year lapse between registering the case and its final decision).

157. See Brower & Tupman, *supra* note 58, at 24–25 (revealing the fact that states may hide their assets to avoid attachment during the lengthy process of obtaining a provisional measure); see also Marchac, *supra* note 142, at 136 (emphasizing the paralyzing effect an attachment may have in respect to a state's ability to conceal assets); Redfern, *supra* note 145, at 79 (arguing the necessity of orders of attachment to prevent states from transferring assets out of the jurisdiction to avoid paying upon settlement or resolution of the matter).

158. See ICSID, *supra* note 1, at art. 26 (allowing a contracting state to the Convention to exclude any other remedy outside the arbitration proceeding); Delaume, *supra* note 21, at 784 (excluding domestic courts from intervening with ICSID arbitration due to the parties' agreeing to Article 26 of the Convention); see also Nmehielle, *supra* note 10, at 29 (illustrating Article 26's exclusionary rule in seeking remedy outside of arbitration).

159. See ICSID, *supra* note 1, at art. 26 (stipulating that a domestic court may only enforce or recognize an award, which impliedly excludes awarding conservatory measures); Camponovo, *supra* note 39, at 217 (alerting investors to possible roadblocks to seeking relief in foreign courts, namely sovereign immunity); see also Delaume, *supra* note 76, at 785 (posing sovereign immunity as an obstacle to enforcing an arbitration agreement).

remedy.¹⁶⁰ At first sight this would seem to preclude any resort to national courts for orders of CMs, absent the express agreement of the parties, on the twin basis of respect for the Convention and of respect for the parties' arbitration agreement.¹⁶¹ Such a reading may operate to the detriment of the TNC as there are circumstances in which a national court would be more inclined to grant orders of protection than would an ICSID tribunal.¹⁶²

However, this literal interpretation was adopted by the Belgian¹⁶³ and then Swiss courts¹⁶⁴ in the *Mine v. Guinea* case, where it was held that in case of ICSID arbitration, only the arbitrators can decide on provisional measures to the exclusion of the national courts.¹⁶⁵ The courts based their reasoning on Article 26 as evidence that "when a state accepts submission of a dispute to ICISD arbitration and accordingly provides an investor with the possibility of access to an international forum, this state should not be exposed to other measures of pressures or to

160. See ICSID, *supra* note 1, at art. 26 (reading the meaning to be that the parties involved in the arbitration may not seek any other remedy); Giorgio Bernini, *Foreign Investments and Arbitration in the Frame of Globalization of the World Economy*, 4 CROAT. ARB. Y.B. 83, 93 (1997) (providing that under Article 26, arbitration shall be the exclusive remedy for parties to the ICSID arbitration agreement); see also William 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, 363 (2000) (clarifying that state parties to Article 26 must seek resolution to investment disputes in arbitration and to the exclusion of domestic courts).

161. See Friedland, *supra* note 143, at 161; Delaume, *supra* note 76, at 794 (precluding parties to an ICSID arbitration from seeking other remedies in domestic court, unless they have agreed otherwise); see also Rubins, *supra* note 9, at 345–46 (alluding to the Article 26 power to exclude the parties from seeking remedy in national courts).

162. See TOOPE, *supra* note 152, at 236 (noting the disparity of granting orders between municipal courts and an ICSID tribunal); see, e.g., *Guineas & Soguipêche v. Atlantic Triton Company*, 24 I.L.M. 340, 341 (1985) (striking down a national court decision, which would have been more favorable toward the moving party than the decision of the ICSID arbitration panel); see also Colleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519, 1544 (1991) (raising the issue of divergence between a court's granting of interim measures and an arbitration panel's more limited discretion to grant the same measures).

163. See *MINE v. Guinea*, 24 I.L.M. 1639 (Court of First Instance of Antwerp, Belgium (1985)) (claiming exclusive jurisdiction to the arbitrators handling the ICSID proceeding because the parties did not agree otherwise). See generally Richard Garnett, *International Arbitration Law: Progress Towards Harmonization*, 3 MELBOURNE J. INT'L L. 400, 406 (2002) (noting Belgium's Code Judiciaire, which allows parties to opt out of local procedural rules, thereby removing jurisdiction from the local courts when agreeing to ICSID arbitration); Slate, *supra* note 151, at 59 (reinforcing the point that arbitrators grant interim measures based upon the language of the contract between the parties).

164. See *Guinea v. MINE*, 26 I.L.M. 382, 388 (1987) (limiting the power to grant provisional measures solely to the arbitrators involved in the ICSID arbitration proceeding); *Switzerland: Statute on International Arbitration*, 27 I.L.M. 37, 40 (1988) (granting parties the power to exclude court intervention in the arbitral proceeding by the contract they sign when entering arbitration). See generally Reisman, *supra* note 56, at 805 (allowing waiver of all recourse in international arbitrations, thereby allowing the arbitrators to decide all aspects without interference of a domestic court).

165. See *MINE*, 24 I.L.M. at 1639 (striking down intervention of U.S. courts in the ICSID arbitral proceeding because the parties signed on the ICSID Convention, granting exclusive jurisdiction to the arbitration panel); *Guinea*, 26 I.L.M. at 387–89 (affirming ICSID sole arbitral control over proceedings within its jurisdiction, unless the parties contract out of this pursuant to the ICSID Rules and Regulations); see also Lamm & Smutney, *supra* note 69, at 11 (establishing that all remedies concerning the arbitration proceeding must be sought before the arbitral panel, and not with a national court, unless the parties have agreed otherwise).

other recourse.”¹⁶⁶ The exclusive nature of ICSID means that if parties wish to retain the possibility of applying to local or judicial authorities to obtain conservatory measures, they must expressly agree.¹⁶⁷ It follows that if they fail to do so, ICSID arbitrators are exclusively competent for ordering provisional measures.¹⁶⁸

However, not all commentators read this article to exclude the provision of court-ordered interim measures at the request of parties to ICSID arbitral proceedings.¹⁶⁹ Van den Berg argues that what is intended is that no court proceedings *on the merits* can take place if ICSID arbitration is agreed to.¹⁷⁰ He argues that a blanket ban on court intervention would render

166. See Delaume, *supra* note 21, at 784–85 (excluding national courts from ICSID arbitration proceedings, a rule which the contracting parties agree to under Article 26 of the ICSID Rules and Regulation); see also Kaufmann-Kohler, *supra* note 120, at 1320 (remarking that de-nationalization of the arbitration proceeding under the ICSID assures parties that their dispute will be fully adjudicated before the arbitration panel and not a foreign national court).

167. See ICSID, *supra* note 1, at art. 26 (binding all parties to the exclusionary rule under Article 26, unless the parties have expressly agreed otherwise); Delaume, *supra* note 76, at 794 (ensuring that consent to ICSID arbitration is exclusive of any other remedy, so long as the parties have not expressly retained the option to seek interim measures in a local court). See generally Dodge, *supra* note 160, at 363 (declaring the only way to bypass Article 26's exclusionary rule is to expressly preserve access to local courts).

168. See *Mar. Int'l Nominees Establishment v. Guinea*, 693 F.2d 1094, 1103 (D.C. Cir. 1982) (stating that ICSID arbitration is the exclusive remedy for resolving disputes unless the parties in dispute express otherwise pursuant to Article 26 of the Convention); Philip D. O'Neill, Jr., *American Legal Developments in Commercial Arbitration Involving Foreign States and State Enterprises*, 47 PRAC. L. INST., 225, 246 (1988) (explaining that provisional remedies are not available both before and after ICSID proceedings begin since consent to ICSID arbitration makes it the exclusive remedy unless the parties expressly provide otherwise); Rubins, *supra* note 9, at 345–46 (explaining that Article 26 of the Convention prohibits parties from requesting support from courts to order conservation of assets and that Article 39(5) was added to the rules specifically to allow interim measures by a court only if parties provided so in their agreement).

169. See *Guinea and Soguipeche v. Atlantic Triton Co.*, 26 I.L.M. 373, 375 (1987) (rejecting the argument that Article 26 expressly excludes the powers of the state court to order conservatory measures, thus showing that the powers of national courts to order provisional measures remain available to ICSID parties in need of conservatory relief); see also *AMCO Asia Corp. et al. v. Indonesia*, 25 I.L.M. 1439, 1453–54 (1986) (recognizing that if the parties reserved under Article 26 of the Convention the right to require prior exhaustion of local remedies as a condition for agreeing to ICSID arbitration, such measure would have been upheld); O'Neill, *supra* note 168, at 327–28 (establishing that the ICSID arbitration rules do not prevent French courts from ordering provisional remedies unless such exclusion was expressly agreed upon by the parties to arbitration).

170. See *Mar. Int'l Nominees Establishment*, 693 F.2d at 1102 (recognizing that the State Department requested that the court should not contemplate the involvement of domestic courts before the final ICSID decision); see also Delaume, *supra* note 21, at 784–85 (stating that a domestic court aware of the fact that a dispute before it may be subject to ICSID proceedings should stay its proceeding until the ICSID has properly determined the issue and preserved the exclusivity of ICSID proceedings); Koa, *supra* note 53, at 467–68 (noting that the decision in *AMCO Asia Corp. v. Indonesia* was clearly a departure from the strongest development of international commercial arbitration because of its review on the merits).

enforcement of an ICSID award impossible, in contradiction to Article 54.¹⁷¹ Furthermore, Van den Berg argues, if the drafters of the ICSID convention wished to exclude conservatory measures by a state court, they would have provided so in unambiguous terms since these measures in aid of arbitration are generally worldwide-recognized measures that can be ordered by the court.¹⁷² Furthermore, it is argued that as Article 47 authorizes the ICSID tribunal only to recommend provisional measures, the power to prescribe provisional measures was left to the national courts.¹⁷³

However, on September 26, 1984, the Administrative Council of ICSID decided to amend the ICSID arbitration rules to effectively prohibit national courts from providing interim relief unless the parties had otherwise agreed.¹⁷⁴ As a result of this amendment, unless a TNC has the foresight, bargaining power or political influence to reach an *ad idem*, it will be

171. See 22 U.S.C. § 1650(a) (declaring that an award of the arbitral tribunal shall be given full faith and credit in the U.S. as if it were a final judgment of a court from one of the several states); *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986) (examining Article 54 of the Convention to illustrate that arbitration awards rendered have binding force that contracting states must abide by); see also *Mar. Int'l Nominees Establishment v. Guinea*, 20 I.L.M. 1436, 1483–84 (1981) (No. 81-1073) (noticing that the ICSID Convention does provide a responsibility for domestic courts in the enforcement of ICSID awards).

172. See ICSID, *supra* note 1, at art. 46(3) (providing that parties to the Convention may request from any competent judicial authority for interim or conservatory measures without having held to have infringed upon the agreement to arbitrate or to affect the powers of the tribunal); Netherlands Arbitration Act, Dec. 1, 1986, art. 1074(2) (stating that an arbitration agreement does not preclude a party from demanding a court in the Netherlands to order interim measures of protection) available at <http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1074> (last visited Mar. 10, 2004); Jacob, *supra* note 124, 154–55 (illustrating through Delaume's argument that the Convention allows conservatory measures by a state court because the drafters of the Convention wished to protect the parties' autonomy to choose their own arbitral process and ensure the finality of awards).

173. The *travaux préparatoires* (TPs) of the Convention reveal that the drafters specifically rejected the language empowering ICSID tribunals to prescribe interim relief. But see Friedland, *supra* note 143, at 161–65 (arguing that Article 47's authorization of mere recommendations as opposed to prescriptions or orders reveals nothing about the intent of the signatories to limit ICSID parties pursuant to Article 26 to those remedies available under the convention).

174. The amendment was a new paragraph 5 to Rule 39 reading:

Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceedings, or during the proceedings, for the preservation of their respective rights and interests.

See ICSID, *supra* note 1, at Rule 39(5) (providing that if parties stipulated in the agreement recording their consent, then they are able to request judicial or any other authority to order provisional measures); *Guinea and Soguipeche*, 24 I.L.M. at 340 (asserting that if parties wished to seek provisional measures from judicial authority, they must do so by express agreement pursuant to the Revised Arbitration Rules adopted on Sept. 26, 1984); see also O'Neill, *supra* note 168, at 246 (stating that unless parties expressly agree otherwise, a consent to ICSID arbitration is the consent to the ICSID remedy exclusive of all other remedies other than the ultimate enforcement of ICSID awards by state courts pursuant to Rule 39(5)).

barred from court-ordered interim measures.¹⁷⁵ Accordingly, action can be commenced only after the award has been rendered and the time period for such national attachment and enforcement proceedings will be added to those of the arbitral proceedings.¹⁷⁶

Having obtained a CM from either the national court or a recommendation from the ICSID tribunal, the application of sovereign immunity may prevent the courts of both the U.S. and the U.K. from enforcing such measures as both the FSIA and the SIA subject CMs to the requirement of an express consent by the state concerned.¹⁷⁷

This requirement has been subject to several criticisms. First, it is unclear why a state party should be treated differently from a private party in this respect.¹⁷⁸ Second, if a state participates in international arbitration it should be deemed to have assumed the same responsibilities

175. See ICSID, *supra* note 1, at art. 42 (providing that the tribunal must apply the law of the contracting state party and rules of international law in the absence of an agreement otherwise between the parties); Guinea and Soguipeche v. Atlantic Triton Co., 24 I.L.M. 340, 344 (1985) (explaining that if local jurisdictions do obtain authority to consider ordering provisional measures in ordinary circumstances, it would restrict the competence of an ICSID tribunal from reaching equitable decisions); Toope, *supra* note 152, at 237–38 (opining that the difficulty in having sufficient foresight, bargaining power, or political capacity to deviate from the ICSID standard will impede parties' willingness to agree to allow applications to municipal courts for protective measures).

176. See ICSID, *supra* note 1, at art. 52 (stating that a party requesting an annulment of the award must make an application within 120 days after the date on which the award was rendered); see also *Compania de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentina* (Decision of Annulment), 41 I.L.M. 1135, 1150 (2003) (reasoning that a party may present its own arguments for annulment as long as they concern specific matters pleaded by the party requesting annulment of the award already rendered by the tribunal); North American Free Trade Agreement, art. 1136, May 1993, 32 I.L.M. 605, 646 (1993) (illustrating that a request for annulment follows the award by the tribunal by setting forth in the agreement that parties may not seek enforcement of the award until 120 days have elapsed without such request from the date the award was rendered).

177. See *Liberian Eastern Timber Corp. (LETICO) v. Liberia*, 26 I.L.M. 695, 695–96 (1987) (recognizing that, absent the exceptions to immunity of foreign states from execution of a judgment entered by a U.S. court, such states normally are entitled to immunity pursuant to Article 55 of the Convention); *ER.G. v. Nat'l Iranian Oil Co.*, 22 I.L.M. 1279, 1301–2 (1983) (providing that the U.S. Foreign Sovereign Immunity Act and the British State Immunity Act allow attachment of property prior to a judgment as a measure to secure satisfaction of a judgment); Anne Joyce, *Arbitration: United States Court Recognition of ICSID Arbitral Awards*, 29 HARV. INT'L L.J. 135, 140–41 (1988) (criticizing the decisions in *LETICO v. Liberia* for being too restrictive and against highly relevant precedent cases in its application of the narrowly construed exception to foreign sovereign immunity).

178. See *SGS Societe Generale de Surveillance S.A. v. Pakistan*, 42 I.L.M. 1290, 1319 (2003) (asserting that Article 11 does not claim that breaches of contract alleged against a state are automatically elevated to the level of breaches of international treaty law); see also *Compania de Aguas del Aconquija, S.A.*, 40 I.L.M. at 439, 443 (rejecting the claimant's argument that a lesser standard of liability of "due diligence" or "good offices" that the Argentine Republic demands only applies if private party actions are involved). *But cf. Lanco Int'l Inc. v. Argentina*, 40 I.L.M. 457, 468 (2001) (maintaining that while investors can choose to submit a dispute to the ICSID from several settlement methods, the states bound by the Argentina-U.S. Treaty must submit to arbitration as selected by the investor).

as a private party.¹⁷⁹ Third, if ICSID arbitrators were to be exclusively competent for ordering provisional measures, the ordering of these measures may prove to be illusory.¹⁸⁰ In short, then, unless the parties have otherwise agreed, a TNC can only have recourse to the ICSID tribunals for recommendations of interim measures.¹⁸¹ A possible justification for this restriction is that such measures can also be viewed as methods to harass states.¹⁸² Nonetheless it may mean that an award in favor of a TNC is a Pyrrhic victory.

6) The Recognition and Enforcement Mechanism

Assuming the TNC has managed to locate Argentina's assets and these assets have not been dissipated, it can only execute against these assets if the award is recognized and the assets are not protected by sovereign immunity from execution.¹⁸³ With regard to recognition, it has

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179. See *Mondev Int'l Ltd. v. United States*, 42 I.L.M. 85, 111 (2003) (explaining that Justice Holmes's "square-corners" rule's proposition makes clear that governments are subject to the same rules and liabilities as private parties in both tax and contract cases); Monroe Leigh, *Arbitration—Contracts—International Shipping—Obligation of Good Faith Performance—Speculativeness of Damages for Future Lost Profits*, 82 AM. J. INT'L L. 598, 599 (1988) (stating that the tribunal's decision in *Mar. Int'l Nominees Establishment v. Guinea* stands for the proposition that both contracting state and individual are held to the same good-faith standard to refrain from hindering the contract). But 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, 19–20, (2001) (criticizing the fact that contracting states and foreign individual parties are not held to the same responsibility in reality because one cannot claim that a private party had violated international laws due to its breach of contract with a state).
180. See ICSID, *supra* note 1, at art. 55 (declaring that enforcement of final tribunal awards are nevertheless subject to immunity laws of the contracting state); see also ICSID, *supra* note 1, at MODEL CLAUSES, Chapter VII, cl. 15 (emphasizing that, although all contracting states must recognize the binding effect of awards rendered, Article 55 of the Convention clearly provides that states do not waive their immunity from execution of awards by becoming party to the convention unless expressly stipulated as to waive immunity); Delaume, *supra* note 21, at 789 (noting that in the case of *MINE v. Guinea*, the Court of Appeals for the District of Columbia Circuit reversed the district court's decision only to the extent that Guinea was entitled to immunity from suit because a mere consent to ICSID arbitration was not a waiver of sovereign immunity).
181. See ICSID, *supra* note 1, at art. 47, 55 (stating that the tribunal may make recommendations of provisional measures if it considered it necessary to preserve the respective rights of the parties, unless agreed otherwise); *Compania del Desarrollo de Santa Elena S.A. v. Costa Rica*, 39 I.L.M. 1317, 1324 (2000) (illustrating that ICSID tribunals can only make recommendations by providing that the ultimate relief requested by respondent was a recommendation for provisional measures pursuant to Article 47 of the ICSID Convention).
182. See George R. Delaume, *De l'efficacite des Sentences Transnationales Interessant un etat; Une Ponderation s'impose*, in ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 469, 473 (Bâle, Helbing & Lichtenhahn, eds. 1993) (criticizing the award creditor *Liamco* in a non-ICSID case for taking steps necessary to enforce the awards because of its potential pretext for abuses such as the attachments practiced in France following the *Liamco* award); Jacob, *supra* note 124, at 146–47 (criticizing the ICSID's annulment procedure for its lack of finality and its repeating cycle of rendering awards and annulments as evidenced in recent annulment processes); see also Nmehielle, *supra* note 10, at 30–31 (illustrating the difficulty of enforcing awards because of the problem of immunity laws of the contracting state).
183. See ICSID, *supra* note 1, at art. 55 (stating that nothing in the ICSID treaty "shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution"); Jeffery Snyder, *Proceedings of the Eighth Annual Conference on Legal Aspects of Doing Business in Latin America: Developing Strategies, Alliances, and Markets*, 10 FLA. J. INT'L L. 1, 109 (1995) (recommending that parties involved in a dispute before the ICSID ensure that government entities waive sovereign immunity); see also Park, *supra* note 128, at 1068 (noting that sovereign immunity hinders investor confidence with regard to international business).

been noted that the Convention provides for automatic recognition.¹⁸⁴ However, this obligation has not been correctly implemented in national law, at least in the U.S.¹⁸⁵ Also, even where national authorities have an obligation to automatically recognize, in practice they have not adhered to this: national courts in the U.S. at least have attempted to see whether the award complied with national laws rather than automatically recognizing the award.¹⁸⁶

7) State Immunity from Execution

a) Introduction

Article 55 (a specification of Article 54(3) stating that execution of an award is subject to national law of the forum state) preserves sovereign immunity from execution.¹⁸⁷ In accordance with Article 54(1), sovereign immunity will apply to the execution of an ICSID award in the same way as it would apply to the execution of a judgment of a domestic court. In the U.K. this law is the Sovereign Immunities Act 1977 (SIA).¹⁸⁸ In the U.S., the law on sovereign immunity offers separate rules on the execution of arbitral awards. Thus, in the case of ICSID awards, the law in force on immunity from execution of domestic judgments as well as of arbitral awards is

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184. See ICSID, *supra* note 1, at art. 53(1) (stating that “award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”); Caron, *supra* note 141, at 113 (noting that while ICSID awards are recognized through the ICSID process, they are enforced in the national courts of the state party); Delaume, *supra* note 21, at 791 (noting that state abstention from ICSID arbitration does not preclude award recognition).
185. See Broches, *supra* note 39, at 331 (noting that historically U.S. courts have not followed the ICSID principle of automatic recognition). See generally Delaume, *supra* note 17, at 486 (noting that the U.S. courts consider issues with regard to award recognition); Georges Delaume, *Decisions of Regional and Foreign Courts: France—Recognition of ICSID Awards—Sovereign Immunity*, 86 AM. J. INT’L. L. 138, 138 (1992) (stating that contracting countries cannot deny ICSID award recognition).
186. See *Liberian Eastern Timber Corp (LETICO) v. Government of the Republic of Liberia*, 650 F Supp. 73, 74–75 (S.D.N.Y. 1986) (finding that Liberia had waived its sovereign immunity from jurisdiction by entering into a concession contract with LETICO and, in doing so, establishing that the court was not recognizing the ICSID award automatically). See generally Delaume, *supra* note 17, at 138, 140 (stating that contracting countries cannot deny ICSID award recognition and discussing a French court’s decision to rely on municipal law to allow the recognition of the ICSID award, instead of acknowledging that Articles 53 and 54 constitute an autonomous regime for recognition and enforcement).
187. See ICSID, *supra* note 1, at art. 55 (stating that nothing in the ICSID treaty “shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”); Greenfield & Rooney, *supra* note 1, at 378 (recognizing that sovereign immunity often overrides the decisions of international dispute resolution bodies). But see Delaume, *supra* note 17, at 486 (stating that courts have allowed diplomatic considerations to interfere with sovereign immunity).
188. See ICSID, *supra* note 1, at art. 54(1) (1966) (stating that “a contracting state with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state”); Daniel J. Michalchuck, *Filling a Legal Vacuum: The Form and Content of Russia’s Future State Immunity Law—Suggestions for Legal Reform*, 32 LAW AND POL’Y. INT’L BUS. 487, 501–2 (2001) (recognizing that the United Kingdom has adopted the theory of restrictive immunity); Caron, *supra* note 141, at 191 (providing a brief discussion of the U.K.’s Sovereign Immunity Act).

applicable, both of which are contained in the Foreign Sovereign Immunities Act 1976 (FSIA).¹⁸⁹

With respect to forced execution, most states continue to apply absolute immunity: there can be no execution against any assets of foreign states.¹⁹⁰ This is in line with the view that it is generally accepted that states do not take coercive action against each other or their property.¹⁹¹ For a TNC this means that after putting all efforts in arbitration against a state, and having won, it cannot collect the money it is entitled to under the award, which often amounts to millions of dollars.¹⁹² Until the late '70s, the U.S. and U.K. clung to the doctrine of absolute immunity,¹⁹³ whereupon they switched—first the U.S., then the U.K.—to the doctrine of restrictive immunity.¹⁹⁴ That is, while generally a TNC cannot forcibly execute its judgment against the property of a state, there are exceptions to this general rule.¹⁹⁵

189. See FSIA, 28 U.S.C. § 1610(a) (listing the FSIA exclusions); Leslie McKay, *A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya*, 13 AM. U. INT'L. L. REV. 439, 445–46 (1997) (noting that the United States has embraced the doctrine of restrictive immunity); Lee Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L. L. 741, 755–56 (2003) (noting that the United States abrogates immunity only upon application of one of the FSIA exceptions).

190. See ICSID, *supra* note 1, at art. 55 (stating that nothing in the ICSID treaty “shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”). But see James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L. L. 820, 838 (1981) (noting that in 1981 almost no European state clearly adhered to absolute immunity from execution); Delaume, *supra* note 17, at 486 (stating that courts have allowed diplomatic considerations to interfere with sovereign immunity).

191. See Caplan, *supra* note 189, at 755–56 (noting that the United States abrogates foreign immunity only upon application of one of the FSIA exceptions); see also Park, *supra* note 128, at 1068 (noting that sovereign immunity hinders investor confidence with regard to international business). But see Snyder, *supra* note 183, at 109 (recommending that parties involved in a dispute before the ICSID ensure that government entities waive sovereign immunity).

192. See Park, *supra* note 128, at 1068 (noting that sovereign immunity hinders investor confidence with regard to international business). But see Snyder, *supra* note 183, at 109 (recommending that parties involved in a dispute before the ICSID ensure that government entities waive sovereign immunity); Caplan, *supra* note 189, at 755–56 (noting that the United States abrogates immunity only upon application of one of the FSIA exceptions).

193. See *Dexter & Carpenter v. Kunglis Jarnvagtssrtyelsen* 43 E.2d 705, 710 (2d Cir. 1930) (adopting the position that property from a foreign state was free from execution); August Reinisch, *Domestic Courts and International Organizations*, AM. SOC'Y INT'L L. NEWSLETTER (1996) (noting that nations have abandoned the doctrine of absolute immunity). But see Delaume, *supra* note 17, at 485 (stating that before the United States agrees to an ICSID award it first looks to relevant provisions of the Foreign Sovereign Immunities Act).

194. See Caplan, *supra* note 189, at 744 (providing a general discussion of the doctrine of restrictive immunity); McKay, *supra* note 189, at 445–46 (noting that the United States has embraced the doctrine of restrictive immunity); Michalchuck, *supra* note 188, at 501–2 (recognizing that the United Kingdom has adopted the theory of restrictive immunity).

195. See Caplan, *supra* note 189, at 744 (providing a general discussion of the doctrine of restrictive immunity); Maria Gavouneli, *International Decision: Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000, 95 AM. J. INT'L. L. 198 (2001) (recognizing that the doctrine of restrictive immunity has “excluded commercial or other transactions from immunity for some time”); FSIA, 28 U.S.C. § 1610(a) (2004) (stating that the property subject to the FSIA must be for commercial use).

b) Doctrine of Restrictive Immunity

As a general note, in forums where states' immunity is restricted, the question that arises is: On what basis is immunity from execution restricted? Is it on the nature of the assets or their purpose?

i) Tests applied in the U.S. and U.K.

A two-tiered test is applied in the U.S.: For a TNC to be able to execute the award the threshold requirement is that the property must be for a commercial use.¹⁹⁶ Once the commercial use of the property has been established, the grounds for exceptions must be met.¹⁹⁷ The most important of these are the following: the state has waived immunity from execution;¹⁹⁸ the property to be attached is or was used for the commercial activity upon which the claim is based;¹⁹⁹ and the judgment is based on an order confirming an arbitral award rendered against a foreign state.²⁰⁰ To undertake forced execution in the U.K., the TNC may have an easier time, as all it must show is that the property is for the time being used for, or intended for use for, a commercial purpose.²⁰¹

196. See FSIA, 28 U.S.C. § 1610(a) (stating that the property subject to the FSIA must be for commercial use); see also McKay, *supra* note 189, at 445–46 (noting that the United States has embraced the doctrine of restrictive immunity); Caplan, *supra* note 189, at 744 (providing a general discussion of the doctrine of restrictive immunity).

197. See FSIA, 28 U.S.C. § 1610(a) (listing the FSIA exclusions); Gavouneli, *supra* note 195, at 198 (recognizing that the doctrine of restrictive immunity has “excluded commercial or other transactions from immunity for some time”); Caplan, *supra* note 189, at 755–56 (noting that the United States abrogates immunity only upon application of one of the FSIA exceptions).

198. See FSIA, 28 U.S.C.S. § 1610(a)(1) (stating that property of a foreign state within the United States will not be immune from attachment if such state has waived its immunity). See generally Delaume, *supra* note 17, at 140 (showing the application of the foreign sovereign immunity to the execution of a judgment in the *SOABI* case); Georges R. Delaume, *Sovereign Immunity—Arbitration—Agreement to Arbitrate Not Contemplating Role for U.S. Courts Held Not to Waive Immunity*, 77 AM. J. INT’L L. 318, 319 (1983) (outlining the ways in which a foreign state can waive its immunity from execution of a judgment under the Foreign Sovereign Immunities Act).

199. See FSIA, 28 U.S.C.S. § 1610(a)(2) (withdrawing immunity from foreign property located in the United States that was used for commercial activity). See generally Delaume, *supra* note 21, at 798 (indicating that courts will vacate an attachment of property if immunity has not been waived and the property or funds were not used for commercial purposes); Nmehielle, *supra* note 10, at 34 (demonstrating that foreign courts will also not apply sovereign immunity when the property or funds to be attached were used for commercial purposes).

200. See FSIA, 28 U.S.C.S. § 1610(a)(3) (providing that property which has been the subject of a judgment regarding violations of international law will not be immune from attachment). See generally Acqua & Lamm, *supra* note 51, at 738 (commenting that U.S. courts are often asked to confirm awards in international disputes arising from arbitration); Nmehielle, *supra* note 10, at 22 (suggesting that domestic law often resolves issues regarding the enforcement of arbitral and ICSID awards).

201. See State Immunity Act, 1978, c. 33, § 13(4) (Eng.), 17 I.L.M. 1123 (indicating that in the context of state immunity from jurisdiction, a test that looks to the nature of the activity and not to the purpose is used). See generally Timothy B. Atkeson & Stephen D. Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act*, 79 AM. J. INT’L L. 770, 775 (1985) (outlining an approach similar to the U.K.’s that U.S. courts use to determine whether there is foreign sovereign immunity); Crawford, *supra* note 190, at 833 (comparing the approaches taken by the U.K. in the Sovereign Immunities Act and the U.S. in the Foreign Sovereign Immunities Act).

ii) Difficulty in distinguishing commercial from official property

Whether executing in the U.S. or the U.K., a TNC will have difficulty in distinguishing commercial from non-commercial property, especially if the property is not clearly designated.²⁰²

The U.K. approach to resolve this is to give the head of the affected state's diplomatic mission the definitive power to determine the use (unless proof is given to the contrary), and to issue a certificate accordingly.²⁰³ This may mean that debtor states will shelter bank accounts from immunity by claiming they are for diplomatic purposes.²⁰⁴

In the U.S., the court has the final say on whether the property is used for official purposes or not.²⁰⁵ This can lead to real problems as illustrated by an unsuccessful attempt that a TNC, LETCO, made to execute its ICSID award against the property of the state of Liberia in New York.²⁰⁶ It located state property in the form of Liberian registration fees and other taxes

202. See M.P.A. Kindall, Comment, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft*, 75 CAL. L. REV. 1849, 1865 (1987) (noting that it is difficult to clearly distinguish commercial property from other types of property). See generally Delaume, *supra* note 17, at 487 (suggesting that a waiver of immunity should not be limited to commercial property); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 183 (1999) (outlining the distinctions among the types of property discussed in the Foreign Sovereign Immunities Act).

203. See State Immunity Act, 1978, c. 33, § 13(5) (Eng.), 17 I.L.M. 1123 (indicating that it is the "head of a State's diplomatic mission" that has the authority to issue a certificate that indicates the use of the property). See generally Delaume, *supra* note 13, at 320 (suggesting that in the U.K., the SIA attempts to provide clear definitions of the types of property in order to guide determinations of immunity); John M. Rogers, Book Review, 87 AM. J. INT'L L. 365, 367 (1993) (reviewing Michael Wallace Gordon, *FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS* (1991)) (noting that the State Immunity Act of the U.K. statute covers heads of state, whereas the Foreign Sovereign Immunities Act of the U.S. does not).

204. See Schreuer, *supra* note 25, at 1147. See generally Monroe Leigh, *Sovereign Immunity—United Kingdom Act—Garnishment of Embassy Bank Account—Definition of "Commercial Purposes"*, 79 AM. J. INT'L L. 143, 145 (1985) (suggesting that embassy bank accounts appear to have blanket immunity under U.K. laws); Kindall, *supra* note 202, at 1870 (showing that international laws prevent states from seizing bank accounts that are used as a part of a diplomatic mission).

205. See Barry L. McCoy, Note, *Broadening the Scope of the Foreign Sovereign Immunities Act: The Explicit Waiver Provision and Limited Foreign Submissions to Domestic Litigation in Aquamar S.A. v. Del Monte Fresh Produce, Inc.*, 45 VILL. L. REV. 319, 324 (2000) (asserting that the FSIA leaves courts with the discretion to determine whether there has been a waiver of immunity). See generally Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT'L L. REV. 445, 446 (1999) (suggesting that courts have been left to deal with issues that arise under the FSIA); William F. Webster, Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1109 (1988) (stressing that Congress intended to give discretion to the judiciary rather than the legislature in making determinations of sovereign immunity under the FSIA).

206. See *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 74 (S.D.N.Y. 1986) (noting that the government of Liberia sought to have a judgment against it vacated) (hereinafter "*LETCO I*"). See generally Alford, *supra* note 61, at 689 (illustrating that the company LETCO was unsuccessful in having a judgment executed against Liberia because Liberia had not waived its immunity); Nmeihelle, *supra* note 10, at 33 (detailing the unsuccessful litigation brought by LETCO against the Liberian government).

due by ship owners and levied by agents.²⁰⁷ The TNC argued that these fees arose from commercial activities and therefore were not immune from either execution or attachment under the FSIA.²⁰⁸ The state counter-argued that the property was Liberian tax revenue and therefore should be viewed as arising from sovereign activities.²⁰⁹ The court agreed with the state, rejecting LETCO's contention as too fine a distinction²¹⁰ that 27 percent of the fees retained by the U.S. collection agency were used for a commercial activity within the scope of the FSIA exception.

iii) Specially protected property

Under both the FSIA and the SIA, certain types of property are regarded as being particularly sensitive for international relations of states.²¹¹ These include diplomatic property,²¹² mil-

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207. See *LETCO I*, 650 F. Supp. at 77 (pointing out that the funds in question were ship owner tonnage fees, registration fees and other taxes due to the government of Liberia). See generally Delaume, *supra* note 17, at 141 (referring to certain fees and taxes collected by Liberia that were the subject of the immunity dispute); Nmehielle, *supra* note 10, at 33 (listing the property that LETCO sought to execute in a judgment against Liberia).
 208. See *LETCO I*, 650 F. Supp. at 77 (holding that the taxes were immune from execution because the property was not used in commercial activity); see also Nmehielle, *supra* note 10, at 33 (outlining LETCO's argument that the fees had arisen from commercial activity). See generally Alford, *supra* note 61, at 689 (stating that Liberia denied that the fees arose from commercial activity).
 209. See *LETCO I*, 650 F. Supp. at 77 (addressing Liberia's argument that it was immune from execution of the judgment because the tax revenues were sovereign rather than commercial in nature); see also Delaume, *supra* note 17, at 141 (referring to Liberia's argument that the assets were sovereign and not commercial and should therefore be immune from attachment); Nmehielle, *supra* note 10, at 33 (detailing Liberia's argument that the tax revenue was sovereign in nature).
 210. See *LETCO I*, 650 F. Supp. at 77 (rejecting the argument that the 27 percent of fees retained by the United States should be considered commercial activity). See generally Delaume, *supra* note 17, at 486 (detailing the scope of the FSIA exceptions); Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257, 259 (1994) (advocating a narrow definition of sovereign immunity that was set forth by the court in the *LETCO* case).
 211. See FSIA, 28 U.S.C.S. § 1611 (listing the types of property of a foreign state that shall be immune from attachment and execution). See generally Delaume, *supra* note 17, at 141 (addressing the difficulty courts have in determining whether some types of property, such as collected taxes, are immune); Kindall, *supra* note 202, at 1870 (discussing the fact that embassy bank accounts are a common source of international disputes regarding immunity).
 212. Diplomatic property is protected by the Vienna Convention on Diplomatic Relations 1961, under which the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from attachment or execution. See Ethan J. Early, Note, *Flatow v. Islamic Republic of Iran and the Foreign Sovereignty Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203, 231 (1999) (noting that attachment of diplomatic properties would be against the FSIA and would harm foreign policy interests); see also Jonathan Fischbach, Note, *The Empty Pot at the End of the Rainbow: Confronting "Hollow Rights Legislation" After Flatow*, 87 CORNELL L. REV. 1001, 1011 (2002) (observing the difficulty of finding circumstances under which a plaintiff could successfully attach diplomatic property).

itary property,²¹³ and to a lesser extent property held by central banks.²¹⁴ Accordingly, they are given special protection and therefore in no circumstance can a TNC attach them.²¹⁵

Embassy accounts: The Vienna Convention is silent on bank accounts kept by a diplomatic mission.²¹⁶ However, it does require the host state to accord each foreign state "full facilities for the performance of the functions of the state's mission."²¹⁷ In light of this, the U.S. and U.K. courts have treated embassy accounts with much caution.²¹⁸

In the U.K., in *Alcom*, the TNC, having obtained a judgment by default against the Republic of Colombia, sought execution against the Colombian embassy's accounts in London.²¹⁹ The House of Lords held that the attachment can be made if it can be shown that the funds in the account are earmarked solely for the discharge of liability under commercial trans-

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213. See FSIA, 28 U.S.C.S. § 1611(b)(2) (granting immunity from execution for all property connected *in lato sensu* with military activities); State Immunity Act, 1978, c. 33, § 16(2) (Eng.), 17 I.L.M. 1123 (1978); Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 39–40 (2002) (discussing the exemptions of certain military properties from execution under the FSIA).
 214. See FSIA, 28 U.S.C.S. § 1611(b)(2) (granting immunity from attachment and execution rights to property belonging to a foreign central bank or monetary authority held for its own account); State Immunity Act, 1978, c. 33, § 14(4) (Eng.), 17 I.L.M. 1123 (1978) (providing to the same effect); Delaume, *supra* note 210, at 257 (stating that although debatable, central banks are immune to execution based on the FSIA).
 215. See FSIA, 28 U.S.C.S. § 1611 (listing the types of property immune from execution); see also Kindall, *supra* note 202, at 1869 (discussing the exemptions of military, diplomatic and central bank properties from attachment and execution). See generally Heiser, *supra* note 213, at 39–40 (discussing the exemptions of certain military properties and currency reserves from execution under the FSIA).
 216. See *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) (noting the silence of the Vienna Convention on the issue of attachment of bank accounts used by diplomatic missions) (hereinafter "*LETCO II*"); see also *United States v. Kostadinov*, 734 F.2d 905, 906–7 (2d Cir. 1984) (stating that the Vienna Convention does not expressly define the term diplomatic mission for the purposes of diplomatic immunity). See generally Delaume, *supra* note 210, at 257 (discussing the vague definition of diplomatic immunity in the Vienna Convention).
 217. See Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, 1961, art. 25, 23 U.S.T. 3227, 3238 (stating that the host state must provide full facilities for the performance of the functions of the mission); see also *LETCO II*, 659 F. Supp. at 608 (stating that the Liberian Embassy lacked the "full facilities" that the U.S. government agreed to accord). See generally Stephen C. McCaffrey, *The Thirty-Sixth Session of the International Law Commission*, 79 AM. J. INT'L L. 755, 760 (1985) (discussing the obligation of the host state to provide full facilities for the guest state to enable it to perform the functions of its mission).
 218. See Marian Nash Leich, *U.S. Practice*, 81 AM. J. INT'L L. 641, 642–43 (1987) (discussing the United States' caution when dealing with foreign bank accounts). See generally Virginia Morris & M. Christiane Bourloyannis, *The Work of the Sixth Committee at the Forty-Seventh Session of the UN General Assembly*, 87 AM. J. INT'L L. 306, 321 (1993) (noting that the U.S. government unblocked certain Iraqi bank accounts located in the U.S. after there were Iraqi complaints that these accounts were for diplomatic mission purposes).
 219. See *Alcom Ltd. v. The Republic of Colombia*, House of Lords (Court of Appeal 1984) AC 580 (arguing on appeal that attachment of the Colombian bank accounts should be allowed) (hereinafter "*Alcom*"). See generally Goldner, *supra* note 108, at 169 (discussing the outcome in the *Alcom* case, and the difficulty of applying the doctrine of restricted immunity); Leigh, *supra* note 204, at 143–44 (stating that the Republic of Colombia sought review of a decision by the Court of Appeal in England that granted garnishee orders in favor of *Alcom*, Ltd.).

actions.²²⁰ This will not be easy to prove when the ambassador's certificate was held to constitute conclusive evidence on this question.

In the U.S. in *LETCO*, the TNC attempted execution on bank accounts held by the Liberian Embassy.²²¹ Specifically, the plaintiff sought to seize any credits other than wages, commissions or pensions of the defendant that it used for commercial activities.²²² The U.S. District Court for the District of Columbia rejected the attempt to seize Liberia's bank accounts.²²³ It based its decision on the fact that Liberia's bank accounts were immune from attachment on two grounds: first, in light of its obligation under Article 25 of the Vienna Convention, which provides in general terms "the receiving state shall accord full facilities for the performance of the functions of the mission."²²⁴ In the court's view, full facilities included the bank accounts which required full protection so that the embassy could function efficiently.²²⁵ The second ground for immunity was based on the FSIA.²²⁶ The court held that the accounts

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220. See *Alcom*, AC 580 (holding that the attachment of funds can only be made if the funds in the account are earmarked solely for the discharge of liability under commercial transactions); Leigh, *supra* note 204, at 143–44 (noting that the court in *Alcom* held that absent an earmarked intention for the account to be used solely for commercial purposes, the account would be immune from garnishment). See generally Hans-Ernst Folz, Book Review, 79 AM. J. INT'L. L. 796, 798 (1985) (reviewing Ulrich von Schonfeld, DIE STAATENIMMUNITÄT IM AMERIKANISCHEN UND ENGLISCHEN RECHT (1983)) (discussing whether measures of execution may be taken against property with mixed purposes).
 221. See *LETCO II*, 659 F. Supp. at 608 (appealing for relief from orders attaching bank accounts of the embassy of the Republic of Liberia based on suit brought by LETCO); 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, 19 (2000) (stating that a Liberian-incorporated company, owned by French nationals, filed claim against the Liberian government for an alleged breach of a concession agreement); Nmehielle, *supra* note 10, at 31 (noting that the United States District Court for the Southern District of New York recognized for the first time in *LETCO v. Liberia* an arbitral award rendered against Liberia by the ICSID).
 222. See *LETCO II*, 659 F. Supp. at 607 (stating that the court issued writs of attachment to notify banks that the writs seized any credits other than wages, salaries, commissions or pensions of the defendant); see also Nmehielle, *supra* note 10, at 33 (noting that the attempt by LETCO to attach credits other than wages, salaries, commissions or pensions was quashed by the District Court for the District of Columbia).
 223. See *LETCO II*, 659 F. Supp. at 607 (stating that bank accounts off the premises of the mission did not fall within the meaning of the full facilities requirement); Nmehielle, *supra* note 10, at 33 (noting that the United States District Court agreed with Liberia and rejected the attachments sought by LETCO).
 224. See *LETCO II*, 659 F. Supp. at 607 (stating that the Vienna Convention provides that full facilities must be provided by the receiving state for the performance of the functions of the mission); Vienna Convention, 23 U.S.T. 3227, 3238, art. 25 (1961) ("The receiving State shall accord full facilities for the performance of the functions of the mission."); see also Nmehielle, *supra* note 10, at 33 (noting the requirement that the host state provide full facilities in accordance with performance of the functions of the mission).
 225. See *LETCO II*, 659 F. Supp. at 608 (stating the high inconvenience of excluding bank accounts off the premises of the mission, and therefore leading to the conclusion that bank accounts require protection in order that the embassy be able to function properly); see also Nmehielle, *supra* note 10, at 33–34 (noting that the court in *LETCO* held that the bank accounts were immune from attachment by LETCO).
 226. See *LETCO II*, 659 F. Supp. at 609–10 (employing the two-step analysis provided in the FSIA to determine whether immunity exists). See generally FSIA, 28 U.S.C.S § 1610 (providing the exceptions to immunity from attachment or execution for property used for a commercial activity); *Birch v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311, 311–12 (D.D.C. 1980) (setting forth the two-step inquiry to determine if the exception to immunity under the FSIA applies).

did not qualify as property in use for commercial activity since the bank accounts were utilized to perform Liberia's diplomatic and consular functions and were therefore of a public or governmental nature.²²⁷ The court also rejected the idea of separating commercial from public funds for the purposes of execution.²²⁸ The court presumes that some portion of the funds in the bank accounts may be used for commercial activities in connection with running the embassy and declined to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity.²²⁹

c) Conclusions

While the obligation to recognize the award is unconditional²³⁰ and cannot be thwarted by the doctrine of state immunity,²³¹ the obligation to execute is limited by national law of the state in which execution is sought.²³² When executing against the property of Argentina in the U.K. and U.S., a TNC will be faced with a number of hurdles. The property must be used for

227. See *LETCO II*, 659 F. Supp. 606, 610 (D.D.C. 1987) (finding that the essential character of the activity for which the funds were used was of a governmental nature). See generally *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 920 (D.C. Cir. 1987) (determining the commercial character of an activity by looking at the nature of the course of conduct, rather than its asserted purpose); *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981) (asserting the rule that if the activity is one in which a private person could engage, it is not entitled to immunity).

228. See *LETCO II*, 659 F. Supp. at 610 (declining to treat funds used for commercial activity in a mixed account separately); see also Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 387 (2003) (characterizing the decision in *LETCO* not to segregate funds as an accommodating approach to mixed-purpose accounts). But see *Weston Compagnie de Finance et D'Investissement v. Republic of Ecuador*, 823 F. Supp. 1106, 1114 (S.D.N.Y. 1993) (finding that a better approach to a mixed-account situation is to apply the distinction between commercial and public funds, rather than to find the account entirely immune or entirely not immune).

229. See *LETCO II*, 659 F. Supp. at 610 (stating the court's presumption that some portion of the funds in the bank accounts may be used for commercial activities); see also Delaume, *supra* note 210, at 267 (noting that in *LETCO*, the court held that the fact that some of the funds in the account were used for commercial purposes would not cause the entire bank account to lose its sovereign immunity); Keith Highet et al., *Sovereign Immunity—Central Banks—Waiver of Immunity from Prejudgment Attachment—U.S. Foreign Sovereign Immunities Act*, 88 AM. J. INT'L L. 340, 341 (1994) (stating that the court in *LETCO* did not believe that the fact that some of the funds would incidentally be used for commercial purposes caused the entire bank account to lose its status of sovereign immunity).

230. See ICSID, *supra* note 1, at art. 54(1) (providing the obligation of contracting states to recognize ICSID awards); see also Delaume, *supra* note 17, at 139 (describing the mandatory recognition of ICSID awards under the Convention). See generally Delaume, *supra* note 17, at 485 (describing the effect of ICSID mandatory recognition on investors).

231. See Schreuer, *supra* note 25; Delaume, *supra* note 21, at 801 (stating that if a state pleads immunity in order to frustrate the enforcement of an ICSID award, that state will be in violation of its obligations under the treaty); see also Delaume, *supra* note 76, at 815–17 (indicating that issues of sovereign immunity in executing the award will be resolved only after proper recognition of the award).

232. See ICSID, *supra* note 1, at art. 54(3), 55 (providing that execution of an award is governed by the laws of the state where execution is sought and stating that “[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”); see also Greenfield & Rooney, *supra* note 1, at 383–84 (noting that signatory states have bound themselves to ICSID awards only to the extent that they are bound to the decisions of national courts).

commercial as opposed to official use.²³³ As has been demonstrated from the case of *Alcom* and *LETSCO*, difficulty may be encountered in persuading the national courts that the property is intended for such use. That said, under these laws, there are certain hurdles that do not need to be straddled.

1) Link Between Property and Claim

Some national laws require a specific link between the underlying claim and the property that is subject to execution.²³⁴ It is difficult to establish this link, as it is unlikely that a host state will keep commercial assets in another country which is directly connected to an investment in its territory. In addition, it will usually be doubtful whether the host state's underlying activity was commercial.²³⁵ The host state's actions vis-à-vis the investor that led to the dispute are more likely to be official than commercial.²³⁶

2) Sufficient Nexus of the Legal Relationship at Stake with the State of Enforcement

Some countries, such as Switzerland, require a significant connection with the legal relationship upon which the award was rendered, and the Swiss territory, before the court will

233. See FSIA, 28 U.S.C.S § 1610 (providing the exception to immunity from attachment for commercial activity); see also Andrew N. Vollmer et al., *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 551–52 (2002) (describing the necessary requirements to establish the commercial activity exception from immunity). See generally Jeffery Jacobson, *Trying to Fit a Square Peg into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19 WHITTIER L. REV. 757, 797 (1998) (explaining the primary circumstances under which the property of a foreign state is not immune from attachment or execution).

234. See FSIA, 28 U.S.C.S § 1610(a)(6) (stating that it used to be that in order to execute an ICSID award, in addition to showing that the property is used for commercial activity in the United States, it must also be used for commercial activity upon which the claim is based; however, recent amendments regarding the execution of arbitral awards means that the sole criteria is that the assets are for commercial use; also, a 1988 amendment to the FSIA provided for non-immunity for commercial assets of a foreign state if a judgment based on an order confirming the arbitral award rendered against the foreign state provided that attachment in aid of execution would not be inconsistent with any provisions in the arbitral agreement); Nmehielle, *supra* note 10, at 38 (noting that the amendment to section 1610 of the FSIA has effectively eliminated the sovereign immunity defense in arbitration agreements). See generally Delaume, *supra* note 13, at 323 (asserting that the German Federal Constitutional Court found that the link required by section 1610(a)(2) of the FSIA between the property that was subject to execution and the commercial activity upon which the claim was based had no counterpart in other immunity statutes).

235. See Schreuer, *supra* note 25, at 128; Joseph W. Dellapenna, *25th Anniversary of the Foreign Sovereign Immunities Act: Refining the Foreign Sovereign Immunities Act*, 9 WILLIAMETTE J. INT'L & DISP. RES. 57, 149–50 (2001) (noting the difficulties in demonstrating that foreign property had been used for commercial activity); see also Atkeson & Ramsey, *supra* note 201, at 775 (stating that section 1006(a)(3) is rarely invoked by U.S. litigants because expropriating governments have been cautious about marketing such property in the U.S.).

236. See Int'l Ass'n of Machinists v. OPEC, 477 F. Supp 553, 568 (C.D. Cal. 1979) (finding crude oil price-fixing in contracts to be governmental in nature under a narrow interpretation of the term "commercial activity"); see also Saudi Arabia v. Scott Nelson, 507 U.S. 349, 360–61 (1993) (holding that Saudi Arabia's conduct with respect to its police activity was official, rather than commercial). See generally M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: the Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 106–08 (1999) (examining the narrow judicial interpretation of the commercial activity exception).

assume jurisdiction in cases involving arbitration.²³⁷ Such a requirement considerably widens the scope of the discretion left to the judiciary.²³⁸

3) Act of State Doctrine

The Act of State Doctrine constitutes another potential obstacle to the execution of arbitral awards against foreign states.²³⁹ While it used to be a defense to enforcement in the U.S.,²⁴⁰ legislation passed together with the 1988 amendment to the FSIA specifically excludes the applicability of the Act of State Doctrine from execution upon judgments based on orders confirming arbitral awards.²⁴¹

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237. See, e.g., *SA Sogerfin v. Yugoslavia* (1938), 61 *Semaine Judiciaire* 327 (1939); Crawford, *supra* note 190, at 836–37 (analyzing the Swiss doctrine for allowing the attachment of assets of a foreign state). *But see* Court Decisions in the United Kingdom, *The Federal Republic of Germany and the United States in Cases Involving Claims Against Nigeria and the Central Bank of Nigeria (Sovereign Immunity)*, 16 *I.L.M.* 469, 503 (1977) (providing the German court's finding that jurisdiction is not limited to claims which have a connection with Germany).
238. See Georgio Bernini & Albert J. Van Den Berg, *The Enforcement of Arbitral Awards Against a State: The Problem of Immunity From Execution*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 359 (Lew, J., ed. 1987). See generally Kenton Keller Pettit, *The Waiver of Tribunal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 *ALASKA L. REV.* 363, 386–89 (examining different interpretations that courts have employed in determining whether to grant jurisdiction in cases involving arbitration); Caplan, *supra* note 189, at 764 (describing the effects of consent to arbitration on the issue of state immunity and maintaining that jurisdiction will still be left to principles of international law).
239. See David J. Bederman, *Problems of Proving International Human Rights Law in the U.S. Courts: Dead Man's Hand: Reshuffling Foreign Immunities in U.S. Human Rights Litigation*, 25 *GA. J. INT'L & COMP. L.* 255, 264 (1995) (arguing that if an act is characterized as official or public, the Act of State Doctrine might be available to block consideration of the case); see also David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 *COLUM. L. REV.* 1440, 1445–49 (1983) (asserting that the Act of State Doctrine allows a court to refuse to hear a case that would require it to pass upon the validity of a foreign state's sovereign act); Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 *ADMIN. L.J.* 515, 572 (1995) (arguing that the Act of State Doctrine, taken together with sovereign immunity, make it unlikely that any other remedy will be available to individual claimants).
240. See *United States District Court for the District of Columbia*, Jan. 1980, reported in 1981 *VI Y.B. COMM. ARB.* 248 (referring to the District Court's refusal to enforce an award against Libya on the grounds of the Act of State Doctrine; however, that this reasoning was subsequently attacked in the amicus curiae briefs to the Court of Appeals, filed by the American Arbitration Association and others). See generally Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 *INT'L LAW.* 1289, 1289 (1986) (referring to section 2 of H.R. 3137's proposal to add an amendment to the FSIA); Monroe Leigh, Sabbatino's *Silver Anniversary and the RESTATEMENT: No Cause for Celebration*, 24 *INT'L LAW.* 1, 1 (1990) (addressing the RESTATEMENT's revision as a necessary remedy to the confusion associated with foreign state enforcement of arbitral awards).
241. See Title Nine Arbitration, 9 U.S.C. § 15 (announcing that "Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."); *United States: Amendments to the Foreign Sovereign Immunities Act*, 28 *I.L.M.* 396, 398 (1989) (providing the 1988 amendment to the FSIA rendering the Act of State Doctrine inapplicable against foreign arbitral awards). See generally Brice M. Clagett, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Title III of the Helms-Burton Act Is Consistent with International Law*, 90 *AM. J. INT'L L.* 434, 440 (1996) (expressing criticism of the Act of State Doctrine and how it has hindered U.S. relations in international law).

4) Intervention of Political and Administrative Bodies

Some legal systems require the intervention of political and administrative authorities as a necessary step in the execution procedure.²⁴² This type of mandatory intervention of a political authority at the stage of execution tends to frustrate the principles of restrictive immunity laid down by the judiciary.²⁴³ It also may allow foreign states to exert diplomatic pressure on the executive to influence them.²⁴⁴ This naturally gives an unfair advantage to influential foreign states.²⁴⁵

Part IV. Solutions

1) Introduction

It has been established in the previous part that a victorious TNC will be faced with a number of hurdles in enforcing an ICSID award. In this part I will examine the extent to which

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242. See Maurizio Ragazzi, *Italy: Constitutional Court Judgment on Sovereign Immunity with Regard to Measures of Constraint*, 33 I.L.M. 593, 593 (1995) (changing Law No. 1263, that previously said the Minister of Justice had to intervene to allow enforcement proceedings against assets of a foreign state in Italian territory, to reinvest the courts with the power to determine whether immunity should be granted or denied in individual cases). *But see* Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 215 (1983) (referring to *Scherk v. Alberto Culver & Co.*, where the U.S. Supreme Court held that public policy can override the need for judicial interference in an arbitral process). *See generally* Delaume, *supra* note 17, at 477 (discussing the liberal attitude of the U.S. when enforcing foreign state contracts).
243. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511–12 (U.S. 1974) (describing how the United States judiciary looks to legislative intent prior to enforcing an international arbitration clause); *see also* Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 810–11 (1997) (describing how Swedish courts must deal with the other two branches of government to protect individuals from political and administrative abuse of power); Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 47 (discussing the negative effect mandatory intervention of political authority has in Kosovo and East Timor).
244. See Dynda L. Artz, *The Noncorporate Plaintiff: Hostage to the Gordian Knot of the Foreign Sovereign Immunities Act of 1976*, 54 U. CIN. L. REV. 907, 908 (noting that in *The Schooner Exchange v. M'Faddon*, states were required to ask the executive branch for a grant of immunity). *See generally* Fischbach, *supra* note 212, at 1007 (explaining that the purposes of the FSIA were to eliminate diplomatic influence on the executive branch and to clarify the boundaries of foreign sovereign immunity); Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT'L L. 795, 825 (1990) (commenting that the purpose of the FSIA was to protect courts from diplomatic and political pressure so that the judiciary could exercise power over international matters).
245. *See generally* John C. Guilds, III, "If It Quacks Like a Duck": *Comparing the ICJ Chambers to International Arbitration for a Mechanism of Enforcement*, 16 MD. J. INT'L L. & TRADE 43, 72 (1992) (noting that arbitrations which preclude the judiciary from doing its primary role, hearing and determining the merits of a case, are "non-national"); Stephen K. Huber, *International ADR in the 1990's: The Top Ten Developments*, 1 HOUS. BUS. & TAX L.J. 184, 208 (2001) (using France as an example of a nation that refused to recognize the termination of an arbitration award by the courts in the country of origin); Daniel A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L L. & COMM. REG. 705, 732 (referring to only four state statutes with provisions expressly permitting their respective state courts to recognize and enforce foreign arbitral awards made in countries that are not contracting parties to the New York or Inter-American Conventions).

a TNC can circumvent some of these obstacles subject to party autonomy by negotiating. I will then examine the *ex post facto* measures, and their limitations, that can be taken to facilitate execution. Finally, a brief word will be made on suggested reforms to the Convention to facilitate enforcement of an award against a debtor state.

2) Prophylactic Measures

Counsel representing a TNC, at the negotiation and drafting phases of a state contract, must try to exploit party autonomy to the fullest extent to clear all possible obstacles to execution of the award.²⁴⁶

a) Waiver from Article 26

The TNC must try to include in the agreement giving consent to ICSID arbitration a clause providing for provisional measures by domestic courts for the preservation of the parties' rights and interests.²⁴⁷ Such a clause may be difficult to negotiate and even if the parties were able to agree to it, the U.S. and U.K. domestic courts would probably allow such measures only if they were directed at the commercial property of Argentina.²⁴⁸

b) Exclusion of the Tribunal's Power to Impose Non-Monetary Obligations

Such a waiver will ensure that an enforceable award is issued.²⁴⁹ If it is not possible to negotiate this, then the next best option is to provide for a pecuniary alternative in the case of

246. See generally Barbara A. Boczar, *Avenues for Direct Participation of Transnational Corporations in International Environmental Negotiations*, 3 N.Y.U. ENVTL. J.L. 1, 14 (1994) (noting that TNCs play an important role in negotiations); Charney, *supra* note 40, at 749 (discussing the importance of including TNCs in negotiations).

247. See ICSID, *supra* note 1, at Model cl. 4 (offering a formula that may be used by the parties); see also A. Christina Baez, *Should Investment in the Third World Be Internationally Protected? What Role for the United Nations?*, 79 AM. SOC'Y. INT'L L. PROC. 378, 382 (1985) (expressing that "the only provisional or interim measures of protection to which parties may be entitled are those which can be recommended by an arbitral tribunal on its initiative or upon the parties' request"); O'Neill, *supra* note 168, at 246 (stating that consent to the ICSID is usually considered consent to exclusive remedies of the ICSID as well).

248. See UNCTAD, *supra* note 7 (discussing settlement of investment disputes between states and private parties). See generally Delaume, *supra* note 185, at 138 (stating that consent to arbitration via a waiver of immunity has no bearing on immunity from execution in a foreign state). See generally John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 34 (stating that prior to 1996, absent a waiver of immunity, liability of a foreign state for noncommercial, public acts was mostly limited to noncommercial torts).

249. See William J. Aceves, *The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 168 (2000) (stressing the binding effect of a waiver of immunity). See generally Keith Higher & George Kahale III, *International Decisions*, 87 AM. J. INT'L L. 618, 637 (stating that "most courts have refused to find an implicit waiver of immunity to suit in the United States courts by reason of waiver in a jurisdiction other than the United States."). See generally Ramsey, *supra* note 108, at 43 (listing concerns in using arbitration clauses to ensure enforceability of a contract in international law).

non-performance.²⁵⁰ When faced with a state in a particularly strong bargaining position that is unwilling to grant this, then the non-pecuniary obligation imposed by an ICSID award may be enforced via the NYC, which does not contain a comparable limitation to pecuniary obligations.²⁵¹ However, some commentators have argued that the NYC cannot be used to enforce non-national awards on the grounds that the scope of this convention is implicitly limited to awards subject to a national arbitration law.²⁵²

c) Waiver of Immunity from Execution

In view of the far-reaching protection of state-owned property from execution under the SIA and the FSIA, it has been argued that a practitioner acting for a TNC must insist on a clause explicitly waiving immunity from execution of an ICSID award from the host state.²⁵³ Not only would this increase the chances of forced execution but it would also act as an incentive to comply.²⁵⁴

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250. See Broches, *supra* note 39, at 400. See generally James M. Cooper, *Latin America in the Twenty-First Century: Essay: Access to Justice I.I.*, 30 CAL. W. INT'L L.J. 429, 434–35 (2000) (discussing the limitations of agreeing to an arbitration clause in the international context); Knull & Rubins, *supra* note 5, at 535 (stating that in arbitrations there is a great risk that an arbitrator will misinterpret a contract or grant hugely disproportionate remedies and leave a party with little hope for appeal).
 251. See NYC, *supra* note 18, at art. 111. See generally Sydney M. Cone, *The Multinational Enterprise as Global Corporate Citizen I*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 10 (2001) (stating that investors do not have to rely on their home government to protect their investments, but can enforce arbitration awards through the New York Convention). See generally *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, *supra* note 33, at 452 (discussing potential modifications to the ICSID).
 252. See Albert Jan van den Berg, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, 296–311 (1981); see also *Parsons & Wittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RATKA)*, 508 F.2d 969, 974 (2d Cir. 1974) (announcing that the Convention's public policy defense should be narrowly construed. "Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."). But see Shalakany, *supra* note 18, at 442 (stating that under the NYC, courts may refuse to enforce an award for public policy considerations).
 253. See van den Berg, *supra*, note 252, at 451. See generally *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719–23 (9th Cir. 1992) (deciding that Argentina was not immune from suit because Argentina had waived its entitlement to immunity under section 1605(a)(1) of the FSIA by involving itself in U.S. legal proceedings); Caplan, *supra* note 189, at 766 (stating that "section 1605(a)(1) of the FSIA . . . empowers the exercise of district court jurisdiction in cases in which a state 'has waived its immunity either explicitly or by implication.'").
 254. See Schreuer, *supra* note 25, at 1173. See generally *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1183–84 (D.C. Cir. 1994) (considering the waiver of immunity to be a fact of international law and thus urging that the FSIA's waiver provision be construed consistently, so as to allow plaintiffs to sue states for violations of *jus cogens*); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (finding that the amici's *jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in section 1605(a)(1)).

d) How Effective Is This Waiver?

A waiver of immunity from execution may be possible in principle, but its validity and effectiveness will be conditional upon law in force in the state(s) where execution is sought and the willingness of Argentina to sign such a clause.²⁵⁵

e) Host State's Negotiating Power

Most states may refuse to grant such waivers in principle or may refuse to waive immunity for certain types of property.²⁵⁶ This may account for the relative scarcity of waiver clauses.²⁵⁷ However, such a refusal may adversely affect the confidence of the investor in the host state's willingness to abide by its obligation.²⁵⁸ It should be noted that, in the aftermath of the Argentine crisis, the TNC will be in a good bargaining position: Argentina needs funds and the amount of official funds in general is on the decrease; it will be difficult to obtain private funds due to its unstable political position.²⁵⁹ Thus the desire for direct investment may prompt a host state to accept these waivers.²⁶⁰

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255. See also Delaume, *supra* note 17, at 486 (stating that recognition of a waiver of immunity depends on the domestic rules of a nation). See generally *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, 760 F.2d 390 (2d Cir. 1985) (holding that a waiver of immunity was applicable in the present matter); Delaume, *supra* note 210, at 257 (commenting that "In many instances, waivers of immunity are intended to produce an effect in more than one forum. To that end, a waiver of immunity may be a useful adjunct to the type of choice-of-forum clauses that may be required to accomplish the desired objective.").
256. See Jacob, *supra* note 124, at 134 (postulating that states are reluctant to enter into waiver agreements); see also Nmehielle, *supra* note 10, at 40 (asserting that while states strongly resist signing waiver clauses, the bargaining strength of the investor ultimately determines whether or not a state agrees to waive immunity). See generally Delaume, *supra* note 21, at 791 n.27 (stating that diplomatic protection is available to a state that does not comply with an immunity waiver).
257. See Schreuer, *supra* note 25, at 1172; Delaume, *supra* note 210, at 278 n.116 (explaining why it is sometimes difficult to obtain a state's consent to immunity). See generally *Greenfield & Rooney*, *supra* note 1, at 381 (quoting a model waiver of immunity clause as suggested by the ICSID).
258. See Soley, *supra* note 28, at 528 (describing how foreign investors will go so far as to forum-shop to ensure that a host state does not have immunity); see also John Savage, *Danareksa Judgment Spooks Foreign Lenders in Indonesia: Foreign Investors May Want to Choose Arbitration Rather than Local Courts in Indonesia; Investment Dispute*, INT'L FIN. L. REV., Nov. 1, 2003, at 47 (explaining why it is in an investor's best interest to obtain immunity from a host state); Frank C. Shaw, *Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America*, 30 L. & POL'Y INT'L BUS. 147, 147 (1999) (describing the potential problems faced by investors when host states do not grant immunities).
259. See Broches, *supra* note 39, at 136 (noting that the "fear of political risks operates as a deterrent to the flow of private capital to developing countries"); Ross P. Buckley, *Debt Exchanges Revisited: Lessons from Latin America for Eastern Europe*, 18 NW. J. INT'L L. & BUS. 655, 656 n.6 (1998) (stating that Argentina has had to liberalize its investment policies following the debt crisis in order to attract foreign investment); see also *Argentina Seeks an Oil Sector Lifeline*, ENERGY DAY, Jan. 24, 2002, at 7 (describing reasons why Argentina is currently unattractive to foreign private investment).
260. See Georges R. Delaume, *Arbitration with Governments: "Domestic" v. "International" Awards*, 17 INT'L LAW. 687, n.29 (1983) (asserting that a waiver of immunity from execution discourages foreign investment); see also Kalas & Herwig, *supra* note 4, at 92 (indicating that foreign states' will reluctantly agree to waive immunity if necessary to attract foreign investment); Stephen D. McCreary, *International Arbitration in Latin America; Legal Aspects of Exporting and Investing*, BUS. AM., Feb 11, 1991, at 17 (explaining that host states often waive their rights to immunity in order to attract foreign investment).

f) To What Extent Do the FSIA and the SIA Limit the Effectiveness of a Waiver?

As already mentioned, certain forms of waiver of immunity may be invalid even if agreed upon by the parties. This is in keeping with a fundamental question of international policy: an investment contract between a state and a private party cannot per se provide for waiver or abridgement of any national law on sovereign immunity except to the extent allowed therein.

Under the FSIA, a foreign state can waive its right to execution either explicitly or implicitly. However this waiver only applies in respect of property used for a commercial activity in the United States. It is therefore doubtful whether waiver is possible in respect of non-commercial property.²⁶¹ Since arbitration is an independent and equivalent basis for non-immunity of commercial property under the FSIA, it is doubtful whether an explicit waiver would add anything for purposes of enforcing an ICSID award.²⁶²

By contrast, under SIA a TNC will be able to execute on the assets of Argentina, either because Argentina has waived its immunity from execution or because the property is of a commercial nature.²⁶³ Therefore, a waiver in respect of non-commercial property is possible under national law, except if the property is specially protected.²⁶⁴ In any event, a waiver from execution of commercial property is legal nonsense, as commercial property does not enjoy any immunity.²⁶⁵

261. See FSIA, 28 U.S.C. § 1610(a)(1) (indicating that a state's commercial property can be attached when a state waives its immunity); see also Lee, *supra* note 228, at 345 (explaining that the FSIA excepts commercial property from immunity); Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199, 219 (2000) (stating that commercial property associated with commercial activity can be exempt from waiver).

262. See Delaume, *supra* note 13, at 343 (positing that under the ICSID, consent to arbitration clearly results in a waiver of immunity); see also Delaume, *supra* note 76, at 785 (indicating that consent to arbitration results in a binding waiver of immunity); Miller, *supra* note 35, at 1382 (stating that consent to arbitration results in a waiver of immunity).

263. See State Immunity Act, 1978, Part I, § 13(3) (Eng.) (declaring that a state may waive immunity); see also State Immunity Act, 1978, Part I, § 13(4) (Eng.) (establishing that commercial property is not exempt from execution of judgment); Folz, *supra* note 220, at 797 (referencing section 13(5) of the SIA which allows a diplomat to circumvent section 13(4) by declaring that the property is "non commercial" unless proven otherwise).

264. See Delaume, *supra* note 210, at 278 n.116 (stating that commercial transactions occurring within a state render the state subject to execution of judgment). See generally Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds That a Former Head of State Is Not Immune from Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 277 (2000) (explaining that the SIA is nonetheless structurally similar to the FSIA in providing areas of immunity while allowing for exceptions to those areas); Georges R. Delaume, *Sovereign Immunity and Public Debt*, 23 INT'L LAW. 811, 816 (1989) (interpreting the SIA as allowing for attachment of commercial property only).

265. See Crawford, *supra* note 190, at 832 (suggesting that, while not explicit on the issue, the American Law Institute's RESTATEMENT OF FOREIGN RELATIONS LAW can be read to mean that commercial property is not immune from execution); see also Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 735 (1988) (asserting that states no longer grant commercial property immunity from execution); Noyes, *supra* note 15, at 844 n.50 (indicating that commercial property may be subject to execution in lawsuits).

g) Waiver in Respect of Diplomatic Property

As mentioned above, in the U.S. under the FSIA, consent to arbitration leads to non-immunity of commercial property independently of waiver.²⁶⁶ We have also said that waiver of immunity from execution for non-commercial property would not appear possible, as waiver is available only in respect of commercial property.²⁶⁷ However, an express waiver is possible under the FSIA and the SIA for property of a foreign central bank.²⁶⁸

h) Stabilization Clause

Even if the laws of the enforcement state permit execution against the assets of a state at present, this does not mean that this will always be the case; these laws may change. Article 55 must be read as a reference to the law on immunity from execution as it evolves over time.²⁶⁹ Thus, to the extent that immunity from execution evolves and is limited through state practice, the possibilities for the execution of the ICSID awards against states evolve as well. One has to consider the changes that have occurred in the laws of state immunity in the 1960s and 1970s.²⁷⁰ For this reason, it may be worthwhile adding a stabilization clause. The question would, however, arise whether a law on enforcement is applicable even if it was repealed. The response, certainly in the U.S. and the U.K., would be no.

266. See Eric D. Suben, *Contrasting Judicial Approaches to Seamen's Claims Under the Foreign Sovereign Immunities Act*, 18 TUL. MAR. L.J. 231, n.94 (1994) (citing the FSIA and affirming that consent to arbitration waives sovereign immunity); see also Evered, *supra* note 121, at 177 (positing that under the FSIA, consent to arbitration implies a waiver of sovereign immunity); Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act*, 90 COLUM. L. REV. 2278, 2287–89 (1990) (suggesting that U.S. courts read an implied waiver of immunity into foreign states' consent to arbitration).

267. See Lee, *supra* note 228, at 335 (indicating that the preamble to the FSIA sets forth the principle that commercial property can be attached to satisfy judgments); see also Sajko, *supra* note 81, at 140 (suggesting that only commercial property is subject to immunity waivers).

268. See William W. Park, *When the Borrower and the Banker Are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323, 1342 n.71 (1991) (positing that a central bank is immune from execution unless the immunity is explicitly waived); see also Vollmer, *supra* note 233, at 525 (agreeing with the FSIA proposition that central banks should be exempt from award executions). But see Hight, *supra* note 229, at 340 (claiming that a narrow reading of the FSIA indicates that central banks are not immune from prejudgment attachment despite express waivers of execution).

269. See C. F. Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation*, 9 VAND. J. TRANSNAT'L L. 793, 814 (1976). See generally Dr. Giorgio Bernini, *Foreign Investments and Arbitration in the Frame of Globalization of World Economy*, 4 CROAT. ARB. Y.B. 83, 94 (1997) (asserting that Article 55 protects an enforcing country's laws regarding immunity from execution); Delaume, *supra* note 17, at 139 (pointing out that Article 55 of the ICSID protects a contracting state's immunity from execution of an award).

270. See Schreuer, *supra* note 25, at 1147 (commenting on the evolution of modern sovereign immunity); see also Sandhya Chandrasekhar, *Cartel in a Can: The Financial Collapse of the International Tin Council*, 10 NW. J. INT'L L. & BUS. 309, 321 (1989) (noting British legislation in the late 1970s curtailing state sovereign immunity from suit); Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 169 (1986) (mentioning that in 1976 the U.S. State Department enacted legislation abridging the immunity of foreign sovereign states from suit).

To summarize, waivers, to the extent that they are conceivable, would have to be restricted to matters within the control of the parties.²⁷¹ With respect to waiver from immunity from execution, the possibility of such a waiver will be subject to the FSIA and SIA.²⁷² These laws on immunity place a significant limitation on party autonomy.²⁷³ However, it could be argued that this limit on party autonomy is justified. As Lew notes, it would be clearly wrong if by carefully drafting an arbitration clause and waiving immunity, parties could bypass fundamental laws of a state, which affect states' relations *inter se*.²⁷⁴ However, what is needed is a uniform limitation.

i) Forum Shopping

Since the obligation to recognize and enforce under Article 54 is imposed on all contracting states, a TNC when seeking recognition and enforcement of an award should try to select

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271. See also Nmehielle, *supra* note 10, at 34–36 (opining that irrespective of waiver of immunity, the sovereign immunity doctrine is a stumbling block to the enforcement of judgments under the ICSID Convention). See generally Delaume, *supra* note 13, at 343–44 (recognizing that ICSID is impotent for the purpose of enforcing awards against sovereigns should they choose to ignore the judgment); Delaume, *supra* note 76, at 795–96 (stating that the enforcement of ICSID judgments against sovereigns, irrespective of a waiver of immunity, must be dealt with under the sovereign's domestic law).
272. See Michael W. Hoops, *Retroactivity, Implied Waiver, and the FSIA: Is It Time to Reform the Law on Sovereign Immunity?*, 24 HOFSTRA L. REV. 515, 520–23 (1995) (outlining the scope of the FSIA with respect to waivers of sovereign immunity); see also Simmons, *supra* note 266, at 2287–89 (stating that the House Report accompanying the FSIA noted that implied waivers of sovereign entities committed to arbitration were subject to the FSIA). See generally McKay, *supra* note 189, at 445–48 (mentioning that the scope of the FSIA includes waivers of sovereign immunity of nations under arbitration enforcement actions in U.S. courts).
273. See Jami J. Campisano, *Foreign Sovereign Immunities Act Is Exclusive Basis for Exercising Subject Matter Jurisdiction in Suits Against Foreign States: Argentine Republic v. Amerada Hess Shipping Corp.*, 13 MAR. LAW. 327, 328–30 (1989) (outlining the FSIA and explaining the circumstances under which U.S. courts may take jurisdiction over otherwise autonomous sovereigns); see also Sunil R. Harjani, Comment, *Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 NW. J. INT'L L. & BUS. 181, 182–83 (1999) (discussing the theory of “restrictive immunity” and the U.S. intent to curtail the immunity of sovereign nations in U.S. courts under the Foreign Government-Owned Corporation exception); Teresa M. O’Toole, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 831–38 (1988) (describing the doctrine of “restrictive sovereign immunity” under the Foreign Sovereign Immunity Act).
274. See Lew, *supra* note 1, at 732 (opining that limitations on member state immunity is needed to provide stability for TNCs in their business transactions); see also S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1256–57 (2000) (restating the U.S. Department of State’s intention that the FSIA improves fairness in international commerce between private parties and sovereign parties); M. Scott Bucci, Comment, *Breaking Through the Immunity Wall: Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT’L LEGAL STUD. 293, 294–96 (1997) (elaborating on Justice Marshall’s opinion in *The Schooner Exchange v. M’Faddon* that it is in the interest of fairness and “good dealing” in commerce that sovereign immunity be abridged).

the forum whose laws are most favorable for this purpose.²⁷⁵ This selection will be determined primarily by the availability of suitable assets, but will also depend on the extent to which these assets are immune from execution.²⁷⁶ It would appear that the SIA has more generous limitations of sovereign immunity and therefore, provided the assets are commercial and non-specially protected, it will be easier to establish a prima facie case for enforcement.²⁷⁷ However, if it is not clear whether the property is for a commercial use (for example, a bank account where funds are for official and non-official purposes), then the ambassador can make a unilateral declaration on its nature. The TNC will be faced with the problem of finding evidence to rebut this if it is not clear.²⁷⁸

j) Parallel Proceedings

Due to the difficulties a TNC may have in determining at the outset whether an asset will be immune from execution or not, it may be advisable to commence proceedings for recognition and enforcement of an ICSID award in several states simultaneously.²⁷⁹ Partial payment in different states is both possible and legitimate.²⁸⁰ In such circumstances, competent authorities

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275. See Kalas & Herwig, *supra* note 4, at 95 (noting that ICSID judgments are universally enforceable, but careful forum shopping is required); see also Nmehielle, *supra* note 10, at 47 (advocating forum shopping for private parties when attempting to enforce a judgment under the ICSID convention). See generally Alford, *supra* note 61, at 691–94 (recognizing that under Article 54 of the ICSID once a judgment is rendered, it is binding in the forum where justice was sought).
276. See Goldner, *supra* note 108, at 171–72 (recognizing the difficulty in executing awards because of immunity of assets). See generally Delaume, *supra* note 21, at 797–99 (analyzing the difficulty of collecting awards against France and Libya because their assets were deemed immune from execution after ICSID adjudication); Schwarcz, *supra* note 20, at 1027–28 (mentioning that with ICSID judgments there is a difficulty in recovering awards from “recalcitrant” states).
277. See Crawford, *supra* note 190, at 833–35 (comparing the FSIA to the SIA and postulating that the SIA allows for broader execution of judgments); see also Delaume, *supra* note 13, at 336–37 (recognizing that the SIA does not have the limitations on commercial assets judgment enforcement that the FSIA contains). See generally Kindall, *supra* note 202, at 1862–71 (comparing immunity from enforcement under the SIA, FSIA, and the ILC).
278. See Crawford, *supra* note 190, at 860–62 (quoting Sompong Sucharitkul’s Second Report on Jurisdictional Immunities of States and Their Property, which notes a lack of clarity under the SIA allowing “proper” officials to waive immunity from execution of judgment on property). See generally State Immunity Act, 1978, c. 33, § 1 (Eng.), 17 I.L.M. 1123 (listing the circumstances in which the United Kingdom abrogates sovereign immunity from suit). See generally Kindall, *supra* note 202, at 1862–71 (comparing and contrasting the SIA, FSIA, and ILC, all of which require that a state waive immunity for execution of judgments upon certain types of property).
279. See Goldner, *supra* note 108, at 168–72 (distinguishing between execution and enforcement of ICSID awards and noting the various approaches to execution taken by member states); see also Greenfield & Rooney, *supra* note 1, at 383 (asserting that under the ICSID, the guarantee of an award is only as strong as the court that grants it). See generally Kalas & Herwig, *supra* note 4, at 92 (listing the various problems that may arise when a party tries to enforce an ICSID award against a sovereign party).
280. See Libyan American Oil Co (Liamco) v. Libyan Arab Republic, 20 I.L.M. 1 (1981) (granting an arbitration award against the state of Libya and attaching Libyan state and state enterprise bank accounts in France) (hereinafter “*Liamco*”); Caron, *supra* note 141, at 120 n.67 (citing the *Liamco* case in which the award was recognized in France and Sweden); see also Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT’L L. 476, 548–50 (1981) (examining the international impact that the ICSID award in the *Liamco* case and noting that attempts to levy the award were made in Libya, France, and Switzerland).

in these states must co-ordinate their steps to ensure that payment is only made once. However, the problems with this are that, first, there is no overarching authority that can coordinate the efforts of the states involved, let alone compel compliance directly in their territories,²⁸¹ and second, bringing parallel proceedings is costly.²⁸² On a cost/benefit analysis, then, if the possibility of satisfaction of the award is high, additional proceedings would not be advisable.²⁸³

3) *Ex Post Facto* Remedies: State Responsibility

a) Introduction

The debtor state's obligation to comply with the award, as well as being a contractual duty to the TNC, is a treaty obligation.²⁸⁴ So, the host state's non-compliance will engage its state responsibility.²⁸⁵ State responsibility will be activated despite the impossibility of enforcing an ICSID award due to the law on sovereign immunity, which is only a procedural bar to execu-

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281. See Nmehielle, *supra* note 10, at 21–26, 30–32 (explaining the structure and authority of the ICSID and noting the limitations on award enforcement and execution). See generally Timothy C. Evered, *Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union*, 3 BUFF. J. INT'L L. 153, 174, 176 (1996) (positing that it is out of respect for the World Bank under which the ICSID is organized that member nations allow for the enforcement of awards levied against them). See generally Kalas & Herwig, *supra* note 4, at 91–93 (describing the award enforcement authority of the ICSID and noting that parties seeking to execute their award are best served by careful forum shopping).
282. See Reisman, *supra* note 56, at 749–50 (opining that while the purpose of the ICSID was to minimize legal costs, the intention has not come to fruition). See generally Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness—Some Thoughts Concerning Arbitral Process Design*, 2 PEPP. DISP. RESOL. L.J. 53, 55 (2002) (mentioning that the cost of arbitration can be surprisingly high). See generally Clyde C. Pearce & Jack Coe, Jr., *Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 343 (2000) (asserting that arbitration is “costly” as well as “time-consuming”).
283. See Bishop, *supra* note 77, at 668 (discussing the costs and benefits of instituting parallel proceedings); see also Knull & Rubins, *supra* note 5, at 536–37 (describing the costs and unpredictability of parallel international arbitration proceedings); Jason 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, 2658 n.12 (2001) (noting that parallel proceedings invite the possibility of multiple damage awards).
284. See Bishop, *supra* note 77, at 653 (stating that ICSID awards are binding under treaty obligation through the ICSID's status as a WTO organization); see also Lewler, *supra* note 121, at 391–92 (describing the ICSID's binding authority under the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States). See generally Jacob, *supra* note 124, at 136 (arguing that states are less likely to defy ICSID awards because of its binding treaty status).
285. See Jacob, *supra* note 124, at 136 (describing the potentially adverse international consequences that induce states to comply with ICSID awards). See generally Daniel Q. Posin, *Recent Developments in ICSID Annulment Procedures*, 13 WORLD ARB. & MEDIATION REP. 170 (2002) (noting that contracting states agree that ICSID awards are binding and enforceable); Alford, *supra* note 61, at 692 (explaining that ICSID-subscribing nations agree to obey and enforce any arbitral awards).

tion that has no effect on the binding nature of the award.²⁸⁶ Consequently the contracting state whose national is an unsatisfied award creditor could (a) interpose diplomatically, which can be exercised through negotiations, institution of judicial proceedings between two states;²⁸⁷ or (b) bring a claim before the ICJ (or any other agreed forum) against the defaulting contracting state under Article 64.²⁸⁸

b) Diplomatic Proceedings (DP)

Article 27(1) provides that the right to diplomatic protection revives if a state does not comply with its obligations to enforce the award.²⁸⁹ However, the remedy of diplomatic protection has notable deficiencies from an investor's perspective. First, it may be the case that a TNC cannot bring the claim unless it has already exhausted local remedies.²⁹⁰ Second, it is the state that has the right to protect, and not the TNC that has the right to be protected.²⁹¹ Whether a

286. See Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award 12 August 1988, 4 ICSID Report 115/6 (stating that non-compliance by states constitutes a violation by that state of its international sanctions which will attract its own sanctions); see also Nmehielle, *supra* note 10, at 40–41 (describing the remedies for non-compliance available under the ICSID Convention); Shihata, *supra* note 73, at 105 (commenting that failure to comply with an ICSID award would not only subject a state to sanctions under the ICSID Convention, but deprive it of international credibility).

287. See Craig, *supra* note 60, at 41 n.117 (stating that domestic courts must enforce ICSID arbitral awards, but may not interfere in the actual dispute resolution itself); see also Delaume, *supra* note 21, at 785 (noting that domestic courts are obliged to enforce ICSID agreements under the Convention); Greenfield & Rooney, *supra* note 1, at 380 (explaining that only nationals of signatory nations can avail remedies under the ICSID, but courts in those signatory nations are bound to enforce ICSID awards as if they were their own).

288. See Bernini, *supra* note 269, at 94 (explaining that parties who default on an ICSID award may be subject to liability in the ICJ under Article 64 of the Convention); see also Nmehielle, *supra* note 10, at 41 (stating that an aggrieved national's state can refer the dispute to the ICJ). See generally Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 106 (1996) (arguing that the ICJ is essentially an arbitration forum, with jurisdiction over disputes between nationals).

289. See ICSID, *supra* note 1, at art. 27(1) (providing that "[c]ontracting Parties shall endeavor to settle disputes concerning the application or interpretation of the Treaty through diplomatic channels."); see also Choi, *supra* note 26, at 213 (explaining that diplomatic protection entails having an aggrieved party ask its government to file an international claim on their behalf under Article 27); Nmehielle, *supra* note 10, at 41 (commenting that under Article 27 of the Convention, diplomatic protection is suspended from the date of submission to the ICSID until the time when the award is carried out).

290. See ICSID, *supra* note 1, at art. 26 (Article 26 of the ICSID Convention provides that a contracting state may, as a condition of its consent to ICSID arbitration, require the exhaustion of local remedies); see also Shihata, *supra* note 73, at 102 (recounting that the ICSID Convention allows contracting states to require exhaustion of local remedies as a condition of ICSID arbitration). See generally Nolan, *supra* note 30, at 675 (noting that the ICSID authorizes its contracting states to require a prior exhaustion of local remedies before resorting to arbitration).

291. But see Nmehielle, *supra* note 10, at 23 (asserting that a main purpose of the ICSID is to protect private investors from foreign governments). See generally Daniil E. Fedorchuk, *Acceding to the WTO: Advantages for Foreign Investors in the Ukrainian Market*, 15 N.Y. INT'L L. REV. 1, 55–56 (2002) (discussing the ICSID's purpose of settling disputes between private, transnational corporations and foreign host governments); Hanson Hosein, *Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285, 314 (1993) (noting that in ICSID disputes, a contracting state must assert claims on behalf of individual citizens).

state exercises this right depends on considerations of interstate relations,²⁹² and thus the right may be subordinated to other, more political goals pursued by the protecting state.²⁹³ Thus, rarely will the interests of the TNC in solving these problems coincide with those of the home state.²⁹⁴ As a matter of policy it may refuse to exercise this right for reasons that have more to do with international relations between the host and home countries than with the validity of the TNC's claim.²⁹⁵ This political element is likely to have greater weight if the merits of the TNC's case are not wholly clear in the host government's view.²⁹⁶ Consequently, the TNC will be denied the opportunity to have its case heard by an impartial tribunal. If the home state decides to take up the claim, this right can only be exercised after the award has been rendered and enforcement frustrated.²⁹⁷ Third, even if the home country successfully pursues the claim, it is not legally obliged to transfer the proceeds of the claim to its national investors.²⁹⁸ This

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292. See Lerner, *supra* note 10, at 282 (commenting that the ICSID is ill-equipped to handle delicate political issues involving state sovereignty). *But see* Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 225 (2001) (recalling that the ICSID and other arbitration forums were established to separate investment disputes from the political arena); Sureda, *supra* note 43, at 166 (arguing that the ICSID was structured to "depoliticize" international arbitration).
293. See Choi, *supra* note 26, at 177 (recognizing that investors' governments have sometimes declined to bring ICSID claims on their behalf due to political considerations); *see also* Nmehielle, *supra* note 10, at 35 (noting that forcing another state to arbitrate is considered an infringement upon sovereign immunity); Steven L. Schwarcz, *Global Decentralization and the Subnational Debt Problem*, 51 DUKE L.J. 1179, 1236 (2002) (explaining that a state may be reluctant to bring a claim on behalf of one of its nationals for political reasons).
294. See Nmehielle, *supra* note 10, at 24 (asserting that national politics hinder the enforcement of ICSID awards to the detriment of private investors). *But see* Poirier, *supra* note 31, at 879 (arguing that the ICSID is a less political option than arbitrating in a nation's own courts). *See generally* Hosein, *supra* note 291, at 313-14 (explaining that only certain nationalities can utilize ICSID arbitration).
295. See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE LAW 179, 238 (1994) (noting that the home state may refuse because pursuing such a claim would be regarded as an unfriendly act by the host government and interfere with bilateral relations on other matters); Choi, *supra* note 26, at 177 (recognizing that nations are often reluctant to offend other nations' notions of sovereignty by forcing them to arbitrate); *see also* Koa, *supra* note 53, at 446 (explaining that the ICSID was created as a forum to address delicate issues of state sovereignty in international arbitration).
296. *See generally* Daly, *supra* note 37, at 1163 (noting political influences resulting in dubious claims based on the political strength of the foreign investor's home state); Lauren E. Godshall, Note, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264, 270 (2002) (noting the tension between investors and host states and the procedure where an investor can pursue a claim against the host state in arbitration under ICSID); Robin, *supra* note 9, at 955 (stating that the ICSID arbitration process diminishes the political consequences surrounding the investor's claim).
297. *See* ICSID, *supra* note 1, at art. 27 (stating the requirement that the contracting state must have failed to abide by the award given before the remainder of the article applies); Georges Delaume, *TRANSNATIONAL CONTRACTS: LAW AND PRACTICE*, 77-78 (Oceana Publications, ed. 1985). *But see* Schreuer, *supra* note 25, at 78 (arguing that diplomatic protection may be used concurrently with Article 54.; however, as soon as one remedy has succeeded the other must be discontinued).
298. *See* Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Oxford Univ. Press, ed. 1999).

logically follows from the fact that the state is really asserting its own rights.²⁹⁹ Fourth, in the case of TNCs with affiliates in numerous countries, each possessing in all probability a different legal nationality, and a highly international shareholder profile, it may be difficult, if not impossible to state accurately what the firm's nationality should be for the purposes of establishing the right of diplomatic protection on the part of the protecting state.³⁰⁰ For example, if the parent company of the TNC is established in contracting state A but all its shareholders, or at least its principal ones, are in contracting state B, state A may have no interest in espousing the claim of the TNC.³⁰¹ Finally we return to the problem that ICSID was trying to avoid, namely, the politicization of investment disputes.³⁰² It has been noted³⁰³ that the process of

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299. See *Barcelona Traction Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 46 (Feb. 5) (stating that "whether claims are made on behalf of a state's nationals or on behalf of the state itself, they are always a claim of the state.") (hereinafter "*Barcelona Traction*"). See generally Antti Korkeakivi, *Consequences of "Higher" International Law: Evaluating Crimes of State and Erga Omnes*, 2 J. INT'L LEGAL STUD. 81, 98 (1996) (discussing the *Barcelona Traction* case's notion of "erga omnes" that states have a legal interest in their protection); Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, 92 AM. J. INT'L L. 791, 792 (1998) (noting the premise in *Barcelona Traction* that each state has a legal interest in their protection).
300. See generally Bernard Kishoiyian, Note, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 347 (1994) (stating the under *Barcelona Traction*, foreign shareholders do not have a right under traditional international law to assert a separate claim on their behalf against the state of incorporation); R. St. J. Macdonald, *Solidarity in the Practice and Disclosure of Public International Law*, 8 PACE INT'L L. REV. 259, 263 (1996) (noting from *Barcelona Traction* the different obligations of states in regard to diplomatic protection); F.A. Mann, *Foreign Investment in the International Court of Justice: The Elsi Case*, 86 AM. J. INT'L L. 92, 98 (1992) (mentioning the attempt by Belgium in *Barcelona Traction*, to bring an action on behalf of Belgian shareholders as a result of damage suffered by a Canadian company).
301. See *Barcelona Traction*, 1970 I.C.J. 3 (Feb. 5) (stating that under international law it may not be acceptable to "lift the corporate veil" to determine the nationality of the corporation by reference to the nationality of its principal controlling shareholders as opposed to the nationality of its seats or place of incorporation, which is the accepted standard). See generally Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 743 (1983) (describing the jurisdictional problem that exists if every country where a large corporation has assets could exercise jurisdiction over the corporation); Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In re Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 302 (noting the difficulty in determining the nationality of Union Carbide Corp., which has an international shareholder base).
302. See Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Unit in the Early 21st Century?*, 94 AM. SOC'Y INT'L L. PROC. 41, 343 (2000) (asserting that by generally precluding the kinds of state-to-state confrontations that so often accompanied investment disputes in the past, the provision of Article 27(1) has been an important factor in the depoliticization of such disputes by the ICSID arbitral mechanism); see also Nmeihelle, *supra* note 10, at 40 (stating that a primary goal of the ICSID convention is depoliticization of the process for dispute settlements available to host states and investors); Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 2003 (1994) (noting that ICSID was created to provide a depoliticized forum for the conflict resolution of investment disputes).
303. See UNCTAD, *supra* note 7, at 6.

diplomatic protection requires even small claims to be pursued through interstate mechanisms.³⁰⁴ Consequently, investor-state disputes may be elevated into inter-state disagreements.³⁰⁵ As a matter of business strategy, neither the TNC nor the host country may desire this, as it could have implications for future economic arrangements among investors and for relations between the home and the host countries concerned, implications that may be quite out of proportion to the claim in issue.³⁰⁶ Given these difficulties, TNCs often decline diplomatic protection where they have the option of securing remedies more directly by means of investor/state dispute settlement mechanisms.³⁰⁷

4) Non-Legal Methods of Ensuring Enforcement

Parra notes that when states have in the past delayed in complying with awards the Secretariat has issued, complaints are written to the countries concerned to remind them of their obligations under the convention to honor the award.³⁰⁸ In almost all these cases, the payment

304. See generally ICSID, *supra* note 1, at art. 27 (stating that

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute; (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute[.];

Bernini, *supra* note 269, at 94 (indicating that once parties have consented to ICSID, under Article 27 of the Convention, parties cannot exercise diplomatic protection or file a claim in an international forum); Michael Laidhold, Note, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?*, 12 TRANSNAT'L LAW. 427, 445 (1999) (noting that upon utilizing the ICSID forum, the investor cannot file suit in non-ICSID forums).

305. See generally Coe, *supra* note 62, at 1471 (implying that under Article 27(1) of the ICSID Convention, an investor's home state is not permitted to exercise diplomatic protection after a dispute has been brought to ICSID); Crook, *supra* note 55, at 284 (stating that international law may apply in addition to the law of the contracting state which is part of the dispute where no agreement exists as to controlling law); Nmehielle, *supra* note 10, at 41 (noting that non-compliance under Article 27(1) can lead to a remedy under Article 64 of the Convention allowing an investor's state to file a claim with the International Court of Justice).

306. See generally Udombana, *supra* note 2, at 4 (describing the potential of negative future economic effects of a host state dealing with a dispute before sending it to arbitration elsewhere); Note, *supra* note 302, at 2010 (suggesting that Vietnam should join ICSID because of the positive economic implications to investors); Victor Essien, Book Note, *Aron Broches, Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law*, 19 FORDHAM INT'L L.J. 818, 824 (1995) (noting that the investor's home state has the right to engage in informal diplomatic exchanges with the investor in order to bring about settlement of the dispute).

307. See generally Scott Holwick, Note, *Transnational Corporate Behavior and Its Disparate and Unjust Effect on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 207 (2000) (reasoning that some countries may believe that it is easier to permit U.S. courts to render a penalty on transnational corporations on behalf of that country rather than attempt to use its own judiciary system); Lee, *supra* note 283, at 2689-90 (suggesting that Chapter 11 of NAFTA does not provide for the use of diplomatic protection as a means of resolving disputes).

308. See Parra, *supra* note 302, at 344. See generally ICSID, *supra* note 1, at art. 54 (stating that "[e]ach contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State . . ."); Robin, *supra* note 9, at 956 (noting that each state has an obligation to enforce judgments of the ICSID tribunal as if it were a "final domestic judgment").

obligations in the awards have eventually been discharged, either in accordance with the terms of the awards or in accordance with post-award settlement agreements.³⁰⁹

5) Conclusions

The solutions suggested are inadequate for the following reasons. Even if a TNC succeeds in negotiating a waiver from immunity from execution of commercial and non-commercial assets of the state, in the U.S. this waiver would have a limited effect, because under the FSIA, a state's consent to arbitration implies the waiver of immunity from execution of commercial assets.³¹⁰ With respect to all non-commercial assets, except possibly central bank assets, a state does not have the power to waive immunity of these assets.³¹¹

In the U.K., state assets used or intended to be used for a commercial purpose do not anyway enjoy immunity, so a waiver in respect of such assets is devoid of legal meaning.³¹² With respect to non-commercial assets, with the exception of specially protected property, their immunity can be waived.³¹³

309. See generally ICSID, *supra* note 1, at art. 54 (stating the circumstances in which a party may request annulment of an ICSID tribunal award); MacKenzie, *supra* note 15, at 232 (discussing the defense of sovereign immunity to discharge a payment obligation); Sajko, *supra* note 81, at 140 (noting where an award was discharged upon Liberia's objection and not commercial property).

310. See FSIA, 28 U.S.C.S. §§ 1602–11 (stating that "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . ."). See generally ICSID, *supra* note 1, at art. 26 (noting the effect of consent of the parties to arbitrate under the terms of the ICSID Convention is to preclude any other remedy); Russell J. Pope, Note, *Maritime Arrest Under the Foreign Sovereign Immunities Act: An Anachronism*, 62 TEX. L. REV. 511, 526 (1983) (noting the potential under the FSIA for a foreign state to contravene the execution of an adverse judgment by removing commercial assets from the court's jurisdiction).

311. See generally Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 756 (1999) (noting the general refusal by states to waive their sovereign immunity in suits brought against them); Heath Oberloh, Note, *Calvello v. Yankton Sioux Tribe: Shoring Up Tribal Sovereign Immunity Against the Flood of Commercial Transactions Involving Tribally Owned Businesses*, 44 S.D. L. REV. 746, 751 (1999) (commenting on the limited nature of state sovereign immunity in light of state statutes and state and federal court decisions); Vadnais, *supra* note 261, at 218 (discussing the general acceptance of the attachment by plaintiffs of states' commercial assets to ensure the payment of judgments).

312. See H. Scott Fairley, Book Review, 79 AM. J. INT'L L. 1100, 1102 (1985) (reviewing AUSTRALIAN LAW REFORM COMMISSION, *FOREIGN STATE IMMUNITY* (1984)) (citing the condition imposed by the United Kingdom that a foreign state's assets can be attached only to the extent of the commercial purposes being pursued at a particular time). See generally Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 76 GEO. L.J. 675, 701 (1999) (discussing the United Kingdom's authorization of immunity waiver with respect to noncommercial torts arising within its territories); Park, *supra* note 268, at 1338 (noting that in the I.T.C. Headquarters Agreement with the United Kingdom, the I.T.C. would not have immunity against the enforcement of arbitration awards).

313. See Kindall, *supra* note 202, at 1865 (comparing the commercial property exception of the United Kingdom's State Immunity Act to that of the International Law Commission's Draft). See generally Delaume, *supra* note 210, at 277 (commenting on the consistency with the United Kingdom's codified immunity rules of viewing public debt as commercial in nature); C.T. Ebenroth, Book Review, 81 AM. J. INT'L L. 963, 967 (1987) (reviewing Helmut Damian, *STAATENIMMUNITÄT UND GERICHTSZWANG* (1985)) (noting the court practice in Great Britain of limited immunity from the domestic power of execution).

6) Long-Term Solutions

a) Amendment of the ICSID Convention: Insertion of Waiver

One solution could be to amend the Convention and reformulate the rules on the execution of ICSID awards, reviewing the delegation of the powers of execution to national courts. The decision to keep the law of sovereign immunity from execution intact was the result of a conscious decision in the Convention's drafting; however the inclusion of a waiver of immunity would have been technically possible and indeed one delegate during the drafting raised the possibility of abandoning the doctrine of immunity from execution.³¹⁴ However, at the time the convention was drafted, it was felt that the time was not ripe for such a drastic step, as the national laws on sovereign immunity were so far apart that an attempt to include such a waiver would have run into determined opposition of the developing countries and would jeopardize the wide ratification of the Convention.³¹⁵ Since this gap has narrowed somewhat, it is timely to consider whether the insertion of a waiver of immunity from execution would be appropriate. We shall address the arguments for and against the inclusion of a waiver.

i) Arguments supporting the inclusion of a waiver from execution

First, the national laws on sovereign immunity have changed considerably since the Convention was drafted.³¹⁶ In 1964, there were few, if any, exceptions to immunity from forced execution.³¹⁷ Indeed, the issue of immunity from execution scarcely arose, as restricted immu-

314. See Nmehielle, *supra* note 10, at 22 (questioning the effective enforcement of ICSID awards due to assertion of sovereign immunity). See generally Sajko, *supra* note 81, at 140 (noting application of sovereign immunity against execution by a United States federal court); *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 77-78 (S.D.N.Y. 1986) (granting Liberia's motion to vacate the execution of funds because there had been no waiver of sovereign immunity).

315. See Broches, *supra* note 295, at 238 (discussing the decision by the Convention drafters to omit a waiver of sovereign immunity because of the wide variation of application by different countries). See generally Shaw, *supra* note 258, at 156-57 (noting the varied response of Latin American countries to arbitration as a dispute resolution mechanism and suggesting that in all cases, waiver of sovereign immunity be sought in such an agreement); Zicherman, *supra* note 142, at 684 (observing that under ICSID rules, a request for relief made to a judicial authority will be dismissed unless the parties have explicitly provided for the relief in the arbitration agreement).

316. See Delaume, *supra* note 76, at 784-85 (noting the recent progress in the doctrine of immunity through treaties, statutory enactments, and judicial pronouncements); see also Goldner, *supra* note 108, at 167-68 (discussing the general acceptance that agreeing to arbitrate implicitly waives immunity); Greenfield & Rooney, *supra* note 1, at 380 (citing the worldwide success of the ICSID, with over 100 states having ratified the agreement).

317. See Crawford, *supra* note 190, at 825-26 (explaining that since 1945, treaty practice has incorporated some restrictions on immunity from execution); see also Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 AM. BANKR. INST. L. REV. 179, 185-86 (2003) (noting that prior to the Tate Letter of 1952, United States courts generally deferred to requests of immunity in all actions); Brittenham, *supra* note 239, at 1441-42 (discussing the 1976 enactment of the Foreign Sovereign Immunities Act, replacing deference to immunity requests with a statutory framework of immunity subject to specific exceptions).

nity from suit was not the norm.³¹⁸ Thus, the Convention should be amended to reflect this change.

Strengthening the enforcement mechanism: Sovereign immunity from execution under the ICSID convention is the weakness in the ICSID enforcement machinery because, depending on the law of sovereign immunity in the forum of enforcement, states can rely on it as a defense against the execution of the award.³¹⁹ This, in turn, will lead to forum shopping and all its negative consequences.³²⁰

Second, it is illogical that a waiver of immunity is accepted with respect to jurisdiction but not with respect to execution.³²¹ The argument is that if a state agrees to arbitration, it must be deemed to have accepted and foreseen all its consequences, including compliance with an unfavorable award, and the involvement of any of the courts of any contracting state in enforcing

318. See, e.g., *Trendtex Trading Corp. v. Cent. Bank of Nig.*, 1977 Q.B. 529, 560 (1977) (holding that there is no immunity with respect to commercial transactions, even for a government department); see also Caplan, *supra* note 189, at 743 (noting the emergence by Western nations in the early 20th century of adopting restrictive immunity relating to international trade). See generally *Victory Transp. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (considering the purpose of the restrictive theory of sovereign immunity).

319. See MacKenzie, *supra* note 15, at 232–33 (stating that if a state did raise the defense of sovereign immunity, it may be subject to sanctions prescribed by the ICSID Convention); see also Thomas E. Carbonneau, Book Review, 63 TUL. L. REV. 957, 968 (1989) (Georges R. Delaume, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS (1988)) (discussing the essential problems of transnational litigation, including the sovereign immunity defense). See generally Low K. Yang, *Venturing Beyond Spore*, BUS. TIMES (SINGAPORE), May 20, 1993 at 23 (noting general state immunity against foreign jurisdiction and enforcement of judgments and awards).

320. See Delaume, *supra* note 131, at 36–37 (noting that forum shopping may crowd judicial dockets with cases that, even though they have little or no substantial connection with the forum, may be the source of complex, lengthy and costly proceedings. Furthermore, involvement, however indirect, may also prove a cause of political embarrassment and have adverse consequences upon the forum state's economy by discouraging foreign states from making use of its financial facilities. Enforcement measures by a TNC against a state may lead to much the same thing although what is at jeopardy is the relationship between the debtor state and the state of enforcement whereas in the other case the relationship of the debtor state and the home state is at risk). See generally Pelagia Ivanova, Note, *Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. REV. 899, 920 (2003) (discussing the goal of the New York Convention to prevent forum shopping by ensuring recognition and enforcement of awards in every member state); Leah Sturtz, Note, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 480 (2001) (realizing the possibility of inconsistent jurisprudence and forum shopping wherever there is a choice of forum).

321. See Bernini & van den Berg, *supra* note 238, at 360; see also Crawford, *supra* note 190, at 838 (citing the District Court of Frankfurt's decision treating immunity from jurisdiction and execution as strictly correlative). See generally Delaume, *supra* note 13, at 323–24 (noting separate judicial determinations with respect to claims of immunity from jurisdiction and immunity from execution).

the pecuniary obligations of the award.³²² If it fails to comply, then forced execution should be possible against its assets, with the possible exception of military and diplomatic objects, like those of a private person.³²³ In other words, waiver of immunity should imply waiver of immunity from execution.³²⁴ Decisions to this effect can be found in Germany, Switzerland and the U.S.³²⁵

ii) Arguments against the insertion of a waiver

With respect to the first argument that the laws on sovereign immunity have changed considerably, while this assertion is valid with respect to immunity from jurisdiction, it assumes less validity with respect to immunity from execution.³²⁶

Even if a waiver was inserted, the question would arise: Should it be absolute or restrictive? If such a waiver was absolute, it would lead to the undesirable position whereby a TNC would be empowered to enforce an award rendered by a private decision-making body, for example, by executing it against the assets of the diplomatic mission.³²⁷ This would breach existing inter-

322. See generally Knoll & Rubins, *supra* note 5, at 539 (commenting on the relative ease of enforcing international arbitration awards due to multilateral arbitration treaties which compel courts in member states to enforce agreements and awards); Caron, *supra* note 141, at 112 (noting that customary international law recognizes the right of either party to an arbitration to declare the award a nullity if the process lacks fundamental norms of fairness). But see Delaume, *supra* note 17, at 141 (suggesting that state consent to arbitration is an implicit waiver of immunity to jurisdiction, but not an implicit waiver of immunity from execution).

323. This was the argument the counsel for LETCO tried (unsuccessfully) to employ, arguing that Liberia had waived its sovereign immunity by entering into the concession agreement whereby it agreed to submit any disputes arising from the contract to ICSID arbitration pursuant to the Convention. See Sergei I. Ruck, *Arbitration in Belarus*, 4 CROAT. ARB. Y.B. 73, 79 (1997) (stating that in accordance with Belarus procedural law, an arbitration decision may be submitted for forced execution within Belarus within three years of its issuance). See generally Martin Hunter et al., THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS 6 (1993) (noting the intention of arbitration to lead to a binding determination of a dispute, enforceable against a party's assets through execution).

324. See van den Berg, *supra* note 252, at 13; see also Nmehielle, *supra* note 10, at 35 (commenting that it is illogical that a waiver is accepted when it applies to enforcement in a particular jurisdiction but not execution).

325. See Schreuer, *supra* note 25, at 1148 (citing the relevant cases); see also Lalive, *supra* note 144 at 162 (citing *Birch Shipping Corp. v Embassy of United Republic of Tanzania*, where Tanzania's agreement to arbitrate in New York constituted an implicit waiver of immunity from execution of the arbitral award. See generally Goldner, *supra* note 108, at 169 (highlighting examples of countries that apply restricted immunity, which allows execution against commercial assets of a foreign state, but not against property rights of a foreign state that belong to sovereign activities or public functions of the state).

326. See Schreuer, *supra* note 25, at 1148; see also Erwin Chemerinsky, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216 (2001) (noting how the American tort system has changed its focus to the goals of deterrence and compensation, and discussing how sovereign immunity frustrates these goals). See generally Nmehielle, *supra* note 10, at 35 (citing the reasons countries are hesitant to waive immunity for execution).

327. See Nmehielle, *supra* note 10, at 33 (reporting that under the Vienna Convention on Diplomatic Relations, host states must provide each foreign state full facilities for performance of the functions of that state's mission); Delaume, *supra* note 210, at 267 (suggesting that a waiver of immunity would avoid the bar to collection on a diplomatic bank account, as in the case of a judgment against Liberia that was not able to be collected). See generally Delaume, *supra* note 17, at 141–42, 486 (citing an example of assets that are immune from execution and illustrating that mixed accounts are not exempt assets).

national obligations on the protection of diplomatic property, which would have a detrimental effect on international relations.³²⁸ Furthermore, an objective of ICSID was to depoliticize investment disputes;³²⁹ allowing execution against the account of the diplomatic embassy would further politicize diplomatic relations.³³⁰

If waiver limited to execution against non-commercial property is inserted, then the same problems would be encountered which exist at national law, namely, on what basis the distinction between commercial and non-commercial property will be made and who will bear the burden of proof.³³¹ In this regard it has been stated that the conceptual difficulties involved in formulating a satisfactory method of differentiating between commercial acts and sovereign acts is unworkable.³³² For this reason, it is arguable that the issue of immunity should be left to the discretion of national laws: execution is commonly felt to be an intensive interference with the rights of a state, and could upset inter-state relations.³³³ Third, while a state may be party to the dispute, the dispute in fact might have originated in sub-national entities, such as the provinces of federal states, independent regulatory agencies or state-owned or privileged enterprises over which the government had limited legal and political influence.³³⁴ Third, it may be

328. See generally Atkeson & Ramsey, *supra* note 201, at 787–88 (outlining exceptions to the immunity from attachment or execution); Nmehielle, *supra* note 10, at 33–34 (citing an example of a United States District Court's preservation of assets as immune from execution).

329. See Shihata, *supra* note 73, at 104; see also Kishoiyian, *supra* note 300, at 368 (citing one of the goals of ICSID as depoliticizing the settlement of investment disputes); Laidhold, *supra* note 304, at 445–46 (describing the efforts by ICSID to depoliticize the settlement of investment disputes).

330. See generally Delaume, *supra* note 13, at 335 (noting that private investors have reason to be wary of the sovereign immunity afforded to countries); Murphy, *supra* note 202, at 185 (citing diplomatic residences as immune from execution).

331. See generally Nmehielle, *supra* note 10, at 33 (noting that the Supreme Court ruled in the *LETGO* case that fees collected from Liberian shipowners for flying the Liberian flag were commercial activities and therefore, not immune); Delaume, *supra* note 17, at 486 (illustrating the difference between disparate definitions of "commercial").

332. See *Victory Transport v. Comisaria General de Abastecimientos y Transporte*, 336 F.2d 354, 360 (2d Cir. 1964) (recognizing the sovereign immunity of the Spanish Ministry of Commerce, despite its signing of an arbitration agreement in the event of a dispute); see also Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051, 1067–68, (1995) (referring to the *Victory Transport* case). See generally Howard J. Lager, Note, *Avoiding the "Nature-Purpose" Distinction: Redefining an International Commercial Act of the State*, 18 *U. PA. J. INT'L ECON. L.* 1085, 1088 n.18 (1997) (describing the short-lived nature of "absolute immunity").

333. See *Libyan American Oil Co (Liamco) v. Libyan Arab Republic*, 20 *I.L.M.* 1 (1981) (awarding the TNC an arbitration award against the state of Libya arising from the expropriation of petroleum concessions; the foreign investor later obtained an attachment of numerous bank accounts of the Libyan states and Libyan state and state enterprises in France); Nmehielle, *supra* note 10, at 35 (noting that execution is commonly thought to be a severe interference with the rights of a state). See generally Delaume, *supra* note 76, at 815–16 (stating that whether there may be proper execution depends on the sovereign immunity laws of the forum state).

334. See Walde and Weiler, *supra* note 111 (referring to the *Lyonnaise des Eaux* case, involving a utility-based dispute in the Argentine province of Tucuman, where it was accepted that the Republic of Argentina was not a party to the concession contract of the negotiations that led to its conclusion). See generally Thomas W. Waelde & Abba Kolo, *Renegotiating Previous Governments' Privatization Details: The 1997 U.K. Windfall Tax on Utilities and International Law*, 19 *NW. J. INT'L L. & BUS.* 405, 416 (1999) (citing *Lyonnaise des Eaux* to illustrate the approach that the Labor Party takes when determining whether the windfall tax would discriminate against investors of other member states).

embarrassing for the U.K. and the U.S., third-party states, to undertake forced execution against Argentina, which may be regarded as a friendly foreign state.³³⁵ That said, enforcement in third-party states is a feature of many international agreements, including the NYC.³³⁶

iii) Obstacles in amending the treaty

Any amendment to the convention requires the approval of all contracting states,³³⁷ and the possibility of reaching such a consensus appears remote.³³⁸ In this respect, it is noteworthy that it would be difficult to convince developing states of the utility of these changes to their position.³³⁹ Indeed, it has been already argued that, while developing states are now making increased use of ICSID,³⁴⁰ it is difficult to make the case that developing states have as much to

335. See Noyes, *supra* note 15, at 861–62 (predicting the result of forced and unwanted arbitration as hindering otherwise friendly relations between states). See generally Atkeson & Ramsey, *supra* note 201, at 771 (describing how American discovery attempts against foreign non-sovereign defendants have produced conflicts with friendly governments); Jacobson, *supra* note 233, at 764–65 (commenting on the drawbacks of America's case-by-case approach to awarding diplomatic immunity until 1952).

336. See Jennifer Dawn Nicholson, *Recent Development: Lander Co., Inc. v. MMP Investments, Inc.*, 13 OHIO ST. J. ON DISP. RESOL. 287, 287 (1997) (outlining the purpose of the New York Convention and the procedure in the event that a losing party refuses to pay an arbitral award); see also Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L.J. 920, 925–26 (1995) (stating that signatories to the New York Convention are bound to enforce arbitral awards, but may opt out if enforcement is against public policy). See generally Sean J. Cleary, *International Arbitration—Foreign Arbitral Awards—Enforcement of Foreign Arbitral Award Refused Under Article V(1)(b) of New York Convention*, Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (2d Cir. 1992), 17 SUFFOLK TRANSNAT'L L. REV. 566, 566 (1994) (noting an exception to enforcement as when a party was denied an opportunity to present its claim before the ruling arbitral body).

337. See ICSID *supra* note 1, at art. 66 (1) (illustrating the procedure for amendment as requiring approval of all signatory states); see also Reisman, *supra* note 56, at 806 (describing the process of amendment of the Convention and noting its difficulty); Nmehielle, *supra* note 10, at 36 (discussing the difficulty of amending the Convention and attributing this to the failure of the drafters to agree on the meaning and scope of execution).

338. See ICSID *supra* note 1, at art. 66 (outlining the correct procedure for amending the convention). See generally Nmehielle, *supra* note 10, at 22 (reviewing the ICSID and the problems associated with enforcing arbitration awards); Andrés Rigo Sureda, *ICSID: An Overview*, 13 WORLD ARB. MEDIATION REP. 166, 166–67 (2002) (discussing the basic structure and goals of the International Center for the Settlement of Investment Disputes).

339. See generally Jennifer L. Amundsen, Note & Comment, *Membership Has Its Privileges: The Confidence-Building Potential of the New York Convention Can Boost Commerce in Developing Nations*, 21 WIS. L. REV. 383, 403 (2003) (addressing how developing nations fear international arbitration schemes); Parra, *supra* note 302, at 42 (discussing the increase of investment treaties and arbitrations among developing nations); *Treaty Update for MIGA, ICSID and N.Y. Convention*, 8-12 MEALEY'S INT'L ARB. REP. (1993) (reporting the increased use of arbitration by such developing nations as the Philippines and Mozambique).

340. In 1987, the first case was brought before ICSID in which both parties were from LDCs. See generally Amundsen, *supra* note 339, at 403–7 (reviewing how developing nations may gain from becoming involved with international arbitration); Parra, *supra* note 302, at 42 (discussing the growing body of arbitration groups and their relationship with developing nations); *Treaty Update for MIGA, ICSID and N.Y. Convention*, *supra* note 339 (recognizing the growing list of developing nations which have recently become involved in arbitration schemes such as ICSID).

gain from the Convention as do foreign investors.³⁴¹ Furthermore, even if the text of an amendment could be accepted by all states, the impact of Article 66(2) would mean that such an amendment would have only a prospective effect, as no amendment can affect the rights of possible parties to ICSID proceedings arising out of consent to arbitration given before the entry into force of the amendment.³⁴² In other words, even if Article 52 were amended, the article as it exists now would remain applicable possibly for some time.

b) Harmonization of National Laws on Sovereign Immunity from Execution

While, in light of the above, amending the Convention seems utopic, a less ambitious way of avoiding forum shopping would be to liberalize and harmonize the rules on immunity from execution, by states with conservative positions on state immunity passing legislation or making judicial pronouncements to extend the current waiver from immunity from jurisdiction to encompass waiver from execution of arbitral awards.³⁴³ In this respect, it should be noted that Switzerland is one of the few countries where the theory of immunity from jurisdiction is extended to immunity from execution.³⁴⁴ However before a TNC can enforce its award, it may still face the hurdle of establishing that the legal relationship in respect of which the award was rendered was connected with Switzerland.³⁴⁵

Part V. Conclusions

The aim of this paper has been to assess the efficiency of the ICSID enforcement mechanism. It is concluded that *prima facie* the ICSID recognition mechanism is more effective than the NYC regime used to enforce ICC awards because it prevents the forum state from refusing

341. See Toope, *supra* note 152, at 221–22 (discussing why developing nations regard international arbitration schemes as more beneficial for foreign investors). *Contra* Lamm & Smutney, *supra* note 69, at 11 (showing how ICSID has taken steps to ensure that arbitration is fair to all parties involved). See generally Alvarez & Park, *supra* note 111 (detailing some of the historical reasons why developing nations have been opposed to international arbitration regimes).

342. See ICSID, *supra* note 1, at art. 66 (stating that if the Administrative Council accepts a proposed amendment, by a majority of two-thirds, then it shall be implemented thirty days later).

343. See van den Berg, *supra* note 252, at 20. See generally Ivanova, *supra* note 320, at 899 (detailing the problems associated with forum shopping and international arbitration); De Ly, *supra* note 116, at 52–53 (illustrating the various factors which are considered when investors forum-shop for arbitration plans).

344. See generally Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 456–58 (2000) (discussing Swiss arbitration law); Crawford, *supra* note 190, at 836 (analyzing Switzerland's unique theories of executing judgments); Michael F. Hoellering, Book Review, 85 AM. J. INT'L L. 424, 424–26 (1991) (reviewing Andreas Bucher & Pierre-Yves Tschanz, *INTERNATIONAL ARBITRATION IN SWITZERLAND* (1989)) (detailing Swiss law governing arbitration).

345. See *Libyan American Oil Co (Liamco) v Libyan Arab Republic*, 20 I.L.M. 1 (1981) (describing the TNC's belief that it could execute its award against Libya on the latter's assets in Switzerland; yet the Swiss Federal Tribunal refused to grant execution, reasoning that the legal relationship in respect of which the award was rendered was not connected with Switzerland. The fact that the sole arbitrator had been sitting in Geneva did not satisfy the requirements of the inner connection required by Swiss law). See generally Drahozal, *supra* note 344, at 457 (discussing how Switzerland differs in processing the enforcement of arbitration awards).

recognition and enforcement on the grounds of public policy.³⁴⁶ The fact that the essence of the public policy defense, albeit in a tightly constrained form, is maintained in the grounds for annulment, ensures that the legitimacy of the arbitral process is not sacrificed to reach the goal of finality.³⁴⁷ However, it has then been demonstrated that while it is not optimal, it is more efficient than the NYC mechanism used to enforce ICC awards, for both legal and non-legal reasons.³⁴⁸

The recognition enforcement mechanism is not optimal due to ICSID's inability to enforce its awards and the fact that there are no institutional remedies against a non-complying state.³⁴⁹ Consequently, the tribunal must delegate this duty to the authorities of contracting states, who will enforce within the framework of their national laws and existing treaty obligations, such as those governing diplomatic relations.³⁵⁰ The operation of these national laws and international obligations may prevent the execution of the ICSID award, which could amount to millions of dollars.

First, while the Convention obligates the competent authorities in the contracting states to provide automatic recognition, they have, as the cases of *Benvenuti* and *LETSCO* illustrate, been reluctant to do so.³⁵¹

346. See the NYC, *supra* note 18, at art. 5 (governing those parties who arbitrate under the N.Y. Convention and allowing an arbitral award to be refused if "contrary to the public policy of that country"). See generally Bowman, *supra* note 80, at 49 (noting that under N.Y. Convention rules, enforcement of an arbitration award may be refused on the grounds that it does not comport with the law of the country in which the negotiation took place); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 810–12 (1999) (highlighting the enforcement problems of the N.Y. Convention).

347. See the NYC, *supra* note 18, at art. 5 (governing arbitration and commonly referred to as the N.Y. Convention). See generally Knull & Rubins, *supra* note 5, at 551–54 (discussing the enforcement of arbitration awards and the effects of annulment upon the NCSID); Park, *supra* note 346, at 806–8 (reviewing the effects of annulments upon the enforcement awards).

348. See the NYC, *supra* note 18, at art. 5 (governing arbitration and commonly referred to as the N.Y. Convention). See generally Ivanova, *supra* note 320, at 904–7 (explaining the enforcement of arbitral awards under the N.Y. Convention); Knull & Rubins, *supra* note 5, at 552 (comparing the ICSID appeal system with that of the New York Convention).

349. See generally Knull & Rubins, *supra* note 5, at 545 (noting that, unlike Switzerland's practice, most other jurisdictions would not allow the parties to "waive the right to object to confirmation of the award at the place of enforcement"); Reisman, *supra* note 56, at 807 (concluding that significant changes are needed in order to effectuate substantive improvements in the ICSID system); Delaume, *supra* note 21, at 796–98 (discussing one particular case study which involves the recognition and enforcement of ICSID awards).

350. See generally Reisman, *supra* note 56, at 787–88, 806 (offering potential remedies to the problems which have arisen in the enforcement of arbitral awards under the ICSID mechanism and detailing the possibility of amending ICSID and implementing an *ad hoc* committee to review appeals of arbitral awards).

351. See Delaume, *supra* note 17, at 139–42 (commenting on the role of recognition in the *LETSCO* and *Benvenuti* cases); Mihajlo Dika, *Recognition and Enforcement of Foreign Arbitral Awards According to Croatian and Slovenian Law*, 1 CROAT. ARB. Y.B. 91, 97 (1994) (noting the policy of contracting states under ICSID is that they are obliged to recognize awards); Nmehielle, *supra* note 10, at 29–34 (discussing recognition and enforcement of awards and using the *LETSCO* case as an illustration).

Second, where recognition is not an issue, the operation of sovereign immunity under U.S. and U.K. law will withdraw a large number of assets from the pool of potentially executable assets.³⁵² While both states follow the doctrine of restricted immunity, which will allow the TNC to force execution on state assets used for commercial purposes, a problem arises because the distinction between official property and commercial property, all-important to a TNC, is difficult to draw, especially where the asset is a bank account for mixed purposes.³⁵³ Due to this uncertainty, it is difficult for a TNC to calculate accurately the cost/benefit of executing an award in these states.³⁵⁴ In the U.K., perhaps to uphold relations with friendly states, the person who draws this distinction is the ambassador; in the U.S., it is the courts.³⁵⁵ Thus, the U.S. courts, by defining commercial purposes restrictively, have the power to prevent a TNC from realizing its award, perhaps to fulfill the policy motive of preserving their jurisdiction as a center for bank accounts of foreign states.³⁵⁶ This may lead a shrewd and influential

352. See Coe, *supra* note 62, at 1450–51 (stressing that ICSID convention awards can be subject to sovereign immunity); Greenfield & Rooney, *supra* note 1, at 383, 386 (illustrating how sovereign immunity can trump an ICSID resolution and that it is a troublesome area with regard to the ICSID convention); see also MacKenzie, *supra* note 15, at 232–33 (noting the relationship between ICSID and sovereign immunity with respect to execution awards).

353. See Frank A. Cona, *Focus on Cyber Law: Application of Online Systems in Alternative Dispute Resolution*, 45 *BUFFALO L. REV.* 975, 983 (1997) (asserting the trend of using restricted immunity instead of absolute immunity regarding ICSID); Goldner, *supra* note 108, at 169 (acknowledging that both the United States and England apply the doctrine of restricted immunity); Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 *AM. J. INT'L L.* 283, 296–97 (1981) (expressing that both the United States and United Kingdom use the doctrine of restrictive immunity).

354. See Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 *VA. J. INT'L L.* 331, 354 (1998) (indicating that a major concern regarding transnational corporations is cost-benefit analysis); Holwick, *supra* note 307, at 207 (assessing the benefits of transnational corporation suits in the United States). See generally John Vidal, *Dissent: Harmed and Dangerous*, *GUARDIAN* (LONDON), May 8, 1996, at 6 (noting the increasing presence of transnational corporations around the world).

355. Pre-FSIA, the issue of whether assets were immune or not was settled ultimately by the U.S. Executive. Indeed the principal purpose of the FSIA was to transfer the determination of SI from the executive to the judicial branch. See McKay, *supra* note 189, at 446 (acknowledging that sovereign immunity determinations are made in the judicial branch as codified in the FSIA); David E. Seidelson, *The Foreign Sovereign Immunities Act: Whose Conflicts Law? Whose Local Law?* Barkanic v. General Administration of Civil Aviation of the People's Republic of China, 58 *BROOK. L. REV.* 427, 438 (1992) (recognizing that the FSIA changed the branch of government which made sovereign immunity determinations from the executive to the judicial branch). See generally *Gulf Resources Am. v. Rep. of Congo*, 276 F. Supp. 2d 20, 24 (D.D.C. 2003) (outlining the U.S. judicial process with regard to the FSIA sovereign immunity and that determinations for assets are made by the courts).

356. See *Arbitration of Maritime International Nominees Establishment v. The Republic of New Guinea*, 505 F. Supp. 141, 143 (D.D.C. 1981) (noting what the United States courts consider commercial activities); Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 *AM. U. L. REV.* 1321, 1351–53 (2001) (asserting that the United States definition of “commercial” is restrictive); see also Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under § 160 (a)(2) of the Foreign Sovereign Immunities Act*, 35 *ARIZ. L. REV.* 1123, 1127 (1993) (suggesting that the term commercial activity has been given an ambiguous definition and U.S. courts have used their discretion to interpret it restrictively).

state to conclude that even monetary ICSID awards have little coercive force, due to the operation of state immunity.³⁵⁷

A common solution suggested to straddle the hurdle of sovereign immunity is to take prophylactic measures and negotiate waivers.³⁵⁸ However, in the U.S. such a waiver would have little effect since it is only possible to waive immunity from execution in respect of commercial assets, and such assets are not immune from the execution of an ICSID award.³⁵⁹ In the U.K., it is possible to waive immunity from execution in respect of non-commercial property, provided such property does not fall within the ambit of specially protected property.³⁶⁰

While most of the problems are derived from this reliance on national courts, some are due to flaws inherent in ICSID itself. Examples of this are that under the Convention only a monetary award is enforceable³⁶¹ and that interim measures from national courts are prohib-

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357. See Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 305 (2000) (acknowledging that ICSID awards are not automatic and even when awarded can have little force); Alford, *supra* note 61, at 688–91 (discussing ICSID awards and state immunity with regard to enforcing the awards); see also Delaume, *supra* note 76, at 817–18 (reporting that ICSID awards can be difficult to enforce depending on the state).
358. See Delaume, *supra* note 76, at 820 (declaring that one of the common ways to remove the problem of sovereign immunity is to get a waiver); Schneider, *supra* note 311, at 756 (advocating the benefit of waivers to sovereign immunity but noting that they are difficult to obtain); see also John Savage, *Danareksa Judgment Spooks Foreign Lenders in Indonesia: Foreign Investors May Want to Choose Arbitration Rather Than Local Courts in Indonesia; Investment Dispute*, INT'L FIN. L. REV., Nov. 1, 2003, at 47 (identifying a possible way to overcome the problem of sovereign immunity is to obtain a waiver of the privilege).
359. See Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA. J. INT'L L. 615, 678 (1994) (indicating that the United States adheres to a standard with respect to sovereign immunity where non-commercial activities are sovereign and get immunity whereas commercial activities are not sovereign and do not have immunity); John R. Schmertz, Jr. & Mike Meier, *In Case Where Contract of Yemenite Company with U.S. for Supply of U.S. Wheat Fell Through for Failure of Yemenite Company to Provide Letter of Credit, Eleventh Circuit Finds Jurisdiction over Ministry as Controlling Yemenite Company and Holds FSIA "Arbitration" and "Commercial Activity" Exceptions Applicable*, INT'L L. UPDATE, Sept. 2000 (expressing that there is a commercial exception to sovereign immunity in the United States); Emmanuel Gaillard, *Waiving State Immunity from Execution in France: An Update*, N.Y.L.J., Oct. 5, 2000, at 3 (addressing how in the United States it is only possible to waive immunity for commercial assets).
360. See Crawford, *supra* note 190, at 832–33 (discussing U.S. and U.K. immunity law); Delaume, *supra* note 13, at 320 (reporting that United Kingdom immunity law attempts to identify commercial activities for which one cannot waive immunity but do not define it specifically); William W. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, 1788 (1984) (emphasizing that England only recognizes immunity in certain limited circumstance).
361. See generally Christophe Dugue, *Dispute Resolution in International Project Finance Transactions*, 24 FORDHAM INT'L L.J. 1064, 1080–81 (2001) (discussing ICSID awards that are governed by the Washington Convention); Goldner, *supra* note 108, at 168 (detailing the binding nature of ICSID awards); see generally Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation-Introduction*, 15 B.U. INT'L L.J. 175, 177 (1997) (commenting on the awards available in Washington Convention).

ited unless the parties otherwise agree.³⁶² This means that the sole avenue a TNC will have to protect potential assets from enforcement is a recommendation by an ICSID tribunal. While *Casado* has held such recommendations to be binding, it is unclear how much weight will be attached to this precedent, and, furthermore, as such measures are not self-executing, court assistance will be needed to enforce them.³⁶³ At this stage, the TNC may be blocked by the operation of sovereign immunity.³⁶⁴

The only solution suggested is foresight on the part of the TNC to include such a clause in its contract with the state. The drawbacks of this solution are that the TNC may not be able to reach an *ad idem* with the host state, though it is more likely to do so given Argentina's present conditions. Also, this solution will only be possible if consent to ICSID arbitration was given in the first place via a state contract and not via a BIT.³⁶⁵

Suggestions have been made on how to improve the ICSID mechanism, but as has been explained, these may be difficult to implement. In light of these suggestions it is difficult to accept Broches' assertion that the treaty provisions give the TNC all he could realistically expect.³⁶⁶

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362. See Crawford, *supra* note 190, at 869 (discussing how international law precludes a state from taking interim measures to ensure that the final execution of the award is effective). *But see* Maria Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, with an Analysis of the Decisions of the Court of Justice of the Andean Community*, 19 ARIZ. J. INT'L & COMP. L. 863, 869 (2002) (noting that the panel of international arbitrators can order interim measures to protect the rights of the parties involved with the dispute). *See generally* Rubins, *supra* note 9, at 316 (noting that parties to an international arbitration are generally free to include a clause governing security for arbitration costs).
363. See Provisional Measures "Recommended" by ICSID Tribunals to Be Binding on the Parties, PUBLIC INTERNATIONAL LAW NEWS, (Freshfields Bruckhaus Deringer) March/April 2003, at 3, available at www.freshfields.com/practice/pil/publications/pil_news/200304.pdf (stating that the recommendations of the ICSID are intended to be binding on the parties). *See generally* Danielle Everett, *New Concern for Transnational Corporations: Potential Liability for Tortious Acts Committed by Foreign Partners*, 35 SAN DIEGO L. REV. 1123, 1144 (1998) (discussing the effects of sovereign immunity on a plaintiff's case against a foreign nation); Greenfield & Rooney, *supra* note 1, at 383 (citing Article 55 of the UCSID Convention, which states "[t]he doctrine of sovereign immunity is a principle of international law grounded on the assumption that sovereigns are equal and should not be subject to suit in the courts of another jurisdiction").
364. *See generally* Everett, *supra* note 363, at 1144 (discussing the effects of sovereign immunity on a plaintiff's case against a foreign nation); Greenfield & Rooney, *supra* note 1, at 383 (citing Article 55 of the UCSID Convention, which states "[t]he doctrine of sovereign immunity is a principle of international law grounded on the assumption that sovereigns are equal and should not be subject to suit in the courts of another jurisdiction").
365. *See generally* Adriana Lieders, *A New Chapter in Brazil's Oil Industry: Opening the Market While Protecting the Environment*, 13 GEO. INT'L ENVTL. L. REV. 781, 795 (2001) (discussing the formation of a contract between a TNC and a host country); Sompong Sucharitkul, Book Review, 88 AM. J. INT'L L. 572, 573 (1994) (reviewing Moshe Hirsch, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES* (1993)) (noting that the consent of the host nation to arbitration determines jurisdiction)); Delaume, *supra* note 17, at 139 (stating that once a nation has recognized an award granted by ICSID, the nation can no longer claim sovereign immunity).
366. *See* Broches, *supra* note 295; *see also* Nmehielle, *supra* note 10, at 47 (acknowledging the fact that the ICSID mechanism has problems with enforcing the awards it grants). *See generally* Monroe Leigh, *Decision: ICSID Arbitral Decision: Arbitration—Annulment of Arbitral Award for Failure to Apply Law Applicable Under ICSID Convention and Failure to State Sufficiently Pertinent Reasons*, 81 AM. J. INT'L L. 222, 224 (1987) (noting the inherent flaws in the ICSID mechanism).

Despite the aforementioned drawbacks, the ICSID mechanism is still a considerable improvement over the NYC mechanism for several reasons. First, with respect to sovereign immunity, this doctrine is only activated at the execution stage in ICSID;³⁶⁷ under the NYC, it may, depending upon the legal seat of arbitration,³⁶⁸ operate to prevent a court from assuming jurisdiction.³⁶⁹ Furthermore, national laws on sovereign immunity only operate to bar execution in that jurisdiction;³⁷⁰ such laws have no impact on the award itself, which therefore can be enforced in another jurisdiction whose sovereign immunity laws are more lenient.³⁷¹ Second, as a member of the World Bank family, ICSID enjoys a distinct advantage over the NYC mechanisms. Withdrawal of official aid, especially in the form of largely subsidized funds that Argentina is negotiating, will bear heavily on the risk calculus of a rational state deciding whether to comply or not. Whether this is morally justifiable is a different issue.³⁷² In light of the above, especially the World Bank family connections, ICSID, despite its lack of an institutional remedy for non-compliance, may enjoy its popularity, for the meanwhile.

367. See Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 ARB. INT. 28, 32 (1987). See generally Greenfield & Rooney, *supra* note 1, at 380–81 (discussing the connection between sovereign immunity and the execution of ICSID awards); Delaume, *supra* note 17, at 485 (stating that the execution of ICSID awards, even after recognition, has failed because of sovereign immunity).

368. See *Ipitrade Int'l v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (holding that, under the New York Convention, immunity from execution is waived only when a foreign state agrees to arbitrate and the state of arbitration and the state of execution are all signatories to the Convention). See generally Hayden R. Brainard, *Survey and Study of Technology Development and Transfer Needs in New York*, 9 ALB. L.J. SCI. & TECH. 423, 470–71 (1999) (noting that the New York Convention does not specify the laws governing the arbitration of a dispute); Park, *supra* note 346, at 810 (stating that the effectiveness of the New York Convention depends on the arbitration laws of the participating countries).

369. See *Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 215 (4th Cir. 2002) (holding that a U.S. court could not enforce the arbitration agreement despite the public policy considerations otherwise).

370. See Schwarcz, *supra* note 20, at 1027 n.422 (noting that although contracting nations are bound to recognize ICSID arbitral awards, a nation's own laws may provide it sovereign immunity and prevent the execution of the award); see also Charles N. Brower, *Arbitrating Against Foreign Governments*, 6 J. TRANSNAT'L L. & POL'Y 189, 194 (1997) (acknowledging that the execution of arbitral awards is subject to rules of sovereign immunity). But see Zicherman, *supra* note 142, 667 (stating that the International Chamber of Commerce estimates that there is a problem with the execution of an arbitral award in only 10 percent of cases).

371. See also Choi, *supra* note 26, at 213 (noting that the outstanding order of recognition may deter the states from bringing assets into the jurisdiction and may ultimately prove enough of a barrier to the state's conduct of economic transactions to induce payment of the award).

372. See A.A. Asouzu, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES*, 399 (Cambridge Univ. Press, ed. 2001).

Is Section 201 of the Trade Act of 1974 Consistent with the World Trade Organization Agreement on Safeguards?

By Morgan Frohman*

I. Introduction

In March of 2002, the United States implemented its largest safeguard measure on steel imports in response to the International Trade Commission's (ITC, or USITC)¹ finding that increased imports of certain steel products were a substantial cause of serious injury to the domestic industry.² In response to this action, several U.S. trading partners threatened retaliatory action, implemented provisional safeguard measures, and requested formal consultations with the U.S. under the World Trade Organization (WTO) Dispute Settlement Mechanism (DSM).³ In July of 2003, the WTO Panel ruled that the U.S. had violated its international obligations in the imposition of its latest safeguards measure, a finding which was affirmed by the WTO Appellate Body (AB).⁴ Less than one month after the AB issued its report and almost two years after implementing the steel safeguard, the Bush administration repealed the controversial tariffs in the face of a threatened trade war by the European Union.⁵

1. The ITC is the investigative body under U.S. trade remedy laws. See 19 U.S.C. § 1330 (granting the ITC the authority to investigate injuries claimed under trade resolutions).
2. See ITC Steel Determination, Investigation No. TA-201-73 (Dec. 20, 2001), available at <http://usitc.gov/steel/i1220y1.pdf> (last visited Jan. 13, 2003) (hereinafter "Steel"); see also Matthew J.S. Graham, Note, *Special Protection Is Not the Solution to Save Domestic Steel: A Critique of the Bush Steel Initiative*, 12 MINN. J. GLOBAL TRADE 199, 199-200 (2003) (recognizing that the importation of foreign steel has had detrimental affects on the domestic steel industry). But cf. Robert Mascola, *Recent Development: Unfair Trade in Steel From Korea? The International Trade Commission's Treatment of Cross-Border Dedicated Supplier Relationships*, 35 HARV. INT'L L.J. 201, 201 (1994) (noting that imports of foreign steel did not have an unfair effect on domestic steel producers, based on a 1994 ITC study).
3. See Graham, *supra* note 2, at 209-10 (observing that foreign nations have reacted negatively to measures designed to protect the domestic steel industry); see also Brady P. Priest, Note, *Steel Tariffs: A Shining Example of the Tension Between Politics and Economics in the United States Today*, 28 BROOK. J. INT'L L. 1025, 1026 (2003) (noting the negative effect that the steel tariff will have on foreign nations); *UK Steel Association Deplores Bush Move on Steel* (June 6, 2001) (discussing the negative manner in which the British steel industry has reacted to actions designed to protect the United States domestic steel industry) available at <http://www.uksteel.org.uk/nw73.htm> (last visited Feb. 19, 2004).
4. See Graham, *supra* note 2 at 209-10 (discussing the process by which the WTO reached its conclusion that the steel tariffs violated global trade rules); Priest, *supra* note 3, at 1055-56 (discussing the WTO's finding that the Bush administration's steel tariffs violated global trade rules). See generally John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 799 (2003) (describing the history and purpose of the WTO).
5. See Richard W. Stevenson, *Bush Set to Lift Tariffs on Steel*, N.Y. TIMES, Dec. 4, 2003, at A1 (describing the expectations from President Bush's imminent decision to lift steel tariffs); Richard W. Stevenson, *After 21 Months, Bush Lifts Tariff on Steel Imports*, N.Y. TIMES, Dec. 5, 2003, at A1 (discussing the Bush administration's decision to lift the tariffs on steel imports); see also Priest, *supra* note 3, at 1056 (observing the Bush administration's initial reaction to the WTO ruling).

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The steel safeguard is only the latest chapter in the controversy over U.S. import relief measures. Section 201 of the Trade Act of 1974⁶ has been the source of several disputes in the WTO involving every U.S. safeguard measure employed since the WTO's formation.⁷ The common complaint of WTO members challenging U.S. safeguard action is either that section 201 violates certain provisions of the WTO Agreement on Safeguards (SA) or that the implementation of section 201 is inconsistent with the SA.⁸

This article will analyze whether U.S. safeguards law is consistent with international safeguards provisions and considers whether the manner in which section 201 is implemented needs to be modified in order for the U.S. to effectuate relief compatible with WTO rules. Part II(A) will provide an overview of section 201 and its relationship to various provisions in the SA and the General Agreement on Tariffs and Trade (GATT).⁹ The method by which the AB interprets WTO agreements is relevant background to a discussion of the consistency of a WTO member's domestic law with that member's WTO obligations. After discussing key aspects of the SA and Article XIX of the GATT, Part II(B) of this article will focus on the inconsistent aspects of U.S. safeguard measures as identified by the WTO Appellate Body. Identification of the inconsistencies will illuminate the differences between section 201 and the SA and help develop solutions to the United States' negative WTO safeguard record. Finally, Part III will examine the implications of adopting different courses of action in light of the AB and Panel decisions. In order for future U.S. safeguard actions to withstand and hopefully prevent further WTO litigation, a few suggestions are offered. A clarification of the SA, a modification of U.S. law embodied in section 201, or an alteration of the ITC's injury and causation determination methodology would tighten the requirements for permissible safeguard action. In exchange for the restriction on U.S. flexibility in implementing safeguard actions, there

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6. See Trade Act of 1974 §§ 201–204 (current version at 19 U.S.C. §§ 2251–2254 (2003)).
 7. See Susana Hernandez Puente, *Section 301 and the New WTO Dispute Settlement Understanding*, 2 ILSA J. INT'L. & COMP. L. 213, 213–14 (noting that disputes between the U.S. and other WTO member nations have arisen over actions taken under the 1974 Trade Act); Leo Wise, *Recent Development: Trading with China*, 38 HARV. J. ON LEGIS. 567, 567 (2001) (discussing past instances when actions taken under the Trade Act of 1974 have run afoul of WTO regulations); see also Elizabeth Becker, *Europe Seeks Permission to Punish U.S., Citing Trade Ruling*, N.Y. TIMES, Jan. 16, 2004, at C2 (analyzing recent requests by European members of the WTO to punish the U.S. for actions taken with regard to global trade).
 8. See WTO, Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994) (discussing the process through which WTO safeguard measures are initiated) available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Jan. 13, 2003); see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 956, 978–79 (2002) (noting that the Bush administration used section 201 in dealing with the threats posed by steel importation); Janelle M. Diller & David A. Levy, Notes and Comment, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 682 (1997) (observing that safeguard procedures are effective when applied).
 9. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; see also Diller & Levy, *supra* note 8, at 665 (finding that GATT is one of the principal agreements in international trade); Clyde Stoltzberg, *Law Regulation and International Business*, 40 AM. BUS. L.J. 445, 449 (2003) (noting that current problems with global trade will likely be resolved via the GATT agreement); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879, 902 (1999) (observing that nations appeal to the WTO when GATT regulations are violated).

would be an increased likelihood of WTO compatibility because the U.S. would only be allowed to impose safeguard measures in clear circumstances.

A. Important Features of Section 201

The U.S. implements import relief (a safeguard) under section 201 of the Trade Act of 1974 in accordance with Article XIX of the GATT and the WTO SA.¹⁰ U.S. trade law in this area sets forth the authority and procedures for the ITC and the President to assist domestic industry in the form of a temporary relief mechanism, rather than as a permanent protection against foreign competition.¹¹ Under section 201, a domestic industry seriously injured or threatened with serious injury, by fairly traded increased imports, may petition the ITC for import relief.¹² If the Commission makes an affirmative determination, it recommends to the President relief that would remedy or prevent the injury and facilitate industry adjustment to import competition.¹³ The President makes the final decision of whether to provide relief and the amount of such relief.¹⁴

As a result of undertaking trade liberalization, it is recognized that particular sectors of domestic industry will encounter temporary difficulties of economic adjustment in response to

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10. See Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 819 (2001) (discussing GATT Article XIX's purpose of giving governments a safety valve when trade partners derogate from global trade rules); Murphy, *supra* note 8, at 978–79 (finding the Bush administration's decision to use section 201 to deal with foreign steel importation); see also Gary H. Perlow, *The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?*, 75 AM. J. INT'L L. 93, 174 n.167 (1981) (advising that domestic producers can resort to section 201 to deal with import losses).
 11. See 19 U.S.C. § 2251(b) (listing the elements of a section 201 cause of action); see also Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV. 479, 483 (1998) (stating that section 201 is intended for temporary relief); Murphy, *supra* note 8, at 978–79 (noting the temporary nature of relief granted under section 201).
 12. See Trade Act of 1974 § 201(a)(1) (current version at 19 U.S.C. § 2251 (2003)). The ITC assesses whether “an article is being imported into the U.S. in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.” Under section 302 of the NAFTA Implementation Act, the Commission determines whether, as a result of the reduction or elimination in a duty under the NAFTA, increased imports from Canada or Mexico are a substantial cause of serious injury or threat of serious injury to a U.S. industry. *Id.* If the Commission makes an affirmative determination, it makes a remedy recommendation to the President, who makes the final remedy decision. See generally Jan D'Alessandro, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 GEO. L.J. 417, 331 n.166 (1987) (discussing the elemental standards of section 201(a)(1)); Murphy, *supra* note 8, at 978–79 (discussing section 201).
 13. See Trade Act of 1974 § 202(e)(1). See also Graham, *supra* note 2, at 199–200 (noting that President Bush made his decision to impose steel tariffs pursuant to findings made by the ITC); Eun Sup Lee, *Korean Version of Uruguay Round Agreement on Safeguards*, 8 M.S.U.-D.C. L.J. INT'L L. 397, 175 n.144 (1999) (opining that under section 202(e)(1) the ITC has authority to recommend actions to deal with threats posed by foreign imports).
 14. See Trade Act of 1974 § 203. See also Michael Cornell Dypski, *The Caribbean Basin Initiative: An Examination of Structural Dependency, Good Neighbor Relations, and American Investment*, 12 J. TRANSNAT'L L. & POL'Y 95, 107–08 (2002) (examining the President's powers under section 203); Graham, *supra* note 2, at 199 (noting that the decision to undertake such measures lies with the President).

increased foreign competition.¹⁵ Safeguard provisions facilitate trade liberalization by providing a remedy for the difficulties that originate from, or are at least worsened by, free trade agreements.¹⁶ Thus, section 201 does not require a finding of an unfair trade practice, as do the antidumping and countervailing duty laws¹⁷ and section 337 of the Tariff Act of 1930.¹⁸ However, the injury requirement under section 201 is considered to be more difficult to demonstrate than the injury determinations of the unfair trade statutes.¹⁹ From the United States'

15. See WTO Panel, United States—Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb Meat, WT/DS177/R (Dec. 21, 2000) at para. 7.240 (noting that the purpose of the Safeguard Agreement is to provide temporary relief and assistance for domestic industries that suffer serious injury or threat thereof due to increased imports) (hereinafter “*Lamb Meat*”); see also Proclamation No. 7273, 65 Fed. Reg. 8621, 8621 (Feb. 16, 2000) (finding that importing certain steel wire rod increased so significantly in quantity that it brought injury to domestic industry in competition); Robert E. Scott, *Impacts of the Trade Deficit on the U.S. Economy: Briefing for the Trade Deficit Review Commission* (Sept. 9, 1999) (reporting that the growth of trade deficits since the 1970s has damaging effects on domestic employment, labor relations and wages), available at <http://www.ustdrc.gov/hearings/09sept99/rscott.pdf> (last visited Feb. 26, 2004).
16. See Trade Act of 1974 § 201; see also *NAFTA and Agricultural Trade: U.S. Department of Agriculture Fact Sheet* (June 1996) (illustrating how safeguard provisions between the U.S. and Mexico provided remedies against import surges for agricultural goods), available at <http://usinfo.state.gov/journals/ites/0696/ijee/ejfaf3.htm>; *OAS Summary Description of the Uruguay Round—Marrakesh Agreement Establishing the World Trade Organization: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (listing the permissible safeguard actions, its applications, and the guidelines for administration to protect domestic industries against import surges), available at <http://www.sice.oas.org/summary/ur%5Fround/ur16.asp> (last visited Feb. 17, 2004).
17. See Tariff Act of 1930, 19 U.S.C. § 1673, Pub. L. No. 108–144 (2003) (providing for relief in response to unfairly traded imports); see also Harvey M. Applebaum, *Practising Law Institute, Recent Developments in ITC Injury Determinations in Antidumping and Countervailing Duty Cases*, PLI Order No. A4-4178, at 180 (1987) (stating that the ITC customarily applied a heavier standard in antidumping and countervailing duty cases than in the escape clause of section 201); William E. Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 B.U. INT’L L.J. 345, 349 (1985) (explaining that under section 201 the commission examines all fairly traded imports to protect domestic industries for a limited amount of time, while under the antidumping and countervailing duty laws the commission examines unfairly traded imports).
18. See Tariff Act of 1930 § 337 (excluding 108–136, 108–137) (2003) (providing that section 337 is used for imports that infringe upon a U.S. patent, copyright, trademark, or registered semiconductor mask work).
19. See Perry, *supra* note 17, at 350–51 (explaining that only a material cause of injury is required to be found in imports in antidumping and countervailing duty laws, whereas the commission must find that imports are a substantial cause of serious injury to a large industry in section 201 investigations); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 580–81, 581 n.108 (1987) (observing that domestic industries favor section 201 over antidumping and countervailing duty laws because the injury test is stricter). Compare Tariff Act of 1930 (requiring cheaper import costs to cause “material injury” or threat thereof in the injury provision of the U.S. antidumping statute) with Trade Act of 1974 (requiring imports to be a “substantial cause of serious injury, or threat thereof.”). See Perry, *supra* note 17, at 350–51 (explaining that only a material cause of injury is required to be found in imports in antidumping and countervailing duty laws, whereas the commission must find that imports are a substantial cause of serious injury to a large industry in section 201 investigations); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 580–81, 581 n.108 (1987) (observing that domestic industries favor section 201 over antidumping and countervailing duty laws because the injury test is stricter).

point of view, section 201 is a stricter standard for safeguard action than under WTO law,²⁰ as it requires that imports be a “substantial cause” of serious injury,²¹ whereas the WTO SA requires only “serious injury.”²² The ITC defines a “substantial cause” as “a cause which is important and not less than any other cause.”²³ However, countries adverse to the U.S. position in WTO dispute settlement have argued the opposite.²⁴ For instance, complainant countries fault the U.S. standard as inconsistent with Article 4.2(b) of the SA because it merely requires that increased imports be not less than any other factor, rather than a substantial cause of serious injury by itself.²⁵ In *Lamb Meat*, New Zealand and Australia argued that increased imports by themselves must be causing or threaten to cause serious injury to meet the SA’s causation standard.²⁶ The U.S. defended its “substantial cause” standard, arguing that the SA “does not imply that increased imports need to be the sole cause of injury as long as they are a substantial cause in the connection between imports and injury. Nor does [SA] Article 4.2(b) require com-

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20. See Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. 457, 468–69 (2002) (stating that technical requirements for section 201 findings of causation such as notification and consultation result in greater hurdles in safeguard agreements); see also David A. Gantz, *Introduction to the World Trading System and Trade Laws Protecting U.S. Business*, 18 WHITTIER L. REV. 289, 304 (1997) (concluding that section 201’s substantial cause of serious injury is a stricter standard than the material injury requirement in antidumping and countervailing duty cases); Kelly Henry, Comment, *Is the United States the World’s Dumping Ground for Steel? Recent Influxes in Steel Imports in the United States, the Effects, and the Possible Remedies*, 25 HOUS. J. INT’L L. 381, 404–05 (2003) (showing that proponents of the antidumping and countervailing duty laws criticize section 201 because of its extremely stringent standard compared to the WTO standard).
 21. See Trade Act of 1974 (stating that the ITC must investigate whether an increased quantity of imports becomes a “substantial cause of serious injury or threat thereof”); see also *Corus Group PLC v. Int’l Trade Comm’n*, 352 F.3d 1351, 1353 (Fed. Cir. 2003) (noting that the Commission must investigate whether the increased quantity of articles imported becomes a “substantial cause of serious injury or threat thereof” pursuant to 19 U.S.C. § 2252(b)(1)(A)); Proclamation No. 7274, 65 Fed. Reg. 9193, 9193 (Feb. 18, 2000) (finding that the increase in line pipe importation was a substantial cause of serious injury to the domestic line pipe industry).
 22. See Trade Act of 1974 § 202(b); WTO Panel, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten From The European Communities*, WT/DS166/R (July 31, 2000) at para. 8.135 (hereinafter “*Wheat Gluten*”); see also John R. Schmertz & Mike Meier, *WTO Dispute Settlement Panel Decides Controversy over U.S. Quotas Imposed on Lamb Meat Imports from Australia and New Zealand Finding That U.S. had Acted Inconsistently with Several Provisions of GATT 1994 and Agreement on Safeguards*, 7 INT’L L. UPDATE 29, 35 (2001) (reporting that Australia and New Zealand argued that the USITC report failed to demonstrate how increased import of lamb meat threatened to cause serious injury to the U.S. domestic industry in the *Lamb Meat* investigation).
 23. See Trade Act of 1974 § 202(b).
 24. See WTO Panel, *supra* note 15, at para. 7.229 (stating that Australia and New Zealand alleged that the “substantial cause” and “not less than any other cause” standard of section 201 was inconsistent with the requirements of Article 4(2)(b) of the Safeguard Agreement because it is a lower standard); *id.* at para. 7.230 (noting that the Panel did not address the argument by Australia and New Zealand that the “substantial cause” and “not less than any other cause” standard was inconsistent with Article 4(2)(b) of the Safeguard Agreement, explaining that it was not within their authority to analyze the U.S. statute *per se*); see also Jorge F. Perez-Lopez, *GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries*, 23 CASE W. RES. J. INT’L L. 517, 576–77 (1991) (recognizing that the “substantial injury” standard adopted by the EEC’s legislation is the same as Title XIX, while the U.S.’s legislation adopted a stricter standard of a “substantial cause” that is “no less important than any other cause”).
 25. See WTO Panel, *supra* note 22, at para. 8.140 (noting that the *Wheat Gluten* Panel concluded that the U.S. was free to determine an appropriate method of assessing causation).
 26. See WTO Panel, *supra* note 22, at para. 8.140.

petent national authorities to examine the effects of increased imports in isolation from other factors.”²⁷ In a preliminary ruling, the AB stated that it was not the consistency of U.S. law *per se* that was under its analysis, rather it was the application of such standard that was at issue in the case.²⁸

The most recent application of section 201 was in the *Steel* safeguard. In *Steel*, section 201 has not only been greatly scrutinized by the U.S. trade partners adversely affected by the measure,²⁹ but has also drawn sharp criticism from Congress, aroused the interest of American citizens, and has even been questioned by some members of the domestic industry protected by the measure.³⁰ From section 201’s causation standard, to the presidential discretion in increasing the ITC’s recommended measure, the *Steel* safeguard is a prime example of underlying multilateral tensions coming together at a boiling point; it is also a useful way to discuss a U.S. course of action to ensure a greater likelihood that future U.S. safeguards are WTO-compatible.

B. The Current Controversy: Steel

Safeguard measures serve the useful economic and political function of giving hard-pressed companies and their workers time to adapt to changes caused by liberalization or peri-

27. See *id.* at para. 8.140.

28. See WTO Panel, *supra* note 15, at para. 7.231 (showing that the Appellate Body did not rule on section 201’s application in that case because other factors in the safeguard measure violated the Safeguard Agreement and GATT of 1994); see also Claus-Dieter Ehlermann, *Reflections On The Appellate Body Of The World Trade Organization (WTO)*, 97 AM. SOC’Y INT’L L. PROC. 77, 83 (2003) (illustrating the analysis by the Appellate Body in applying the causation link between increased imports and “serious injury”); Yang Guohua, *Are Safeguard Measures Permitted under the World Trade Organization System?*, 17 TEMP. INT’L & COMP. L.J. 175, 188–89 (2003) (illustrating how the Appellate Body focused on the U.S.’s implementation of the standard and ultimately determined that such standard was inconsistent with Article 4.2(b)).

29. See Priest, *supra* note 3, at 1025–26 (commenting that the Bush administration’s imposition of tariffs on foreign-made steel under the safeguard provision has been heavily criticized by U.S. trading partners for causing substantial loss of income to companies of those countries that export steel to the U.S.); see also Elizabeth Becker, *EU Leads Charge for New Sanctions Against U.S.*, INT’L HERALD TRIB., Jan. 16, 2004 (reporting that the EU and many other U.S. allies and trade partners requested that the WTO impose sanctions against the U.S. for enforcing steel tariffs and failing to change unfair subsidies for American corporations); BBC News, *Trade War Looms Over Steel Dispute* (Mar. 6, 2002) (illustrating the criticism and opposition to Bush’s steel tariffs by many trade partner countries due to the unfairness and its negative impact on their steel industry).

30. See ITC, Hearing Transcript at 2314 (Sept. 28, 2001) (providing the testimony of Mr. Luberda on behalf of the domestic stainless seamless hollow products industry, who opposed granting relief); ITC, Hearing Transcript at 2352 (presenting the testimony of Mr. Sharkey of Gerlin, USA, a domestic manufacturer of stainless flanges, opposing relief); see also Kevin K. Ho, *Between Empire and Community: The United States and Multilateralism: A Mid-Term Assessment: Trade and Economic Affairs: Trading Rights And Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT’L L. 825, 841–42 (2003) (presenting criticisms of trade restriction by illustrating the negative effects on the general societal welfare and by showing the fallacies in the decision-making process of Bush’s imposition of steel tariffs); Alan Wm. Wolff, The American Enterprise Institute, *The Escape Clause and Antidumping: A Case Study in Steel* (July 19, 1999) (outlining the negative aspect in resorting to section 201 from the domestic steel industry’s perspective), available at http://www.dbtrade.com/publications/the_escape_clause_and_antidumping.htm (last visited on Feb. 19, 2004).

odic market disruption.³¹ On March 5, 2002, the President announced the imposition of a safeguard on \$8.5 billion worth of certain steel products³² after the largest and most complex investigation ever carried out by the ITC.³³ The ITC investigation was part of a comprehensive policy initiative in response to challenges facing the steel industry, announced by the President on June 5, 2001.³⁴ At the President's request, the ITC initiated its investigation into the domestic steel industry in June of 2001.³⁵ The President received recommendations from the

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31. See Henry, *supra* note 20, at 395 (affirming the usefulness of safeguards to economically remedy the deleterious effects import competition can have on domestic industries); see also USITC, *Global Safeguard Investigations*, available at http://www.usitc.gov/er/safeguard/201_FAQ_BASIC.HTM (last visited Feb. 14, 2004) (defining a global safeguard as a protective measure taken by the government to shield an industry where increased imports of a product are alleged to be a substantial cause of serious injury, or threat of serious injury); U.S. Dep't of State, *The Language of Trade, Section 201*, available at <http://usinfo.state.gov/products/pubs/trade/glosssz.htm#sect201> (last visited Feb. 14, 2004) (explaining a section 201 safeguard as an "escape clause," allowing the President to take action to bolster a domestic industry that has been seriously injured by imports).
 32. See Press Release, The White House, Steel Products Proclamation (Mar. 5, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020305-7.html> (last visited Feb. 14, 2004); see also *Import Tariffs*, CHI. SUN-TIMES, Mar. 6, 2002, at 64 (listing the import products to which extra costs would be added under the White House plan). See generally David E. Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports*, N.Y. TIMES, Mar. 6, 2002, at A1 (reporting Bush's steel tariff to protect the American steel producers from import undercutting).
 33. See Press Release, *supra* note 32 (referring to the USITC's initial finding on December 19, 2001, that numerous steel products imported into the U.S. were a substantial cause of serious injury, or threat of serious injury); see also USITC, *Steel Global Safeguard Investigation* (noting the plethora of reports, findings, and commissions involved in conducting the U. S. ITC's investigation) available at <http://www.usitc.gov/steel/> (last visited Feb. 14, 2004); *ITC Vote Significant Step For U.S. Steel Industry, Decision Validates Import Injury, Remedy Phase Next*, (Oct. 23, 2001) (stressing the expanse of the ITC investigation into the domestic steel industry) available at <http://www.steel.org/news/pr/2001/pr011023.htm> (last visited Feb. 15, 2004).
 34. See Letter from Robert B. Zoellick, U.S. Trade Representative, sent to the Hon. Stephen Koplan, ITC Chairman (June 22, 2001) (announcing President Bush's request to launch an ITC investigation concerning the ailing steel industry) available at <http://www.usitc.gov/steel/ER0622Y1.pdf> (last visited Feb. 15, 2004); *ITC Vote Significant Step For U.S. Steel Industry, Decision Validates Import Injury, Remedy Phase Next* (Oct. 23, 2001), (emphasizing the magnitude and complexity of the ITC investigation) available at <http://www.steel.org/news/pr/2001/pr011023.htm> (last visited Feb. 15, 2004); see also Kristine Henry, *Steel Hurt by Imports, Panel Finds*, BALT. SUN, Oct. 23, 2001, at 1C (reporting the extent of the ITC investigation which led to a finding that 12 steel product lines had been seriously injured).
 35. See Letter from Robert B. Zoellick, *supra* note 34 (noting the President's active role in commencing an ITC investigation into the U.S. steel industry); see also *AISI Commends President For Taking Next Step In 201 Pledges Support to Administration and ITC* (June 25, 2001) (explaining the steps taken by President Bush in officially submitting a request to the ITC to investigate the domestic steel industry) available at <http://www.steel.org/news/pr/2001/pr010625.htm> (last visited Feb. 16, 2004); S. Res. 537, 107th Cong. (2001) (adopting resolution by the U.S. Senate Committee on Finance instructing the ITC to investigate certain steel imports) available at <http://finance.senate.gov/steelresolution.pdf> (last visited Feb. 16, 2004).

ITC on December 7, 2001,³⁶ and imposed section 201 relief on March 20, 2002.³⁷ Under the President's action, tariffs on most U.S. imports of steel were scheduled to increase for the period between March 20, 2002, and March 20, 2005.³⁸ Free trade agreement partners of the U.S. were excluded from the safeguard action,³⁹ in addition to countries receiving Caribbean

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36. The ITC determines whether the domestic industry is suffering material injury as a result of increased imports pursuant to section 202(b) of the Trade Act. Pursuant to section 311(a) of the NAFTA Implementation Act (19 U.S.C. § 1311(a)), the ITC found that Canada and Mexico both contributed importantly to serious injury or the threat thereof caused by increased imports. *See* 148 CONG. REC. H625 (Feb. 27, 2002) (statement of Rep. DeLauro) (debating ITC recommendation given to the President to impose tariffs to protect American steel companies); *see also* Henry, *supra* note 34, at 9C (describing decision by ITC recommending that President Bush impose tariffs to protect the domestic steel industry from cheap foreign imports).
37. *See* Press Release, ITC, ITC Details its Determinations Concerning Impact of Imports of Steel on U.S. Industry (Oct. 23, 2001) (setting forth the additional details concerning the ITC determination released on Oct. 22, 2001, regarding imports of steel) *available at* <http://www.usitc.gov/er/nl2001/ER1023Y1.PDF> (last visited Feb. 16, 2004). In comparison to the President's safeguard measure as implemented, the ITC tariff recommendations generally included lower tariff increases, more products that would be subject to tariff-rate quotas (TRQs), and in some cases, different countries that would be subject to the increases altogether. Steel Determination, USITC Inv. No. TA-201-73 (Dec. 20, 2001), at app. C, *available at* <http://www.usitc.gov/steel/i1220y1.pdf> (last visited Feb. 16, 2004); *see also* Press Release, *supra* note 32 (releasing President's decision to impose section 201 safeguards to give the steel industry the opportunity to adjust to a surge in foreign imports).
38. Tariffs were phased in for product groupings under several schedules, with the greatest tariff increase occurring between March 20, 2002, and March 20, 2003. In certain cases, products would be subject to TRQs, under which products would not be subject to higher tariffs until a certain quantity of imports had entered the U.S. *See Steel: Monitoring Developments in the Domestic Industry*, USITC Pub. 3632, Inv. No. TA-204-9, (Sept. 2003) at ch. 1, p. 6, *available at* <http://www.usitc.gov/pub3632/pub3632.htm> (last visited on Feb. 16, 2004). This report is written pursuant to section 204(a)(2) of the Trade Act of 1974 on the results of its monitoring developments in the steel industry since the President imposed tariffs and tariff rate quotas on imports of certain steel products. Table Overview I-3 of the ITC report gives a comprehensive overview of the section 203 safeguard measures imposed on March 20, 2002, by product and form (hereinafter "ITC Report to President"). *See generally* Press Release, *supra* note 32 (enumerating the various tariffs to be imposed throughout the steel industry in order to facilitate recovery).
39. Mexico and Canada were excluded under the NAFTA, and both Israel and Jordan were excluded pursuant to their bilateral free trade agreements with the U.S. *See* Press Release, *supra* note 32 (declaring Mexico, Canada, Israel, and Jordan excluded from the tariff because of free trade agreements in place); *see also* 148 CONG. REC. H1492 (Apr. 23, 2002) (statement of Rep. Brown) (detailing that tariff remedy excludes steel from NAFTA partners Mexico and Canada).

Basin Economic Recovery Act (CBERA) treatment,⁴⁰ and from countries which had received Generalized System of Preferences (GSP) treatment.⁴¹

On March 26, 2003, a WTO Panel preliminarily ruled that the steel import tariffs were illegal.⁴² The next day, Representative Benjamin Cardin of the House of Representatives' Steel Caucus and the Ways and Means Committee (which oversees trade issues) simultaneously condemned the WTO decision and announced his resolve to support the administration's decision to appeal the preliminary ruling.⁴³ In fact, some members of the domestic industry believed the scope of the safeguard was too broad, opposed the imposition of such a remedy, and voiced dissatisfaction because the administration failed to consult with industry before imposing the measure.⁴⁴

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40. See Joint Remedy Recommendations of Chairman Stephen Koplan and Commissioners Marcia E. Miller and Jennifer A. Hillman (recommending tariff exclusion to steel imports from beneficiary countries under CBERA) available at <http://www.usitc.gov/er/nl2001/er1207y1s1.pdf> (last visited Feb. 16, 2004); see also USITC Inv. No. TA-201-73, Summary of Commission Remedy Recommendations (Dec. 7, 2001) (excluding tariff application to steel imports from beneficiary countries under CBERA) available at <http://www.usitc.gov/er/nl2001/er1207y1c1.pdf> (last visited Feb. 16, 2004). See generally 148 CONG. REC. S4571 (May 20, 2002) (statement of Sen. Reid) (granting preferential tariff treatment to beneficiary countries under the Caribbean Basin Initiative).
 41. See Steel: Monitoring Developments in the Domestic Industry, USITC Pub. 3632, Inv. No. TA-204-9, (Sept. 2003) at ch. 1, p. 6, Table Overview I-4, available at <http://www.usitc.gov/pub3632/pub3632.htm> (last visited on Feb. 26, 2004); U.S. Generalized System of Preferences Guidebook (Mar. 1999) (summarizing U.S. trade policy granting preferential treatment to imports from those countries characterized as beneficiary countries under the GSP) available at <http://www.ustr.gov/pdf/gspintro.pdf> (last visited Feb. 16, 2004). See generally Laura Compá & Jeffrey S. Vogt, *Labor Regulation and Trade: Labor Rights in the Generalized System of Preferences: a 20-year Review*, 22 COMP. LAB. L. & POL'Y J. 199, 201 (2001) (stipulating that the GSP provides preferential treatment of duty-free entry of many imports from beneficiary countries).
 42. See Edward Alden & Frances Williams, *U.S. Steel Tariffs Illegal, Rules WTO Trade Dispute*, FIN. TIMES (London), Mar. 27, 2003, at 12 (discussing the WTO's decision finding United States steel tariffs illegal); Elizabeth Becker, *W.T.O. Rules Against U.S. On Steel Tariff*, N.Y. TIMES, Mar. 27, 2003, at C1 (announcing WTO ruling that the steel tariffs imposed by the U.S. were illegal); Paul Blustein, *WTO Rejects Steel Tariffs; U.S. Says Decision Will Be Appealed*, WASH. POST, Mar. 27, 2003, at E01 (explaining President Bush's steel tariff as being illegal according to the WTO).
 43. See Press Release, Benjamin L. Cardin, Rep. Cardin Condemns WTO Decision: Supports Appeal of WTO Preliminary Ruling (Mar. 26, 2003) (criticizing the WTO's ruling which stated that section 201 tariffs imposed by President Bush were a violation of global trade rules) available at <http://www.cardin.house.gov/News.asp?ARTICLE3099=4932&ARCH3099=1> (last visited Feb. 16, 2004). See generally *Protection of the Section 201 Safeguard Action on Certain Steel Products: Before the Subcommittee on Trade, House Committee on Ways and Means*, 108th Cong. (2003) (statement of Chairman Philip M. Crane) (discussing Congress' position to appeal the WTO decision should it not be in favor of the U.S.); American Iron and Steel Institute, *Steel Industry and Union Reaffirm Position Regarding Final World Trade Organization (WTO) Panel Report on Steel 201* (May 5, 2003) (denouncing the WTO decision as unacceptable, calling into question the credibility of the organization) available at <http://www.steel201.org/newsroom/wto7.9.03.pdf> (last visited Feb. 16, 2004).
 44. See ITC, Hearing Transcript at 2314 (Sept. 28, 2001); see also *Steel-tariff Costs Outweigh Benefits*, INDIANAPOLIS STAR, Dec. 3, 2003, at 14A (proclaiming disapproval of the steel tariff because of its potential to invoke a trade war); Steve Raabe, *Proposed Tariffs Split Steel Industry/Some Firms May Be Hurt By Rising Prices*, DENV. POST, Mar. 5, 2002, at C-01 (voicing the divergent sentiment in the steel industry concerning Bush's section 201 tariff).

In one step, the President's action created tension with our trading partners, undermined U.S. efforts to promote free trade, and triggered a wave of foreign safeguard actions on steel.⁴⁵ In response to the U.S. increase in steel duties, the EU implemented its own provisional safeguard protections on steel in March of 2002, without conducting any preliminary injury investigation, on grounds that the ITC's finding of injury was contrary to the SA.⁴⁶ The SA permits the imposition of provisional safeguard measures before the conclusion of an investigation only in critical circumstances where delay would cause irreparable harm.⁴⁷ However, the EU maintains that its provisional safeguard measures were imposed in conformity with WTO rules⁴⁸ and that its measures were provoked by the EU's need to protect its producers from a highly probable flood of injurious imports of steel products following the introduction of the U.S. safeguard measures.⁴⁹ Despite the EU's claims, it seems that such action would be inconsistent because there was no time to make a preliminary determination substantiated by clear evi-

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45. See Gay Alcorn, Tim Colebatch & Tony Parkinson, *U.S. Steel Tariff Voodoo Economics, Says Downer*, THE AGE (Melbourne), Mar. 9, 2002, at 4 (emphasizing the global distaste for the U.S. steel tariff and the actions taken by the international community to challenge the tariff via the WTO); Carol J. Williams & Marjorie Miller, *World: U.S. Steel Tariffs Could Erode Anti-Terror Coalition; Trade: Key Allies Angrily Lash Out at Bush's "Political" Action, Which May Prove More Costly on the Security Front than in Economic Terms*, L.A. TIMES, Mar. 7, 2002, at A7 (indicating U.S. tariffs on steel may provoke trade conflicts and undermine support for the U.S.-led war against terrorism); see also Mariko Sanchanta, *Japan Threatens Retaliatory Tariffs in Steel Dispute With U.S.*, FIN. TIMES (London), Nov. 27, 2003, at 4 (suggesting the possibility of retaliatory tariffs to urge the United States to abandon the tariffs against foreign imports).
46. The measures in question include EC Commission Regulation 560/2002, Mar. 27, 2002 (WT/DS260/1), available at http://www.revenue.ie/pdf/steel_tr.pdf (last visited Feb. 16, 2004) (revealing European Commission's safeguard measures to protect Community producers of steel). See, e.g., *Possible EU Challenge of U.S. Steel Section 201 Would Focus on ITC Finding*, INSIDE U.S. TRADE, Dec. 21, 2001 (threatening challenge to any ITC finding in favor of the United States Steel tariff on imports); see also *EU Imposes Safeguard Measures Against Influx of Steel Products*, INT'L L. UPDATE, Oct. 2002 (announcing safeguard measures put in place by the EU Commission to protect against an undue influx of steel products resulting from the U.S. protective measures).
47. See Agreement on Safeguards, Apr. 15, 1994, WTO Agreement art. 6, Provisional Safeguard Measures (1994), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 16, 2004); see also David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 96 (1995) (discussing USITC procedures and deadlines concerning provisional relief designed to comply with the WTO's Agreement on trade circumstances); cf. 19 U.S.C. § 2252(d)(2) (demonstrating how the USITC incorporated the Provisional Safeguard Measures to shape the country's provisional relief conditions and requirements).
48. See George Hager, *Bush Plays Free-Trade Game*, USA TODAY, May 2, 2002, at 1B (stating that despite impressive threats emanating from the European Union, the European Union will actually act with the self-restraint appropriate to the world trade superpower); Michael Mann & Frances Williams, *WTO Dispute Panel to Hear U.S. Complaint on EU Steel Curbs*, IRISH TIMES, Sep. 17 2002, at 17 (reporting the European Union's claim that it had commenced an investigation in March which confirmed the impending injury to the European steel industry); see also *How to Respond to U.S. Protection*, FIN. TIMES (London), Mar. 11, 2002 at 22 (encouraging the European Union to take actions in accordance with WTO guidelines in a more mature fashion than was taken by the U.S.).
49. See Tim Colebatch, *EU Considers Steel Import Quotas*, THE AGE (Melbourne), Mar. 21, 2002, at 2 (reporting the European Trade Commissioner acknowledgment, within hours of the U.S. announcement, that the decision would cause steel to flood European markets); Iain Dey, *EC Plans \$2 Billion Political Response to U.S. Steel Tariffs*, SCOTSMAN, Mar. 23, 2002, at 21 (noting the European Union's plan to install its own steel safeguard measures in anticipation of the influx of steel imports redirected from the U.S.); see also Mann & Williams, *supra* note 48, at 17 (reporting that the European Union maintained that these measures were necessary even after its steel safeguards were in place).

dence, as required by Article 6 of the SA.⁵⁰ Import restrictions imposed by a major trading partner, such as the EU, can mislead other countries into taking their own actions, resulting in a proliferation of protectionism across nations.⁵¹

Other countries followed suit in retaliatory action. Russia began to restrict imports of frozen chickens from the U.S.⁵² Russia maintained that it was justified in restricting imports under the WTO Agreement on Sanitary and Phytosanitary Measures⁵³ because the U.S. chick-

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50. See Agreement on Safeguards art. 6, *supra* note 47. The U.S. requested consultations with the European Union pursuant to Article 4 of the DSU regarding its provisional safeguard through the WTO Dispute Settlement on June 6, 2002, and requested establishment of a panel on Aug. 19, 2002 (WT/DS260/4). See Michael Mann & Frances Williams, *Trade Panel Set Up to Hear U.S. Steel Complaint*, FIN. TIMES (London), Sep. 17, 2002, at 9 (reporting the successful establishment of the WTO dispute panel requested by the U.S.); *European Communities-Provisional Safeguard Measures on Imports of Certain Steel Products*, World Trade Organization (Aug. 19, 2002) (showing the communication from the U.S. that requested a WTO dispute panel be established) available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 16, 2004).
51. See Clay Chandler, *Steel Dispute Escalates in Asia*, WASH. POST, May 23, 2002, at E01 (emphasizing the specific effect the U.S.'s implementation of steel safeguards had on the Chinese government as new members of the WTO); *Steel Industry Fears Fallout of Trade War*, DAILY YOMIURI (Tokyo) Mar. 29, 2002, at 20 (raising the concern that the U.S. initiation of safeguards in the steel industry sparked global protectionist measures that could cause serious damage to the international free market system); see also *Panel on "Steel" Established*, WTO News—Dispute Settlement Body (Jun. 3, 2002) (citing Korea's accusation, during a WTO panel, that the U.S. initiated a global tariff war of historic proportions) at http://www.wto.org/english/news_e/news02_e/dsb_03june02_e.htm (last visited Feb. 16, 2004).
52. See Michael Glackin, *Bush Playing Game of Chicken Over Trade War*, SCOTSMAN, Mar. 28, 2002, at 5 (stating that three former Soviet Union countries joined Russia's chicken ban, impacting 40 percent of U.S. poultry exports); Janet Plume, *Domino Effect; As the Steel Industry Consolidates, the Import Tariffs Imposed Last Year Have Spurred Reprisals Abroad*, J. COM., Jun. 2, 2003, at 24 (accentuating the effect the Russian restriction had on the U.S. dark meat chicken export market); see also *Russians to End Ban on Poultry*, HOUS. CHRON., Apr. 2, 2002, at 5 (noting that the Russian ban was lifted just one month after it began).
53. See James F. Smith, *From Frankenfood to Fruit Flies: Navigating the WTO/SPS*, 6 U.C. DAVIS J. INT'L L. & POL'Y 1, 10 (2000) (detailing the standards by which a country must comply with WTO standards under the Phytosanitary Agreement as applied to specific cases); Agreement on Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994) (stating the rights of nations in implementing and enforcing minimum sanitary restrictions for imports), available at http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm (last visited Feb. 16, 2004). See generally Charles W. Smitherman, *World Trade Organization Adjudication of the European Union-United States Dispute Over the Moratorium on the Introduction of New Genetically Modified Foods to the European Common Market: A Hypothetical Opinion of the Dispute Panel*, 30 GA. J. INT'L & COMP. L. 475, 492 (2002) (explaining the importance of the Phytosanitary Agreement in ensuring countries legitimize import restrictions).

ens were a health risk to Russia,⁵⁴ but its action could nonetheless be viewed as a retaliation.⁵⁵ Japan joined the EU while threatening immediate retaliation against the U.S.⁵⁶ China implemented a provisional safeguard on certain steel products⁵⁷ and notified the WTO of its intention to retaliate against the U.S. safeguard by suspending trade concessions on three products worth \$392 million in U.S. exports to China in 2001.⁵⁸ In addition, Malaysia imposed a retal-

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54. See Edmund L. Andrews, *Angry Europeans to Challenge U.S. Steel Tariffs at W.T.O.*, N.Y. TIMES, Mar. 6, 2002, at C12 (reporting that the Russian government cited salmonella contamination as one reason for the chicken ban); David L. Greene, *Menu for Talks at Summit is Sure to Include Chicken; Russia's Obstruction of U.S. Poultry Imports is Major Issue for Farmers*, BALT. SUN, May 24, 2002, at 1A (reporting the rumor that Americans exported to Russia only the unhealthy left legs of chickens previously injected with hormones); *Russians to End Ban on Poultry*, HOUS. CHRON., Apr. 2, 2002, at 5 (stating that both salmonella and antibiotics had been blamed for the sudden Russian chicken rejection).
55. This action is significant because Russia is the U.S.'s largest export market for poultry, with poultry exports to Russia totaling \$657 million in 2001. See Joan Morgan, *U.S. Meats Strong Competitor in Russian Market*, BISNIS BULLETIN (A bi-monthly periodical distributed by the U.S. Dep't of Commerce), Mar. 2002, at 3; see also Plume, *supra* note 52, at 24 (stating the U.S.'s view that Russia's chicken ban was reprisal for the tremendous impact U.S. steel safeguards had on the Russian economy). But see William Lash, *Teaching Russia the Wrong Lesson*, J. COM., Apr. 11, 1996, at 7A (suggesting that U.S. poultry imports were deemed a health concern by the Russian government years before the 2002 steel safeguards).
56. See Yoshikuni Sugiyama, *Japan Must Work Toward Asian Trade Zone*, DAILY YOMIURI (Tokyo), May 21, 2002, at 9 (noting Japan's decision to impose retaliatory tariffs paled in comparison to quantity of restrictions imposed by the European Union); see also Hiranuma *Urges U.S. to Budge on Steel Tariffs*, JAPAN POLICY & POLITICS, Mar. 18, 2002, LEXIS, International Newsletter Database, Acc-No. 84393816 (stating Tokyo's intent to meet with Washington during the U.S.-provided postponement period to discuss the possibility of imposing tariffs on other Japanese imports); Hiranuma *Reiterates "Compensation or Retaliation" Policy*, JAPAN POLICY & POLITICS, May 13, 2002, LEXIS, International Newsletter Database, Acc-No. 85877027 (reporting that Japan filed a complaint with the WTO and unsuccessfully met with Washington before deciding whether to impose retaliatory sanctions).
57. See *China Announces Steel Import Curbs*, ASIAN POLITICAL NEWS, May 27, 2002, LEXIS, International Newsletter Database, Acc-No. 86464993 (reporting that China's decision to impose tariffs was based on the urging of national steel manufactures and the influx of foreign steel imports in preceding months); see also *China Criticizes U.S. "Safeguard" Tariffs on Steel Imports*, JAPAN WEEKLY MONITOR, Mar. 25, 2002, LEXIS, International Newsletter Database, Acc-No.84394513 (noting that China uniquely experienced the U.S.-imposed steel tariffs as a new member of the WTO); *Taiwan, China Hold 1st Talks on Steel Import Tariffs*, ASIAN ECONOMIC NEWS, Dec. 16, 2002, LEXIS, International Newsletter Database, Acc-No. 95462649 (stating that China's steel safeguards affected the exports of numerous other WTO members).
58. Through its notification on May 17, 2002, China reserves its rights until March 2005. This position is in accordance with Article 8(3) of the SA, which forbids retaliation against a safeguard during the first three years of its application as long as the measure is based on an absolute increase in imports. See Christine Buckley, *EU Imposes Tariffs on Steel after U.S. Action*, TIMES (London), Mar. 28, 2002 (stating that China now joined a group of WTO member nations that have filed complaints in opposition to the U.S. steel safeguards); *China Files Complaint with WTO over U.S. Steel Tariffs*, ASIAN POLITICAL NEWS, Apr. 1, 2002, LEXIS, International Newsletter Database, Acc-No. 84531910 (noting that this action was the first time China has filed a complaint with the WTO); cf. *Next Steps on Steel*, WASH. POST, Jun. 5, 2002, at A22 (reporting that the European Union threatened retaliatory tariffs expected to affect \$364 million in U.S. exports to European countries).

iatory tariff on certain products.⁵⁹ Several countries filed Requests for Consultations with the WTO as the first step in the dispute settlement process since the steel safeguard was implemented on March 13, 2002.⁶⁰ Amidst global criticism, the U.S. began rectifying the situation by complying with countries' requests to exclude numerous steel products from the original products subject to the safeguard.⁶¹

In March, a House Joint Resolution was introduced to disapprove of the action taken by the President regarding steel imports.⁶² The President's measure was attacked for several reasons: as economically indefensible, politically driven, a trigger of American job losses, contrary to the SA, and hypocritical to the U.S. stated policy goal of liberalized trade, one year before the next WTO trade round.⁶³ Throughout 2002, the U.S. Trade Representative (USTR) announced proposals for liberalizing trade and called for the reduction of tariff barriers, includ-

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59. See *Australia Presses for Tariff Restraint*, AM. METAL MARKET, Mar. 29, 2002, at 2 (stating that Malaysia and Mexico increased steel tariffs, exacerbating a trade industry that required restructuring); see also Ellen Read, *Watch for Dumping After U.S. Sets Tariffs*, THE N.Z. HERALD, Jun. 22, 2002 (stating that Indonesia joined Malaysia in the steel tariff increase). But see Tom Balcerek, *Clock Ticking on EU "201" Retaliation: More Nations Could Get Blanket Free Ride*, AM. METAL MARKET, Jul. 10, 2002, at 1 (suggesting that Malaysia might not have taken action with the WTO if they were still officially considered a developing nation).
60. To date, the EU, Japan, Korea, New Zealand, China, Switzerland, Norway, Brazil, and Chinese Taiwan have filed Requests for Consultations. See *U.S. Seeks Talks with EU on Retaliatory Steel Import Curbs*, JAPAN WEEKLY MONITOR, Apr. 15, 2002, LEXIS, International Newsletter Databases, Acc-No. 84796094 (noting that up to 100 nations are expected to participate in consultations over the U.S.-imposed steel safeguards); see also World Trade Organization, Appellate Body Issues Report on Steel Dispute (Oct. 11, 2003) (listing Canada, Cuba, Mexico, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand, Turkey, and Venezuela as official third-party participants to the dispute); *Panel on "Steel" Established*, WTO—Dispute Settlement Body (June 3, 2002) (summarizing a meeting of the Dispute Settlement Body of the WTO that granted the European Community's request for a panel to be established regarding the recent global steel tariff wars).
61. See Press Release, Office of Public Affairs, U.S. Dep't of Commerce, U.S. Dep't of Commerce and USTR Announce Final Set of Products to be Excluded from Safeguard on Steel Products (Aug. 22, 2002) (discussing some of the explanations put forward by the U.S.) available at http://www.ita.doc.gov/media/PressReleases/august2002/steel_exclusion_082202.html (last visited Apr. 29, 2003). See generally Charles W. Smitherman, *supra* note 53, at 492 (explaining the U.S.'s response to international criticism).
62. On April 24, 2002, the Committee on Ways and Means ordered that H.J. Res. 84 be reported adversely without amendment to the House because the Members believed the President's remedy was better tailored than the recommendations proposed by the ITC to provide relief to the steel industry while minimizing the negative impact on the rest of the economy. Cf. H.R.J. Res. 84, 107th Cong. (2002) (disapproving action taken by the President under section 203 of the Trade Act of 1974); with H.R. Rep. No. 107-437 (2002) (reporting adversely to H.J. Res. 84 because the Members believe the President's remedy is better tailored than the recommendations proposed by the ITC to provide relief to the steel industry while minimizing the negative impact on the rest of the economy).
63. In its 2003 annual report documenting foreign trade barriers to U.S. exports, USTR announced that the "persistence of trade barriers affirms the need for the United States to remain actively engaged in promoting and enforcing trade liberalization at all levels." See Press Release, USTR, Apr. 1, 2003, available at <http://www.ustr.gov/releases/2003/04/03-21.htm> (last visited Apr. 29, 2003). The U.S. concurrently made submissions to the WTO, seeking to strengthen rules against unfair trade practices; Press Release, USTR, available at <http://www.ustr.gov/releases/2003/03/03-17.htm> (last visited Apr. 29, 2003). See also H.R. Rep. No. 107-437, pt. 6 (2002) (contending that the uneconomical and politically driven decision of the President damaged relations with key trading partners, increased taxes and threatened jobs across the country).

ing a comprehensive proposal for the Doha Development Agenda,⁶⁴ calling on members of the WTO to eliminate all tariffs on consumer and industrial goods by 2015.⁶⁵ The further liberalization of trade is the central U.S. policy in upcoming negotiations, but it is also a position criticized by other countries as protectionist in light of the trade-restrictive steel safeguard.⁶⁶

C. WTO Steel Panel Report

From the day of its implementation, the steel safeguard was heavily criticized by domestic and foreign observers⁶⁷ and sparked threats of retaliatory trade sanctions and ultimate trade war.⁶⁸ Seventeen months after the saga began, the WTO Panel issued its report in July of 2003, ruling that the U.S. steel safeguard was inconsistent with various provisions of the SA or the

64. The current WTO trade round is the Doha Development Agenda, which launched in Doha, Qatar, in 2001, and is scheduled for completion by January 1, 2005. See Press Release, Office of the United States Trade Representative (Oct. 23, 2002) (announcing the U.S. proposal presented to the Japanese Government that included recommendations for removing trade barriers); see also Press Release, Office of the United States Trade Representative (Jul. 1, 2002) (reporting on U.S. proposals to other countries to liberalize global trade by lowering their trade barriers in certain areas in an attempt to spur momentum on the Doha Development Agenda).

65. New announcements were made many times during 2002. See, e.g., Nov. 26, 2002 exclusions, Press Release, United States Trade Representative, Nov. 26, 2002, available at <http://www.ustr.gov/releases/2002/11/02-112.htm> (last visited Apr. 29, 2003); Edmund Andrews, *U.S. to Seek to Abolish Many Tariffs*, N.Y. TIMES, Nov. 26, 2002, at C1 (informing readers about the Bush administration's plan to eliminate all tariffs on industrial and consumer goods by 2015); see also Neil King, Jr., *U.S. Proposal Seeks Tariff Cuts For WTO Members*, WALL ST. J., Nov. 26, 2002, at A3 (reporting on and surveying the possible effects of the proposal to eliminate tariffs on industrial and consumer goods).

66. See Press Release, Office of United States Trade Representative (Apr. 1, 2003) (quoting Robert B. Zoellick as describing the Bush administration as committed to identifying unfair barriers to U.S. exports and to working aggressively with our trading partners to eliminate those barriers); see also Paul Krugman, *Testing His Metal*, N.Y. TIMES, Mar. 6, 2002, at A21 (stating that the steel tariffs had added to a U.S. reputation for hypocrisy—"ready and willing to criticize others for failing to live up to their responsibilities, but unwilling to live up to its own"); David Leonhardt, *World Bank Aims to Help Poor Receive Elementary Education*, N.Y. TIMES, Apr. 22, 2002, at A2 (noting that international development officials criticized the tariffs on imported steel as protecting the American steel industry).

67. See H.R. Rep. No. 107-437, pt. 6 (2002) (contending that the uneconomical and politically driven decision of the President damaged relations with key trading partners, increased taxes and threatened jobs across the country); see also *Foreigners Threaten a WTO Complaint, Other Retaliations*, WALL ST. J., Mar. 6, 2002, at A8 (reporting that the EU expressed a desire to immediately file a complaint at the WTO); David Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports*, N.Y. TIMES, Mar. 6, 2002, at A1 (reporting that within minutes of the White House announcement there were announcements from foreign countries to challenge the tariff).

68. See Blaine Greteman, *Biz Watch*, TIME, May 13, 2002, at 20 (noting that the EU had "cranked up \$335 million in retaliatory tariffs"); see also Guy De Jonquieres & Ken Hijino, *Japan Threatens U.S. with Tariffs on Steel Products*, FIN. TIMES, Apr. 26, 2002, at 11 (reporting that Japan had indicated its desire to impose a tariff on U.S. steel products in retaliation for the U.S. tariffs); Paul Krugman, *America The Scofflaw*, N.Y. TIMES, May 24, 2002, at A25 (stating that the EU and other countries had threatened retaliatory tariffs).

GATT 1994.⁶⁹ Five months later, the AB released its findings, affirming the Panel report with only slight modifications, which did not affect the overall outcome.⁷⁰ Specifically, the Panel concluded that the U.S. violated the parallelism requirement and did not provide a reasoned and adequate explanation for its findings in the USITC reports.⁷¹ Claims resolved by the Panel include those related to increased imports (injury threshold), causation, parallelism, and unforeseen developments.⁷² On the basis of those issues, the Panel found inconsistencies resulting in the “absence of the right of the United States to take the safeguard measures at issue in

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69. WTO Appellate Body, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R–WT/DS249/R, WT/DS251/R–WT/DSA254/R, WT/DS258/R–WT/DS259/R (Nov. 10, 2003). In the interests of judicial economy, the Panel did not address every legal argument raised by the complainants and struck down the safeguard measures on only two of the grounds challenged by the complainants. Because the steel measures violated the WTO agreements on the aforementioned grounds, the Panel deemed it unnecessary to decide the other claims advanced by the complainants. Support for the Panel’s exercise of judicial economy is found in *Wheat Gluten* and *Lamb Meat*, cases in which the Appellate Body refrained from ruling on claims relating to unforeseen developments and several additional claims under the SA and the GATT. See WTO Appellate Body, United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, at paras. 181–184 (Dec. 22, 2000); WTO Appellate Body, United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat, WT/DS178/AB/R, at paras. 193–195 (May 1, 2000); see also Appellate Body Report, Argentina—Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, Annex I, para. 98 (Dec. 14, 1999). The Panel’s obligation, following the basic objective of dispute settlement, is to “only address those claims which must be addressed in order to resolve the matter in issue in the dispute.” WTO Appellate Body Report, United States—Wool Shirts and Blouses, WT/DS33/AB/R, at para. 340 (Apr. 25, 1997).
70. See WTO Appellate Body, *supra* note 69, at para. 513 (upholding part of Panel’s decision); see also Daniel Dombey & Frances Williams, *Range of products in EU’s sights over steel dispute*, FIN. TIMES, Nov. 11, 2003, at Int’l Economy 13 (noting that the Appellate Body upheld the essential ruling of the panel); *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, 9 INT’L LAW UPDATE 11, 31 (2003) (providing a summary of the Appellate Body decisions).
71. See WTO Appellate Body, *supra* note 69, at para. 513 (e) (upholding Panel’s conclusion that U.S. failed to comply with parallelism between products); see also *U.S. President Formally Rescinds U.S. Steel Tariffs Before Official Expiration Date; European Union Follows Suit as to Its Retaliatory Measures*, 9 INT’L LAW UPDATE 12, 15 (2003) (noting the Appellate Body ruling that the U.S. failed to provide a reasoned and adequate showing to support the use of a tariff); see also *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 13 (reporting the Appellate Body’s ruling that the U.S. did not satisfy the requirement of parallelism).
72. Claims not required for the resolution of the dispute that related to application included the necessary extent and duration (Articles 5.1 and 7 of the SA), maintenance of an equivalent level of concessions (Article 8 of the SA), *de minimis* developing country exception (Article 9.1 of the SA) and quota allocation (Article XIII of the GATT). The Panel also refrains from addressing claims relating to the allegedly incorrect definition of the imported product, like product and the domestic industry (Articles 2.1 and 4.1(c) of the SA) and serious injury (Articles 2.1 and 4.2(a)). Because the U.S. had no legal basis to impose any safeguard measures against *any* countries, there was certainly no basis to impose a measure against a developing country. Thus, China’s rights under Article 9.1 were not prejudiced as a developing country, referencing its status in the WTO context in its Protocol of Accession. See American Iron and Steel Institute, *Steel Industry and Union Reaffirm Position Regarding Final World Trade Organization (WTO) Panel Report on Steel 201* (May 5, 2003), available at <http://www.steel201.org/newsroom/wto7.9.03.pdf> (last visited Feb. 16, 2004) at para. 10.565–7. See *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 13 (reporting the Appellate Body’s ruling against the U.S. on the issue regarding unforeseen development, parallelism, and causation). See generally Dombey & Williams, *supra* note 70, at 13 (noting that the Appellate Body upheld the essential ruling of the panel against the U.S.).

this dispute.”⁷³ Because the Panel did not rule on the consistency of all aspects of the measure,⁷⁴ the permissibility of a future safeguard is left open for future debate, potentially in another WTO safeguards dispute.

Many of the issues left unresolved by the DSB were considered in *Steel*.⁷⁵ Analysis of these issues, particularly its compatibilities with WTO provisions, is imperative for the creation of a solution. A successful plan of action consistent with prior Panel and AB decisions would ideally lend credence to the U.S. trade provisions and its future safeguard measures (decreasing the need for WTO litigation of U.S. safeguards).⁷⁶ The implications of the WTO Panel and AB’s findings are discussed in greater detail in Section III.

II. WTO Safeguards Provision

In order to understand the relationship between section 201 and the WTO, a familiarity with the relevant provisions of the SA and the GATT is necessary. In this section, the relationship between the WTO dispute settlement body and the requirements for safeguard action under the SA are discussed. In addition, the elements of U.S. safeguard action that have been

73. See American Iron and Steel Institute, *Steel Industry and Union Reaffirm Position Regarding Final World Trade Organization (WTO) Panel Report on Steel 201* (May 5, 2003), available at <http://www.steel201.org/newsroom/wto7.9.03.pdf> (last visited Feb. 16, 2004), at para. 10.558. See also WTO Appellate Body, *supra* note 69, at para. 514 (recommending the DSB request the U.S. to bring its safeguard measures in conformity with the Agreement on Safeguard and the GATT 1994); *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 11 (noting that the Appellate Body upheld the Panel’s finding that the application of the safeguard measures was inconsistent with Article XIX 1(a) of GATT 1994 and Articles 2.1 and 3.1 of the Agreement on Safeguards).

74. See WTO Appellate Body, *supra* note 69, at para. 514, (declining to rule on the issue related to Articles 2.1, 4.1(c), 5.1, and 9.1 of the Agreement on Safeguards); see also *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 12 (noting that the Appellate Body did not determine whether Articles 2.1 and 3.1 of the Agreement on Safeguards were offended by the U.S. determination of increased imports). See generally Dombey & Williams, *supra* note 70, at 13 (noting that the Appellate Body upheld the essential ruling against the U.S.).

75. See American Iron and Steel Institute, *Steel Industry and Union Reaffirm Position Regarding Final World Trade Organization (WTO) Panel Report on Steel 201* (May 5, 2003), available at <http://www.steel201.org/newsroom/wto7.9.03.pdf> (last visited Feb. 16, 2004) at para. 10.558; cf. WTO Appellate Body, *supra* note 69, at para. 514 (restating the issues unresolved in prior agreements) with *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 11 (noting that the panel report on the steel industry raised additional areas of concern).

76. See generally Sec. of Commerce, Report To The Congress (Dec. 30, 2002) (noting that the rule-based system under the WTO is in the U.S. interest because it is necessary to resolve inevitable disputes) available at <http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf> (last visited Feb. 16, 2004); United States Trade Representative, 2002 Annual Report of the Trade Agreements Program, available at <http://www.ustr.gov/reports/2003Annual/II-wto.pdf> (last visited Feb. 16, 2004) (reporting that the U.S. had led efforts to strengthen the rules governing settlement disputes); United States Trade Representative, 2001 Annual Report of the Trade Agreements Program, available at <http://www.ustr.gov/reports/2002/Chapter%20II,%20WTO.pdf> (last visited Feb. 16, 2004) (recommending that an agreement be reached that will improve the ability to enforce WTO rules).

most significantly criticized by the WTO Panel and AB are highlighted, providing both a historical background and a framework from which to move forward.

A. WTO Agreement on Safeguards

Based on Article XIX of the GATT 1994,⁷⁷ the SA allows a member to apply a safeguard measure to a product only if “such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”⁷⁸ A WTO member may apply a safeguard measure to a product when certain conditions are met, and “only to the extent necessary to prevent or remedy serious injury.”⁷⁹ Safeguards should generally be applied on a non-selective (most-favored nation, or “MFN”) basis.⁸⁰

Other than the U.S., India and Korea are the other countries that most often implement safeguard measures.⁸¹ The European Union (EU) tends not to take WTO safeguard actions for reasons of EU internal structural problems that complicate their application of safeguards,⁸²

77. The “GATT 1994” is based upon the text of the original agreement referred to as “GATT 1947.” See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (hereinafter “GATT”).

78. SA, *supra* note 5, art. 2(1). See World Trade Organization Agreement on Safeguards, (Apr. 15, 1994) (hereinafter “WTO Agreement on Safeguards”) (articulating the parallelism requirement) available at http://www.wto.org/english/tratop_e/safeg_e/safeint.htm#provisions (last visited Feb. 16, 2004); see also Bhala & Gantz, *supra* note 20, at 467–68 (explaining the safeguard application requirements).

79. SA, *supra* note 5, art. 5(1). See Lihu Chen & Yun Gu, *China's Safeguard Measures Under the New WTO Framework*, 25 FORDHAM INT'L L.J. 1169, 1170–71 (2002) (finding that safeguards may be imposed only if the imports are proven to have seriously injured or threaten to injure the domestic industry); see also Patrick M. Moore, *The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317, 328 n.17 (1996) (noting that a finding of “serious injury” includes an increase in imports resulting from unforeseen circumstances).

80. SA, *supra* note 5, art. 2(2). See Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 293 (1991) (stating that all foreign suppliers must be treated equally if the MFN basis applies); Brett Williams, *Global Trade Issues in the New Millennium: The Influence and Lack of Influence of Principles in the Negotiation for China's Accession to the World Trade Organization*, 33 GEO. WASH. L. REV. 791, 809 (2001) (finding a derogation from the principles of the SA when safeguard measures differ based on the source).

81. In 2001, India implemented 10 safeguard measures involving industrial products and Korea employed four safeguard measures (one involving an industrial product). See <http://www.wto.org> (last visited Feb. 16, 2004); see also *Anti-Dumping: Drop in Measures, Says London Report*, EUR. REP., May 5, 2001 (finding the U.S. and India to be the leading users of safeguards). See generally Murphy, *supra* note 8, at 977 (noting that India and Korea have executed a wide range of safeguard measures).

82. But see *Anti-Dumping Cases Multiplying in Asia: MITI Report*, MALAYSIAN NAT'L NEWS AGENCY, Feb. 13, 1999 (finding the EU “on the trend” of implementing safeguard measures); Alan Woods, *Markets Await Fall Out as Dollar Gets in Line*, AUSTRALIAN, Sept. 23, 2003 (indicating that the EU is overwhelmed with structural problems); *The Fed's New Deep Bench: Several New Federal Reserve Policymakers Are Making Surprisingly Important Contributions to the Inside Debate*, INT'L ECON., Mar. 22, 2003, at 14 (reporting that the EU suffers from structural problems in certain product markets).

because of a disagreement with the concept of safeguards itself as set forth in the SA.⁸³ Despite those issues, the EU implemented provisional safeguards in response to the U.S. safeguard on steel.⁸⁴

In addition, it is important to understand how these provisions are affected by subsequent WTO Panel and Appellate Body reports, and by the terms of the Dispute Settlement Understanding (DSU). Generally, these reports are of limited legal effect.⁸⁵

Adopted panel reports are an important part of the GATT acquis. Subsequent panels often consider them. They create legitimate expectations among WTO members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.⁸⁶

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83. See generally Charnovitz, *supra* note 10, at 819 (disagreeing with the SA's concept of safeguards in criticizing the failure of the WTO to extend the concept of safeguard measures to non-protectionist purposes); Ranabir Ray Choudhury, *Improper Use of WTO Safeguards Rules*, HINDU BUS. LINE, Nov. 17, 2003 (stating the agreed WTO concept of the SA to be the ability to temporarily suspend trade concessions after certain prerequisites are met); Eun Sup Lee, *Korean Version of Uruguay Round Agreement on Safeguards*, 8 MICH. J. INT'L L. 397, 435 n.3 (1999) (establishing that the purpose of the SA is to create multi-national control over safeguards).
84. See *U.S. Reacts to EU Steel Tariffs*, WASH. POST, Mar. 28, 2002, at E2; see also *EU/US: All Eyes on Bush as He Ponders Steel Response*, EUR. REP., Nov. 15, 2003 (reporting that the EU is responding to the U.S. safeguards by implementing extra tariffs on U.S. imports); *U.S. Steel: EU Welcomes Termination of U.S. Steel Safeguard Measure*, RAPID, Dec. 4, 2003 (finding that the EU's safeguards were enacted to protect against an over-abundance of steel).
85. See Michael A. Asaro, *The Iran and Libya Sanctions Act of 1996: A Thorn in the Side of the World Trading System*, 23 BROOK. J. INT'L L. 505, 514 (1997) (stating that panel reports are not binding); see also John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63–64 (1997) (finding panel reports to be “recommendations” that are not domestically binding); David Palmer & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 402 (1998) (noting that WTO panel reports are only persuasive).
86. Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent With the GATT and the TRIPS Agreement?*, 17 AM. U. INT'L L. REV. 459, 482 (2002); Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171, 181–82 (1998) (stating that panel reports should be normally be followed absent a good reason not to follow them); Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 563 n.16 (2003) (noting that panel reports are binding on the parties to a dispute).

The SA sets forth the rules for application of safeguard measures pursuant to Article XIX of GATT 1994.⁸⁷ Although the WTO AB has not ruled that section 201 is *per se* inconsistent with the SA,⁸⁸ it is possible to identify provisions of section 201, when applied, that are potentially inconsistent with the SA. In order to ensure compliance with the SA, GATT, and AB decisions, modification of section 201 or the SA may be necessary. Solutions are explored in Part III, which concludes that the U.S. may be able to employ safeguards with a certain level of predictability by modifying the implementation of section 201, clarifying the SA, or by taking no action at all.

B. Section 201 Challenges in the WTO

While safeguards allow domestic industry to adjust to new trade conditions,⁸⁹ they simultaneously adversely impact foreign producers in the form of higher tariffs and often provoke the ire of our trading partners.⁹⁰ Since the adoption of the SA, U.S. industry has taken greater

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87. In 1994, the SA was signed into law by 135 member countries as part of the Final Act of the 1984-1994 Uruguay Round re-negotiating the GATT. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 1, 33 I.L.M. 1125 (1994). For the Final Act documents, see WTO, *Legal Texts: The Uruguay Round Agreements*, available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Jan. 13, 2003) (hereinafter “Final Act”); see also David A. Gantz, *supra* note 47, at 135 (finding that the GATT Uruguay Round establishes international safeguard rules). See generally Rosemary A. Ford, *The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions*, 27 BROOK. J. INT’L L. 543, 555 (2002) (noting that the Final Act of the 1984-1994 Uruguay Round renegotiating the GATT, including the SA, was signed into law by 135 member countries in 1994).
88. See An Chen, *The Three Big Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of the Great 1994 Sovereignty Debate, Section 301 Disputes (1998-2000), and Section 201 Disputes (2002-Present)*, 17 TEMP. INT’L & COMP. L.J. 409, 411-15 (2003) (stating that the WTO found the U.S.’s implementation of steel safeguards under section 201 to be inconsistent with the SA, but failing to state whether section 201 itself was against the SA); see also Gregory Husisian, *Globalization’s Impact on International Trade and Intellectual Property Law: When a New Sheriff Comes to Town: The Impending Showdown Between the U.S. Trade Courts and the World Trade Organization*, 17 ST. JOHN’S J. LEGAL COMMENT. 457, 467 (2003) (reporting that the WTO has found the implementation of section 201 to be contrary to the SA in prior cases). See generally Priest, *supra* note 3, at 1042 (noting that there are important differences between the SA and section 201 that make the standard for implementing safeguards less stringent for the latter).
89. See David Blumental, “Reform” or “Opening”? *Reform of China’s State-Owned Enterprises and WTO Accession—The Dilemma of Applying GATT to Marketizing Economies*, 16 UCLA PAC. BASIN L.J. 198, 264 (1998) (stating that safeguard measures are a political device that allow domestic industry to adjust to new trade conditions). See generally Charnovitz, *supra* note 10, at 797 (finding that trade sections have been used throughout the past century to safeguard domestic industry); Eun Sup Lee, *Foreign Trade Regulation of Korea in the WTO World*, 8 J. TRANSNAT’L L. & POL’Y 231, 260 (1999) (finding that the SA’s objective is to provide a fair operation of international trade).
90. See Chen, *supra* note 88, at 412-15 (finding that eight states retaliated against the U.S. after incurring higher tariffs as a result of the U.S.’s steel safeguards); see also Joanmarie M. Dowling & Mark P. Popiel, *War by Sanctions: Are We Targeting Ourselves?*, 11 CURRENTS: INT’L TRADE L.J. 8, 10 (2002) (noting that the U.S.’s steel tariffs ignited retaliatory actions from states). See generally Joel B. Blank, Note & Comment, *Remolding China’s Iron Rice Bowl: An Opportunity for United States Agricultural Commodities Behind the Great Wall of China*, 18 AM. U. INT’L L. REV. 753, 791 (2003) (stating that the use of safeguards often results in retaliatory safeguards from affected countries or the use of the WTO’s Dispute Settlement Mechanism).

advantage of section 201 provisions in the *Wheat Gluten*,⁹¹ *Lamb Meat*,⁹² *Line Pipe*,⁹³ and *Wire Rod*⁹⁴ cases, and most recently with the steel safeguard.⁹⁵ During this time, there has been much interpretation of the agreement by the WTO Panel and AB.⁹⁶ The WTO AB has consistently struck down every U.S. safeguard action challenged by member countries.⁹⁷ The AB has

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91. See Trade Act of 1974 § 202(b), 19 U.S.C. § 2252(b) (2003); WTO Panel, *supra* note 22, at para. 8.135; see also Husisian, *supra* note 88, at 467 (noting the U.S.'s use of section 201 in its wheat gluten safeguard); Dale E. McNeil, *United States Agricultural Protectionism After the Uruguay Round: What Remains of Measures to Provide Relief from Surges of Agricultural Imports*, 23 N.C. J. INT'L L. & COM. REG. 281, 307 (1998) (reporting that the U.S. wheat gluten industry invoked section 201 to increase the EU's tariffs).
 92. See WTO Panel, *supra* note 15, at para. 7.240; see also Catherine Curtiss & Alan Kashdan, *U.S.-Canada Agricultural Trade Issues*, 5 DRAKE J. AGRIC. L. 355, 367 (2000) (reporting that the U.S. implemented a lamb meat safeguard under section 201 due to the importation of inexpensive lamb meat); Husisian, *supra* note 88, at 467 (noting the U.S.'s use of section 201 in its lamb meat safeguard).
 93. WTO Panel, *United States—Definitive Safeguard Measure on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, WT/DS214/4 (Aug. 10, 2001). See Husisian, *supra* note 88, at 467 (noting that the U.S. invoked a line pipe safeguard pursuant to section 201). See generally *EU/US: WTO Decision on Korean Pipes Seen as Influencing Steel Dispute*, EUR. REP., Feb. 20, 2002 (reporting that the line pipe safeguard was successfully challenged by Korea).
 94. USITC Inv. No. TA-201-69 (Jul. 12, 1999). Although the ITC made a negative injury determination, the President imposed relief on February 11, 2000. The EU filed a complaint with the WTO DSB on Dec. 1, 2000, but a WTO panel was not assembled. See Bhala & Gantz, *supra* note 20, at 468 (reporting on the U.S.'s steel safeguard measure pursuant to section 201); see also Charles W. Smitherman, *The New Transatlantic Marketplace: A Contemporary Analysis of United States-European Union Trade Relations and Possibilities for the Future*, 12 MINN. J. GLOBAL TRADE 251, 281 (2003) (noting that the U.S. has imposed wire rod safeguards).
 95. See WTO Appellate Body, *supra* note 69, at para. 12 (stating that the U.S. had initiated the protective steel safeguards as a result of findings by the U.S. Trade Representative indicating that the U.S. domestic steel industry was being "seriously injured" by foreign competition); see also Proclamation No. 7529, 67 Fed. Reg. 10553 (Mar. 5, 2002) (listing the particular goods subject to the steel safeguards); Alice Slayton Clark, et al., *International Legal Developments in Review: 2002: Business Regulation*, 37 INT'L LAW. 399, 401 (2003) (explaining that President Bush initiated the steel safeguards after intense lobbying from industry leaders and politicians).
 96. See Daniel Pruzin, *U.S., Complainants Hold First WTO Dispute Hearing on Steel Safeguard Duties*, 19 INT'L TRADE REP. (BNA), No. 44, at 1882 (Oct. 31, 2002) (explaining that the U.S. failed in the steel safeguard hearings because it had not conducted an adequate investigation into how seriously its domestic steel industry was being injured by foreign competition); see also J. Daniel Stirk, *Symposium Issue on WTO Dispute Settlement Compliance: United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan: Possibilities and Predictions for Compliance with the Appellate Body's Report*, 33 LAW & POL'Y INT'L BUS. 683, 683–84 (2002) (noting the recent burgeoning of litigation before the WTO courts). See generally Terence P. Stewart, Patrick J. McDonough & Marta M. Prado, *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and that Special Needs Are Addressed*, 24 FORDHAM INT'L L.J. 652, 665–66 (2000) (explaining the procedure by which the WTO Panel and Appellate Body rule as to whether there was "serious injury" to a country's domestic market overwhelmed by foreign goods to such an extent as to justify initiating protective tariffs).
 97. See Bhala & Gantz, *supra* note 20, at 467–68 (describing the exacting standard applied by WTO courts in assessing the justifiability of protective tariffs taken by member countries to offset "serious damage" to domestic industries); Husisian, *supra* note 88, at 466–67 (explaining that the WTO courts' recent hostility to U.S. protective measures is due to a perceived hastiness of the U.S. in instituting protective measures without conducting adequate investigations regarding the serious need for these measures).

made no determination in any case that section 201 is inconsistent *per se* with the SA, but it has identified specific aspects of U.S. safeguard action that are incompatible with WTO law.⁹⁸ As identified by the Panel most notably in *Wheat Gluten*,⁹⁹ *Lamb Meat*,¹⁰⁰ and *Line Pipe*,¹⁰¹ and as reaffirmed in *Steel*,¹⁰² the following elements are particularly vulnerable to future challenge: the ITC's injury determination and causation analysis,¹⁰³ the U.S. exclusion of free trade agreement partners from its global safeguard measures,¹⁰⁴ and the demonstration of unforeseen

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98. See Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. LAW 143, 187–88 (2003) (explaining that, in the case of the line pipe safeguards initiated by the U.S. in March 2000 that were challenged by South Korea, the WTO Appellate Body ruled that the U.S. had not given sufficient notification of its intentions to Korea, which would have presumably given rise to consultation between the two countries and possibly diffused the situation giving rise to the safeguards); see also Terence P. Stewart, Patrick J. McDonough & Marta M. Prado, *supra* note 96, at 665 n.37 (discussing that another problem the U.S. has encountered in its implementation of safeguards, which became apparent when the European Community challenged a U.S. safeguard on wheat glutes from Europe, is that the U.S. did not show an adequate causal link between the foreign goods sought to be limited and the serious injury suffered by the domestic market); WTO Appellate Body, *supra* note 69, at para. 178 (ruling that the U.S. had not established that the factors it cited in initiating a safeguard on lamb meat were “unforeseeable” to the extent necessary to support imposing the safeguard).
99. See WTO Appellate Body, *supra* note 69, at para. 13 (ruling that, although imports from developing countries may be excluded from the ambit of a protectionist safeguard, they must still be accounted for in determining whether the implementation of the safeguard was justified).
100. See WTO Appellate Body, *supra* note 69, at para. 15 (holding that the analysis to determine whether there has been serious injury to domestic producers must focus not only on the situation of the producers, but the complete situation of the domestic market at the time of analysis).
101. See WTO Appellate Body—United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea, AB-2001-9 (Feb. 15, 2002), para. 63 (interpreting the language of the WTO Agreement on Safeguards to mean that a country may satisfy the “serious injury or threat thereof” element by showing either injury or a threat, but that a higher burden will be placed on a respondent claiming the latter).
102. See WTO Appellate Body, *supra* note 69, at para. 513 (ruling that the U.S. had failed in showing both that there were unforeseen factors that had contributed to its decision to institute safeguards, and that there was serious injury caused to the U.S. domestic industry because of the goods subject to the safeguard).
103. See *id.* (agreeing with the WTO Panel that determinations regarding whether an increase in imports is so sharp and unexpected as to constitute serious injury to domestic producers must be made on a case-by-case basis); see also WTO Appellate Body, *supra* note 69, at para. 178 (upholding the analysis applied in determining the causal connection between increased imports and other factors, on one hand, and serious injury suffered by domestic producers, on the other: the increased imports must be separated from other potential causes in order to ascertain whether the increased imports are to blame for the injury); see also Bhala & Gantz, *supra* note 98, at 191 (discussing the suit instituted against the U.S. quality line pipe safeguard, the Court tightened the interpretation of “serious threat or injury”; if a litigant attempted to show a threat rather than an injury, a higher standard of proof would be required).
104. Referred to as the “NAFTA Carve-Out.” See WTO Appellate Body, *supra* note 69, at para. 436 (granting the U.S. the right to exclude certain countries—in this case, Canada, Mexico, Israel and Jordan—from a safeguard, the Court nevertheless required the U.S. to account for steel imports from those countries, and to discount the total steel imports, which the U.S. claimed were seriously injuring the domestic U.S. steel producers, by the four-country total). See generally Robert F. Housman & Paul M. Orbuch, *Article: Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U.J. INT'L L. & POL'Y 719, 758 (1993) (explaining that the NAFTA agreement includes controls limiting how much one party's global safeguard measures can apply to the other's imports); Gantz, *supra* note 47, at 99–100 (elaborating on the restrictions imposed on the applicability of global safeguard measures by one or more parties to other NAFTA signatories).

developments, among other issues of non-compliance.¹⁰⁵ For each element discussed below, the SA and GATT requirements are explained, followed by an examination of the corresponding issues. The ITC may have to reconsider its method of determining injury, particularly given U.S. industry's increasing reliance on section 201 measures. Further, even if the ITC is able to bring its determination into conformity with the SA, it is not clear whether a revised methodology will meet WTO requirements.¹⁰⁶

Each element of U.S. procedure remains an issue as the U.S. addresses safeguards provisions in the context of ongoing free trade agreement negotiations,¹⁰⁷ and will likely confront opposition following future safeguard actions under section 201.¹⁰⁸ It is necessary to maintain a clear approach on the issue of safeguards in these upcoming negotiations, where greater trade liberalization will magnify the need for a viable import relief mechanism. Although the AB has not yet ruled that U.S. law is in violation of WTO law, the probability of negative findings in the future as reflected by the U.S. record requires a reassessment of U.S. safeguard implementation. A solution in the form of a modification of section 201 law, or the manner in which it is implemented, may be necessary in order for the U.S. to effectuate relief compatible with WTO

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105. Secondary issues subject to negative scrutiny by the WTO and member countries include the United States' failure to properly remove developing countries from global measures if their imports are *de minimis* (SA art. 9(1)); the scope of the ITC's definition of "domestic industry" and "like product" (SA art. 2(1)); the chosen period of investigation/base period (SA art. 5(1)); substance and timeliness of required notifications to affected countries (SA art. 12(1)). See Bhala & Gantz, *supra* note 20, at 626 (noting that the issue of "unforeseen developments" is not only a tool frequently used by the WTO Appellate Body to strike down safeguards, but is an ill-defined one; thus making it more difficult for parties seeking to initiate safeguards to ensure that they will be upheld); Bhala & Gantz, *supra* note 98, at 180 (explaining that the WTO Appellate Body treats "unforeseeable development" as an indispensable element for a safeguard to withstand scrutiny); see also, Stewart, McDonough, & Prado, *supra* note 96, at 662–63 (explaining that the requirement that the rise in competitive imports is an "unforeseen development" is applied in a strict, if amorphous, sense).
106. See Stirk, *supra* note 96, at 684–85 (noting that the U.S. has failed to comply often and recently, and that the U.S. has not yet established a scheme of compliance with the WTO provisions in question); Lei Yu, Note, *Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 293, 324–25 (2002) (reporting that the WTO Appellate Body explicitly reversed an ITC decision by holding that an analysis of the effect of all imports that form the basis of an imposition of safeguards must be conducted); see also Arun Venkataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 558–59 (1999) (underlining the fact that the ITC has acted to dilute WTO provisions that require a concrete causality between the injury complained of and the safeguard taken, by only requiring a correlation between the two).
107. See Ho, *supra* note 30, at 837 (emphasizing the historic and current U.S. preference for maintaining a large degree of autonomy in international treaties); see also *Don't Wrestle With Free Trade*, SUNDAY BUSINESS GROUP, July 8, 2001, at 15 (explaining the continuing acrimony between the EU and U.S. over trade disagreements); *New USTR Agreements Will Slowly Eliminate Drawback Rights*, MANAGING EXPORTS, Sept. 2003, at 2 (explaining that, although the U.S. may face initial disadvantages due to the unavailability of evasion techniques available to other countries, these discrepancies will disappear as long as the WTO negotiations continue).
108. See Ho, *supra* note 30, at 825–26 (predicting that future negotiations with the current U.S. administration will continue, and possibly escalate, the level of animosity currently existing between the U.S. and other WTO members); see also *Textile curbs attacked by China, defended by U.S.*, ASIAN ECONOMIC NEWS, Nov. 24, 2003 (outlining a new attack from China on U.S. textiles safeguards). But cf. William A. Lovett, Article, *Reflections on the WTO Doha Ministerial: Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 983–85 (2002) (arguing that it would be in the best interests of the U.S. to continue the adversarial approach taken to many WTO members and provisions).

rules. Alternatively, the U.S. may consider renegotiating international safeguard agreements to align them with U.S. law.

1. Causation

a. Causal link between increased imports and serious injury

To employ a safeguard measure, the existence of a causal link between increased imports of a product and serious injury or threat thereof must be demonstrated.¹⁰⁹ When factors other than increased imports are causing injury to the domestic industry at the same time, such injury is not attributed to increased imports for purposes of the injury analysis.¹¹⁰ In other words, injury from increased imports alone is required to satisfy the WTO causation requirement.¹¹¹

In recent challenges to U.S. safeguard measures, the WTO has found fault with a variety of methodological and analytic approaches employed by the ITC in making its injury determination.¹¹² The most common complaint from affected countries in each safeguards case is the ITC's finding of injury based on increased imports without an independent analysis of other

109. See Blank, *supra* note 90, at 789–90 (explaining that a causal link between the increase in imports and the injury or threat of injury to domestic industry complained of is a necessary element to sustaining a safeguard against WTO review); see also Lee, *supra* note 89, at 256 (explaining that, in evaluating the causal link requirement, both domestic goods and goods sufficiently similar to them may be counted against the imported goods).

110. See *Allegheny Ludlum Corp. v. United States*, 116 F. Supp. 2d 1276, 1289 (2000) (finding that, even in light of evidence from substantiality that subject imports were increasing, evidence was insufficient to support a finding that such imports caused injury on the domestic industry); see also *American Spring Wire Corp. v. United States*, 8 Ct. Int'l Trade 20, 22 (1984) (acknowledging that in order to be granted relief, the domestic industry must be suffering as a result of imports). See generally Stevenson, *supra* note 5, at A1 (reviewing the effects of increased imports).

111. See *Angus Chem. Co. v. United States*, 140 F.3d 1478, 1485 (Fed. Cir. 1998) (determining that there must be a causal link between imports and any perceived harm to the domestic industry); *Copperweld Corp. v. United States*, 12 Ct. Int'l Trade 148, 152 (1988) (requiring that the ITC determine that injury is caused by imports); see also *British Steel Corp. v. United States*, 8 Ct. Int'l Trade 86, 90 (1984) (recognizing that injury must be by reason of the subject of imports).

112. See Peter D. Ehrenhaft, *Is Interface of Antidumping and Antitrust Laws Possible?*, 34 GEO. WASH. INT'L L. REV. 363, 363–66 (2002) (acknowledging contention between the U.S., the WTO and European nations in reaching agreements regarding international trade). But see *U.S. Steel Group v. United States*, 96 F.3d 1352, 1361 (Fed. Cir. 1996) (noting that the Tariff Act of 1930 does not mandate use of either the “one-step” (unitary) or “two-step” (bifurcated) analysis; commissioners may use either). See generally Eric P. Salonen, “*One Tomato, Two Tomatoes . . .*” *Selection of Trade Remedy Laws in the Florida-Mexico Tomato Conflict*, 11 FLA. J. INT'L L. 371, 374 (1997) (implying that there is more than one method employed by the ITC in making its injury determination).

factors attributable to the alleged injury.¹¹³ For instance, complainants have argued that the steel industry is injured by its need for reorganization, and not as a result from increased imports from U.S. foreign trading partners.¹¹⁴ Brazil argued in *Steel* that the performance of the U.S. steel industry declined even with a decline in imports because it is “weak, fragmented, and saddled with inefficient and/or antiquated capacity well in excess of demand.”¹¹⁵ Thus, the crux of the opposition to the ITC’s causation analysis is that the injury identified in its determination is not clearly attributable to imports.¹¹⁶ In *Steel*, both the EU and New Zealand argued that the ITC report downplayed the “differences in inputs and production methods” that had a significant impact on the competitiveness of the industry.¹¹⁷ Switzerland joined the EU and New Zealand in its conclusion that the United States steel industry is in transition to become modern and more efficient,¹¹⁸ which is contributing to intra-industry competition and

113. See Ari Afilalo, *Not In My Backyard: Power and Protectionism In U.S. Trade Policy*, 34 N.Y.U. J. INT’L L. & POL. 749, 771 (2002) (identifying the problem in determining which elements of serious injury are attributable to increased imports and which are attributable to other factors); see also Stirk, *supra* note 96, at 701 (stating that injuries caused to the domestic industry by factors other than the dumped imports must not be attributed to the dumped imports). But see Comm. of Domestic Steel Wire Rope & Specialty Cable Mfrs. v. United States, 17 Ct. Int’l Trade 233, 237–38 (1993) (finding that the USITC correctly held a domestic industry was not injured because statutory criteria were only guidelines to be evaluated in light of other factors and the industry as a whole).
114. See WTO Panel, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R–WT/DS254/R, WT/DS258/R, WT/DS259/R, at para. 7.34 (July 11, 2003); see also *Hiranuma Calls for Cautious Approach on Steel Imports*, JAPAN POL’Y & POL., June 11, 2001 (stating that a problem with the U.S. steel industry is a lack of competitiveness and a need for structural improvement). See generally *Japan Eyes WTO Case Over U.S. Steel Tariffs*, JAPAN WKLY. MONITOR, Mar. 11, 2002 (responding to a U.S. decision to curb steel imports, Japan’s Foreign Minister expressed concern that this would delay structural adjustment of the U.S. steel industry).
115. The EU argued further that the U.S. steel industry sought import protection, “rather than innovate and compete.” See WTO Panel, *supra* note 114, at para. 7.3. But see R.M. Cyert & R.J. Fruehan, *Meeting the Challenge: U.S. Industry Faces the 21st Century, The Basic Steel Industry* 14–16, 12 (Dec. 1996) (finding that the U.S. steel industry has increased in efficiency) available at <http://www.ta.doc.gov/Reports/Steel/cd91a.pdf> (last visited Feb. 16, 2004). See generally Press Release, U.K. Steel Ass’n, UK Steel Industry Blasts Threat of U.S. Import Restrictions (Apr. 9, 2001) (reporting that only inefficient U.S. companies are suffering from increased imports) available at <http://www.uksteel.org.uk/nw70.htm> (last visited Feb. 16, 2004).
116. See generally *British Steel Corp. v. United States*, 8 Ct. Int’l Trade 86, 90–91 (1984) (providing relief pursuant to a very broad causation analysis); Kim Mi-Hui, *U.S. Rules Against Foreign Steel Exporters*, THE KOREA HERALD, Oct. 24, 2001 (noting that the Korean government expressed discontent regarding an ITC ruling finding injury on the U.S. steel industry and positing the idea that the ruling is the result of powerful lobbying by the U.S. rather than WTO policies); *India: India Drags U.S. to WTO Over Dumping Duties On Steel*, BUS. LINE (New Delhi), Oct. 12, 2000, (India complaining that ITC’s determination of injury in U.S. is “based on deficient procedures” and without objective examination of fact).
117. WTO Panel, *supra* note 114, at para. 7.15 (stating that the EU and New Zealand noted that the ITC failed to emphasize the impact differences had on the competitiveness of integrated producers). See generally Corinna C. Petry, *President Bush Between a Tariff and a Hard Place*, METAL CTR. NEWS, Dec. 1, 2003 at 6 (indicating that the ITC report did not hold section 201 responsible for increased steel prices).
118. See Tom Stundza, *201 Tariffs, Other Duties Headed for a Meltdown*, PURCHASING, Oct. 10, 2002, at 24B1 (recognizing plans by the U.S. to consolidate the steel industry and eliminate inefficient capacity). See generally *U.S. Steel Chairman Says WTO Ruling Biased; Fully Supports Government Appeal*, PR NEWswire (Pittsburgh), Jul. 11, 2003 (stating that the U.S. is in the process of transforming through consolidations and investments); *WTO Await U.S. Appeal*, STEEL TIMES INT’L July 1, 2003, at 3 (asserting that the U.S. is engaging in negotiation for new productivity, planning major consolidation and making new capital investments).

downward pressure on prices.¹¹⁹ The U.S. countered these claims by arguing that increased steel consumption during the period of investigation created an expectation that the steel industry would perform well;¹²⁰ however, steel imported at historically high levels “w[as] sold at prices that were literally unsustainable and that were demonstrably ruinous to domestic industries.”¹²¹ However, the U.S. disregards factual proof that inefficiency is the reason for its injured domestic industry¹²² and claims the injury is solely attributable to imports.¹²³

The ITC’s methodology has also been cited as flawed because of insufficient data used as evidence,¹²⁴ improper definitions of domestic industry,¹²⁵ and failure to adequately explain key

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119. See WTO Panel, *supra* note 114, at para. 7.34–7.35; see also Guohua, *supra* note 28, at 195 (discussing that the USITC recognized that increased capacity, as well as intra-industry competition, injured the domestic steel industry); Stewart, McDonough & Prado, *supra* note 96, at 712 (explaining that the decline in the steel industry as a whole is the result of a combination of the following factors: severe economic recession in the 1980s, changes in steel consumption, intra-industry competition, and an increase in imports).
 120. See Henry, *supra* note 20, at 386 (indicating that the U.S. expected the steel industry to soar considering the price and demand of steel were both high). See generally Graham, *supra* note 1, at 214 (suggesting that if the steel industry is given protection it will become less competitive).
 121. See WTO Panel, *supra* note 114, at para. 7.43; see also Monica A. Stump, Note, *The Alarms Are Buzzing In Washington: The Antidumping Act of 1916 Returns From Hibernation*, 63 U. PITT. L. REV. 645, 649 (2002) (declaring that steel prices plummeted as a result of steel imports entering the U.S. at low prices and increased rates); Report to the President, Global Steel Trade: Structural Problems and Future Solutions, International Trade Administration of the U.S. Department of Commerce (July 2000) at 11 (identifying a rapid growth in imports together with a drop of prices to be the cause of serious injury to the U.S. steel industry) available at <http://www.ita.doc.gov/media/steelreport726.html> (last visited Feb. 16, 2004).
 122. See Afilalo, *supra* note 113, at 774 (suggesting that domestic injury to the steel industry is the result of inefficiencies and not increased imports). But see Stump, *supra* note 121, at 648 (noticing that the U.S. effort within the steel industry to become efficient was a catalyst to the steel industry crisis). See generally Roger Phillips, *Rule-Based Conduct vs. the Law of the Jungle*, NEW STEEL, Oct. 1, 1999 at 48 (acknowledging American steel producers as the most efficient in the world).
 123. Contra Graham, *supra* note 1, at 204 (blaming “massive worldwide steel overcapacity” for the injured steel industry); but see Dan Quayle, *Perspective: United States International Competitiveness and Trade Policies for the 1980s*, 5 NW. J. INT’L L. & BUS. 1, 23–24 (1983) (identifying various reasons for the U.S.’s injured domestic industry); Nancy E. Kelly, *WTO Panel’s Ruling Bodes Ill for Steel “201,”* AM. METAL MARKET, Oct. 31, 2001, at 12 (noting that an ITC report fails to cite proof that increased imports damaged U.S. steel producers).
 124. See Ho, *supra* note 30, at 832–35 (commenting on the contradicting evidence used by the ITC to make determinations regarding injury); see also Stirk, *supra* note 96, at 700 (recognizing shortcomings in an ITC report because it only examined certain parts of a domestic industry when it should have examined all parts of the industry); Nancy E. Kelly, *White House Rips WTO Over “201,” Vows Appeal*, AM. METAL MARKET, Jul. 14, 2003 at 1 (disputing the methodology used by the ITC, as well as voicing dissatisfaction with how the ITC analyzes data).
 125. See David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT’L L. REV. 1025, 1069–71 (1999) (finding that the definition of “domestic industry” can be critical and determinative of the outcome of cases); Jennifer Karen King, Note, *In Need of Enlightenment: The International Trade Commission’s Misguided Analysis in Sunset Reviews*, 43 WM. & MARY L. REV. 2151, 2177–79 (2002) (stating that there are problems in defining the term “domestic industry”). See generally Stephen J. Powell, Craig R. Giesse & Craig L. Jackson, *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT’L L. & BUS. 177, 197–98 (1990) (indicating various ways to define “domestic industry”).

aspects of injury determinations.¹²⁶ In *Line Pipe*, the AB maintained that the ITC's determination of a causal link between increased imports and the threat of serious injury did not ensure that the injury caused to the domestic industry could not be attributable to factors other than imports.¹²⁷ Alternatively, the ITC did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports.¹²⁸

As stated in Article 4(2)(b) of the SA, the causation requirement is met when "objective evidence" demonstrates that increased imports alone caused (or threaten to cause) serious injury.¹²⁹ In recent decisions, the AB has stipulated that the ITC must separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors in a straightforward and unambiguous analysis, thereby imposing an additional requirement.¹³⁰ In this way, the vagueness of what the SA and the AB actually require has contributed to negative findings against the U.S. on the issue of causation.

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126. See *Atlantic Sugar, Ltd. v. United States & AMSTAR Corp.*, 744 F.2d 1556, 1560 (Fed. Cir. 1984) (referring to the "best information otherwise available" standard used for ITC injury determinations); see also *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 Ct. Int'l Trade 634, 638 (1988) (demonstrating the ITC's failure to adequately explain the meaning of the "like product" standard); Steven Thuesen, Note, *Sustainable Production Agriculture in the Face of Foreign Commodity Dumping: Achieving Effective Antidumping and Countervailing Duty Determinations*, 77 N.D. L. REV. 453, 465 (2001) (describing the lack of a clear definition regarding what determines a "product" under ITC injury determination).
 127. See WTO Appellate Body, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R/27 (Oct. 29, 2001) (stating that the ITC failed to establish a causal link between increased imports and serious injury); see also WTO Appellate Body, *supra* note 69 (affirming the WTO Appellate Body's conclusion that it must be shown that injury caused by factors other than increased imports was not caused by increased imports); *First Meeting Held In WTO Challenge Against U.S. Section 201 Safeguard Measures*, ALL REGIONS, Feb. 6, 2004 (arguing that the U.S. did not properly establish a causal relationship between increased imports and injury to domestic industry).
 128. See WTO Appellate Body, *supra* note 69 (demonstrating that the WTO panel held that the ITC failed to adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports); see also Bhala & Gantz, *supra* note 98, at 182 (relating that the Panel concluded the ITC's causation analysis failed to distinguish injuries caused by factors other than increased imports). But see Yu, *supra* note 106, at 325 (explaining that the ITC is required to adequately identify the cause of injury but not the extent of injury).
 129. See Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A (stating the causation requirement of Article 4(2)(b)) available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 16, 2004); see also Stewart, McDonough, & Prado, *supra* note 96, at 665 (articulating what constitutes objective evidence of serious injury); cf. Afilalo, *supra* note 113, at 768–69 (describing the burden of proof necessary to meet the causation requirement).
 130. See WTO Appellate Body, *United States—Safeguard Measures on Imports of Fish, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R/18 (May 1, 2001) (arguing that the ITC must show that increased imports were a cause of serious injury and they alone accounted for a degree of injury that met a level of seriousness); see also Bhala & Gantz, *supra* note 98, at 182 (finding that the ITC did not attribute injury caused by other factors to imports); Stirk, *supra* note 96, at 702 (requiring the ITC to separate and distinguish injurious effects of factors other than increased imports).

b. Standard of review—"reasoned and adequate explanation"

The AB has also faulted the ITC because of inadequate written explanations for its injury determinations.¹³¹ In *Wheat Gluten*, the AB noted that because the most important part of the WTO Panel's reasoning on allocation methodologies (related to profits and losses) was based on verbal clarifications of the ITC report provided by the United States during oral arguments, the ITC Report was insufficient.¹³² The AB wanted more comprehensive briefs that explicitly explained the ITC's methodology in determining causation of injury to domestic industry and how that was unequivocally linked to increased imports.¹³³ In *Lamb Meat*, the AB upheld the Panel's finding that the ITC failed to ensure that injury caused by other factors was not attributed to imports, as required by Article 4(2)(b) of the SA.¹³⁴ Because the ITC reports provide only a brief explanation of how other factors are not attributable to the injury caused by imports, the causality standard is a prime target for challenges.

Complainants in *Steel* argue that domestic authorities have a "duty to demonstrate, at the time they take safeguard measures, and through a reasoned and adequate explanation"¹³⁵ that the legal requirements for the imposition of those measures are satisfied by the SA.¹³⁶ As sup-

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131. See, e.g., WTO Appellate Body, *supra* note 69 (discussing that the ITC has not adequately explained its injury determinations); cf. Yu, *supra* note 106, at 325 (articulating the importance of use of language that distinguishes injurious effects of imports from other factors). See generally Nam H. Paik, Note, *American Lamb Company v. United States: Application of the Reasonable Indication Standard*, 9 NW. J. INT'L L. & BUS. 191, 196 (1988) (illustrating parties' opportunity to submit written statements before an injury determination is rendered by the ITC).
 132. See WTO Appellate Body, *supra* note 69 (noting that the ITC did not provide an adequate explanation for the determination made with respect to profits and losses); cf. John R. Schmertz & Mike Meier, *EU Complaint Against U.S. Safeguard Measures on Imports of Wheat Gluten Is Ruled Upon by WTO Dispute Settlement Panel in Favor of EU*, 6 INT'L L. UPDATE 8, 10 (2000) (articulating reasons for insufficiency of ITC report). See generally Timothy C. Brightbill, et al., *Business Regulation: International Trade*, 35 INT'L LAW. 407, 412 (2001) (describing reasons for insufficiency of the *Wheat Gluten* report's predecessor, submitted by the ITC in July 2000).
 133. See WTO Appellate Body, *supra* note 69 (criticizing the ITC's methodology in determining causation of injury to domestic injury). See generally Bhala & Gantz, *supra* note 98, at 182 (disparaging the ITC report and its methodology in determining causation of injury to domestic industry); Clark, *supra* note 95, at 410 (explaining the U.S.'s attempt to cure the flaws of the ITC analysis after the fact).
 134. See WTO Appellate Body, *supra* note 130 (concluding that the ITC failed to ensure that injury caused by other factors affecting the product was not attributed to imports); see also WTO Appellate Body, *supra* note 69 (affirming that the ITC failed to explain the causal link between imports and injury); Paik, *supra* note 131, at 215 (stating that the ITC did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports).
 135. See WTO Appellate Body, *supra* note 69 (stating the "reasoned and adequate explanation" requirement); *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. Steel Safeguard Measures*, *supra* note 70, at 11 (finding that the application of U.S. safeguards to steel products was inconsistent with the Agreement on Safeguards because the U.S. failed to provide a "reasoned and adequate explanation" for its findings). See generally Bhala & Gantz, *supra* note 98, at 192 (determining on another occasion that the ITC did not satisfy the "reasoned and adequate" explanation requirement of the Agreement on Safeguards).
 136. See WTO Appellate Body, *supra* note 69 (illustrating the complainants' "reasoned and adequate explanation" argument). See generally *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. Steel Safeguard Measures*, *supra* note 70, at 13 (disparaging the U.S.'s failure to satisfy the Agreement on Safeguards' requirements); Bhala & Gantz, *supra* note 98, at 192 (demonstrating the inadequacy of the U.S.'s analysis).

port for their position, they cite the AB's holding in *Argentina—Safeguard Measures on Imports of Footwear* (EU v. Argentina).¹³⁷ In that case, a panel considered whether the domestic authorities had examined all the relevant factors and “had provided a reasoned explanation of how the facts supported their determination.”¹³⁸ The authority for a “reasoned and adequate explanation” has its roots in Article 3.1 of the SA, which has been clarified by the AB in subsequent cases to impose a “duty to demonstrate” on the domestic authorities.¹³⁹ The SA is silent as to the appropriate standard of review.¹⁴⁰ Article 11 of the DSU applies, broadly requiring the Panel to make an objective assessment of the case in conformity with the agreements’ provi-

137. See WTO Appellate Body, *supra* note 69 (citing the *Argentina* holding, which provides that the “attributes of recentness, suddenness, sharpness, and significance are inexorably linked to the ability of imports to cause or threaten to cause serious injury”); cf. WTO Appellate Body, *Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R/26 (Sep. 28, 2001) (holding that it is necessary to provide timely opportunities for interested parties to have access to all relevant information). See generally Palmetter & Mavroidis, *supra* note 85, at 420 (explaining that considering legal interpretations of panel reports, as the complaints in *Steel* have done by citing *Argentina*, provides legal perspective).

138. See WTO Appellate Body, *supra* note 137 (holding that a panel reviews whether the domestic authorities had examined all the relevant factors and had provided a reasoned explanation of how the facts supported their determination). See generally *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. Steel Safeguard Measures*, *supra* note 70, at 13 (stating the “reasoned and adequate explanation” requirement); Afilalo, *supra* note 113, at 768–69 (describing the necessity of examining all of the relevant factors).

139. See Agreement on Safeguards, WTO Agreement, Apr. 15, 1994, Annex 1A (requiring that “the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law”) available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 16, 2004); see also Craig Thorn & Marinn Carlson, *Part II: Review of Key Substantive Agreements: Panel II D: Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS): The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, 31 LAW & POL’Y INT’L BUS. 841, 849 (2000) (describing how Article 3.1 imposes a general obligation to base their standards on international standards); Layla Hughes, Note, *Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision*, 10 GEO. INT’L ENVTL. L. REV. 915, 925 (1998) (holding that harmonization with international standards under Article 3.1 is the general rule and that the implementation of higher standards was an exception to this rule, with regard to sanitary measures).

140. See Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A (demonstrating that the Agreement on Safeguards is silent as to the appropriate standard of review) available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 16, 2004). See generally Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience*, 26 FORDHAM INT’L L.J. 1505, 1536 (2003) (explaining that Article 11 of the DSU applies to the review of actions of national authorities only to the extent that these actions are covered by the existing WTO law, since the Agreement on Safeguards does not state the appropriate standard of review); Joost Pauwelyn, *The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 121, 138 (2003) (illustrating the ability of WTO members to question WTO policies, due to the lack of guidance as to the appropriate standard of review).

sions.¹⁴¹ Because the Panel may not conduct a *de novo* review of an injury determination, the Panel can only examine whether the ITC's methodology was correct by assessing the provided explanation of how the facts support the injury determination.¹⁴² Without a thorough explanation of how the facts support the injury determination, the U.S. has not fulfilled its burden of proof under the SA.¹⁴³

The EU's, Norway's and Switzerland's central arguments in *Steel* regarding the applicable standard of review was (1) that the U.S. findings were based on a methodology not compliant with the SA¹⁴⁴ and (2) the facts relied upon for the ITC's determination did not meet the substantive requirements of the SA because it was not demonstrated how those standards were met or how such facts justified the ITC's findings.¹⁴⁵ The U.S. countered that the complainants were essentially requesting a *de novo* review, exceeding the Panel's authority under Article 11 of the DSU.¹⁴⁶ The U.S. interprets the complainants' argument for a *de novo* review as an attack

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141. See WTO Appellate Body, *supra* note 69 (noting the Panel's duty under Article 11 to make an objective assessment of the facts of the matter); see also Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561, 582 (2002) (stating the Article 11 requirement that the Panel make an objective analysis of the facts); Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321, 1340 (2000) (describing a Panel's duties under DSU Article 11 to make an objective assessment of a matter).
 142. See Philip A. Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 277, 305 (1996) (explaining that panels, as stated in Article 17.6 of the 1994 Anti-Dumping Code, are to determine whether the authorities' establishment of the facts was proper, unbiased, and objective, and if so, those facts may not be overturned); see also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 198–02 (1996) (examining the standard of review in the WTO). See generally WTO, *Understanding the WTO: The Panel Process* (describing how WTO Panels settle disputes), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited Feb. 15, 2004).
 143. See Guohua, *supra* note 28, at 179–90 (discussing the injury requirement under the Safeguards Agreement in recent cases); Naomi Koppel, *WTO Deals Blow to Bush Steel Tariffs*, CHI. SUN-TIMES, JUL. 23, 2003, at 25 (explaining that according to the WTO Panel, the U.S. failed to prove that its domestic steel industry had been harmed, a precondition for safeguard duties); cf. WTO Panel Report, Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products, WT/DS98/R, paras. 7.54–7.59 (June 21, 1999) (concluding that Korea's injury determination did not meet the requirements of the Safeguards Agreement).
 144. See WTO, Agreement on Safeguards, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 4, (providing the methodology for evaluating serious injury or threat), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 15, 2004); Afilalo, *supra* note 113, at 765–73 (examining the method of determining an injury as required by the Safeguards Agreement). See generally Ernesto M. Hizon, *The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection*, 15 NW. J. INT'L L. & BUS. 105, 132–37 (1994) (discussing the flaws of the findings required in the Safeguards Agreement).
 145. See WTO Panel Report, *supra* note 114, at para. 6.57. See generally Trade Act of 1974, 19 U.S.C. § 2252(c) (2003) (listing the factors the ITC may use in making its findings that an injury has occurred); United States International Trade Commission, *Understanding General Fact Finding Investigations* (discussing the details of an ITC fact finding investigation), available at www.usitc.gov/us332.htm (last visited Feb. 15, 2004).
 146. See WTO Panel, *supra* note 114, at para. 6.58; Ehlermann & Ehling, *supra* note 140, at 1533 (stating the standard of review under Article 11 of the DSU is an objective assessment of the facts, not a *de novo* review); see also Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1233–34 (1998) (discussing the standard of review employed by Panels).

on the ITC's methodologies *per se*.¹⁴⁷ China clarified that the ITC methodology is not being attacked,¹⁴⁸ rather, it is the application of the methodology that is inconsistent with the SA.¹⁴⁹ The Panel reiterated that no claim was made that any aspect of U.S. safeguards law is inconsistent with WTO obligations.¹⁵⁰ The U.S. argued that the methodology employed by the ITC is merely a step in the investigative process¹⁵¹ and is not determinative of compliance with WTO obligations.¹⁵² Evaluating the complainants and the U.S. arguments, it becomes apparent that the U.S. fails to address the principal concerns of the complainants.

The complainants collectively argued that the U.S. assumes the Panel should simply accept the ITC's assertions as compliant with the SA without an adequate explanation of how they are actually compliant—that everyone should merely accept that the methodologies used

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147. See Paik, *supra* note 131, at 208–11 (indicating that the ITC should be granted deference to serve its function); see also Stephen J. Powell & Mark A. Barnett, *The Role of United States Trade Laws in Resolving the Florida-Mexico Tomato Conflict*, 11 FLA. J. INT'L L. 319, 367 (1997) (noting that *de novo* review is inappropriate); Stirk, *supra* note 96, at 702 (stating the Panel's answer to Japan's argument that the ITC did not adequately examine factors).
 148. See generally U.S. International Trade Commission, *Understanding General Fact Finding Investigations* (providing the methodology used by the ITC in investigations), available at www.usitc.gov/us332.htm (last visited Feb. 15, 2004); Bhala & Gantz, *supra* note 98, at 179–83 (examining the ITC's methodology in a relatively similar case); Gantz, *supra* note 47, at 96 (reviewing the procedures of the ITC).
 149. See WTO, Agreement on Safeguards, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 4 (providing the Articles of the Safeguards Act), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 15, 2004); Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049, 1087–89 (1995) (criticizing the standards used by the ITC). See generally Bob Kemper, *Bush Plays for Time on U.S. Steel Tariffs*, CHI. TRIB., Nov. 11, 2003, at 8 (asserting that the WTO ruled the steel tariffs imposed by the U.S. violated international trade regulations).
 150. See WTO Panel, *supra* note 114, at para. 6.73; see also *The Challenge of Negotiating, Monitoring, and Enforcing the U.S. Trade Laws: Hearing Before the Government Oversight Subcomm. of the Senate Comm. on Governmental Affairs*, 110th Cong. (Dec. 9, 2003) (statement by Sen. George Voinovich, Member, Senate Comm. on Governmental Affairs) (stating that under section 201 the steel tariffs are consistent with the WTO). See generally Christopher F. Cori, *Trade Protection and the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 61–68 (1997) (reviewing the WTO Safeguards Agreement and noting that it borrows heavily from United States safeguards law).
 151. See Priest, *supra* note 3, at 1042 (reviewing the process used by the ITC). See generally Robert S. Greenberger, *Tiny Agency Carries a Big Stick in Trade Disputes*, WALL. ST. J., Dec. 24, 1998, at A10 (examining the role of the ITC in trade disputes); Robert W. McGee & Yeomin Yoon, *Technical Flaws in the Applications of the U.S. Antidumping Law: The Experience of U.S.-Korean Trade*, 15 U. PA. J. INT'L BUS. L. 259, 263 (1994) (emphasizing that the ITC shares some functions with the Commerce Department).
 152. See Terence P. Stewart, *U.S.-Japan Economic Duties: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 725 (1999) (stating that although the ITC strives to perform within the parameters of U.S. domestic law and the U.S. obligations under the WTO, safeguards are in place if laws or actions are inconsistent with WTO obligations). See generally WTO, *The WTO Agreements* (listing the general benefits that members of the WTO enjoy), available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm#disputes (last visited Feb. 16, 2004); Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 325 (2001) (reviewing China's obligations once it came to the WTO).

to arrive at such findings satisfied the agreement.¹⁵³ The problem with the ITC's proffered findings, complainants argue, is that the explanations contained in the distributed reports do not actually show how the ITC arrives at its conclusions.¹⁵⁴ In fact, the U.S. only refuted these arguments at Panel proceedings by relying on information that was not even contained in either ITC report.¹⁵⁵

To support its claims, the U.S. has argued that Article 3.1's third sentence and Article 4.2(c) of the SA only require a report reflecting the investigation and do not impose a larger duty to explain such findings.¹⁵⁶ The U.S. further asserted that "if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1."¹⁵⁷ In the U.S. opinion, since the SA does not explicitly require the micro-explanations that the complainants argue is necessary through inference or by implication, the ITC

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153. See WTO Panel, *supra* note 114, at para. 6.55. See generally Pauwelyn, *supra* note 140, at 122–33 (examining the Panel process as applied to disputes involving the U.S.); Henry, *supra* note 20, at 395–409 (discussing the relations between Panels and the safeguards agreement, noting the controversial fact that panels are not directly accountable to any WTO member).
154. See Tariff Act of 1930, 19 U.S.C.S. § 1671 (2003) (describing what the ITC must find for countervailing duties to be imposed); see also Bhala & Gantz, *supra* note 98, at 191 (reviewing the requirement as set forth in *Wheat Gluten*, that the ITC provide a reasoned and adequate explanation that establishes explicitly conditions that necessitate safeguard measures). See generally Bruce M. Steen, Note, *Economically Meaningful Markets: An Alternative Approach to Defining "Like Product" and "Domestic Industry" Under the Trade Agreements Act of 1979*, 73 VA. L. REV. 1459, 1471–80 (1987) (arguing that the ITC's findings are biased in finding market injuries).
155. The ITC completed an original report and a supplementary report before implementing the safeguard measures in March of 2001. Vol. 1: Determinations and Views of Commissioners, USITC Pub. 3479, Inv. No. TA-201-73 (2001) available at <http://www.usitc.gov/steel> (last visited Feb. 16, 2004). See generally WTO Panel, *supra* note 22, at para. 57 (providing that competent authorities shall evaluate all relevant factors having a bearing on injuries to the domestic industry); Paul C. Rosenthal & Robert T. C. Vermeylen, *Antidumping Agreement (AD) and Agreement on Subsidies and Countervailing Measures (SCM)*, 31 LAW & POL'Y INT'L BUS. 871, 880 (2000) (stating that pursuant to Article 11 of the DSU, a panel may determine for itself the facts and law of the case and is not required to defer to an administering authority's assessment or interpretation of the facts).
156. "The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." SA, art. 3.1. "The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." SA, art. 4.2(c). See WTO Panel, *supra* note 114, at para. 6.77; Bhala & Gantz, *supra* note 98, at 180 (providing that in the WTO case involving safeguard measures on the imports of circular welded carbon quality line pipe from Korea, issues involving SA art. 3.1 and 4.2(c) and the U.S.'s omissions of distinct findings were raised on appeal). See generally Guohua, *supra* note 28, at 175 (examining safeguard measures in light of recent cases).
157. See Stirk, *supra* note 96, at 698–700 (examining Article 3.1 and its requirements); Alicia Cebada Romero, *Anti-dumping, Countervailing Duties, and Safeguard Measures: Comparisons Between the Agreements of the European Community and European Eastern Countries and NAFTA*, 16 ARIZ. J. INT'L & COMP. L. 437, 449 (1999) (stating that when a party intends to take a safeguard measure, they must provide all the circumstances which justify the measure).

report is a sufficient “reasoned and adequate explanation.”¹⁵⁸ That the Panel ultimately rejected the U.S. argument should be of no surprise to the U.S., however. Complainants have taken issue with the U.S. interpretation of “reasoned and adequate explanation” in every safeguards dispute in WTO dispute settlement since the Uruguay Round.¹⁵⁹ Panels and ABs have struggled in deciding issues based on ambiguities in ITC reports,¹⁶⁰ and have refrained from ruling on particular issues simply because there was not enough factual analysis contained in the reports to illuminate how the ITC managed to arrive at such a determination.¹⁶¹ In those cases, the safeguard measures were struck down on other elements of inconsistency with the SA.¹⁶²

2. Parallelism Requirement

Perhaps the most controversial issue involving U.S. safeguard measures is whether the U.S. has complied with the SA’s parallelism requirement. Parallelism requires that imports included in the injury determination should correspond to the imports covered by the safe-

158. See WTO Appellate Body, *supra* note 101, at para. 217; see also WTO Appellate Body, *supra* note 69, at para. 103 (discussing the ITC report). See generally Mattias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT’L ECON. L. 635, 651–53 (2003) (reviewing the U.S. response to the ITC report).

159. See WTO Appellate Body, *supra* note 101, at para. 219 (noting Korea’s disagreement with U.S. interpretation); WTO Appellate Body, *supra* note 69, at para. 6 (listing the countries complaining of the U.S. failure to establish a “reasoned and adequate explanation” as China, New Zealand, the European Community, Norway, and Switzerland). See generally Amelia Porges, *Final Act of Uruguay Round Adopted*, AM. SOC’Y INT’L L. NEWSL. (Jan. 1994) (stating that the Uruguay Round finalized the establishment of the WTO in 1994 after years of negotiations).

160. See Peter M. Gerhart, *Reflections on the WTO Doha Ministerial: Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT’L L. REV. 1045, 1053–55 (1999) (noting there are “unresolved ambiguities” that underlie the WTO, which allows its rule-based system to be malleable). See generally Raj Bhala, *Rethinking Anti-dumping Law*, 29 GEO. WASH. J. INT’L L. & ECON. 1, 100 n.468 (1995) (stating that 19 U.S.C. 1673(a)(1) only requires the ITC to either subpoena information or make a report based on “information available,” leaving room for ambiguities based on jurisdictional or foreign state compulsion obstacles in obtaining the subpoenaed information); Peter A. Dohlman, *Determinations of Adequacy in Sunset Reviews of Antidumping Orders in the United States*, 14 AM. U. INT’L L. REV. 1281, 1316–17 (2000) (pointing out that the U.S.’s discretion in combining foreign imports and assessing the effects of such imports may lead to an ambiguous impact).

161. See WTO Panel, *supra* note 15, at para. 7.3 (clarifying that the task of the Panel is not to make a *de novo* review of the evidence in the report, but to determine the report provides an adequate reflection of the threat alleged, as compared to the facts as a whole); WTO Appellate Body, *supra* note 69 (questioning why the USITC report did not explain how it found an overall increase in exports when there had actually been an approximate 30% decrease); see also Jack Lucentini, *U.S. Steel Wire Rod Industry Seeks Import Protection*, J. COMMERCE, Dec. 31, 1998, at 3A (noting that section 201 does not require the ITC to make a finding of unfair trade practices, unlike the antidumping laws).

162. See WTO Secretariat, *India—Anti-Dumping Measure on Batteries*, WT/DS/OV/19, 151 (Feb. 6, 2004) (reversing the Panel’s decision that the U.S. failed to provide a reasoned and adequate explanation regarding the causal link between imports and serious injury, but striking the safeguards down on other grounds). See generally Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 J. INT’L ECON. L. 695, 700–04 (2003) (contemplating whether decision-making by the Panels and the AB would be easier if countries were required to first exhaust national remedies before filing with the WTO); Powell & Barnett, *supra* note 147, at 370 (noticing that even if a U.S. safeguard is struck down by the WTO, relief may only be granted to the injured party on a prospective basis).

guard measure.¹⁶³ As confirmed in *Steel*, the concept of parallelism originates in the first and second paragraphs of Article 2 of the SA, read together with Article 4,¹⁶⁴ as articulated in the *Argentina Footwear* decision and reiterated in subsequent safeguard cases.¹⁶⁵ The gist of Article 2 is that a country may apply a safeguard measure to a product only if it has determined in its analysis that increased imports are the cause of injury to the domestic injury.¹⁶⁶ The second paragraph provides that a safeguard must be applied globally, instead of on a country-by-country basis as in antidumping cases.¹⁶⁷ Article 4 of the SA states that a determination of injury shall not be made unless all factors contributing to the increased imports are included in this analysis.¹⁶⁸ Without including all the countries exporting the particular product, all contributing factors cannot be analyzed.

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163. See WTO Panel, *supra* note 114, at para. 10.559; see also WTO Appellate Body, *supra* note 69, at para. 436 (stating that even though imports from Israel and Jordan may be minimal, those imports must nevertheless be included in calculating injury and application); Bhala & Gantz, *supra* note 98, at 185 (exemplifying Korea's claim of a breach of parallelism by asserting that it is a gap between the injury asserted and the safeguards applied).
164. See WTO Appellate Body, *supra* note 69, at para. 180; see also Rick Van Arnam & Helena Sullivan, *WTO Appellate Body Rules on Steel Safeguards*, METROPOLITAN CORP. COUNSEL (2001) (observing that the word "parallelism" is not found in the text of the Agreement on Safeguards, but was instead implied from the text by the Appellate Body); *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 13 (stating that the U.S. failed to satisfy, *inter alia*, the "parallelism" requirement).
165. See WTO Panel Report, *supra* note 69, at para. 8.87 (emphasizing that Article 2 implies symmetry between the scope and the application of the safeguard measures); WTO Appellate Body, *supra* note 69, at para. 97–99 (stating that for the U.S. to exclude Canada from safeguard application, it must first determine that Canada has not contributed to the "serious injury" at issue); WTO Panel Report, *supra* note 143, at para. 7.86 (allowing safeguards under Article 2.1 only after the prerequisite showing of "serious injury" under Article 4.2).
166. Article 2(1) states "[a] Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." SA, art. 2(1). Article 2(2) states: "[s]afeguard measures shall be applied to a product being imported irrespective of its source." SA, art. 2(2). See WTO Panel, *supra* note 143, at para. 7.53 (acknowledging that Article 2 of the SA is automatically violated when Article 4.2 or Article 4.3 are violated). See generally Ho, *supra* note 30, at 837 (stating that the U.S. reserved these special investigative powers after the Uruguay Round, which authorizes the President to conduct unilateral investigations on imports over the objections of other countries).
167. SA, art.2(2) (stating that "[s]afeguard measures shall be applied to a product being imported irrespective of its source"). See generally General Agreement on Tariffs and Trade, art. IV 2(2) (1994) (exemplifying a dumped product as one which is introduced in a country at less than its cost); Romero, *supra* note 157, at 450 (1999) (discussing some additional differences between antidumping and safeguard measures).
168. See WTO Appellate Body, *supra* note 69, at para. 35–36 (stating the unsuccessful U.S. argument that Article 4.2 does not require it to evaluate injurious factors other than those that provide a "substantial cause"); WTO Panel, *supra* note 143, at para. 7.55 (noting that even if some of the listed factors do not have much bearing on the industry of imports at issue, they are always relevant and therefore required).

The U.S. takes exception to the WTO prescribed parallelism obligation in its so-called NAFTA Carve-Out.¹⁶⁹ In the NAFTA Carve-Out, the ITC excludes Canada and Mexico (and its other free trade agreement partners in some instances) from the application of U.S. safeguard measures, while including them or not taking them into account at all in the injury determination.¹⁷⁰ The controversy associated with the Carve-Out is that the U.S. excludes its trading partners from the safeguard measure,¹⁷¹ when it is not proven in the ITC report that those very countries did not cause the very injury that the safeguard is remedying.¹⁷² This is a problem if Mexico, for example, represents a substantial percentage of U.S. imports in a particular industry, but is excluded from the remedy; the result is that other countries bear the brunt of the measure when they may not have in fact contributed to the injury (if indeed the injury is attributable to increased imports).¹⁷³ Thus, the SA parallelism requirement requires an adequate explanation explicitly establishing how imports from non-NAFTA sources alone satisfied the conditions of the application of a safeguard measure.¹⁷⁴

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169. See generally North American Free Trade Agreement, 32 I.L.M. 289 (1993) (creating a tripartite agreement to eliminate trade barriers and promote fair competition); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 626, 643 (2001) (stating that the U.S. has bilateral trade agreements with Canada, Israel, Mexico, and Jordan); Peter Alleier & Grant Aldonas, *Remarks at the Washington Foreign Press Center on the White House Section 201 Steel Remedy Decision*, FED. NEWS SERVICE, Mar. 5, 2002 (orating that the U.S. steel tariffs are consistent with the WTO measures and the U.S. is "playing by the rules").
170. Pursuant to NAFTA, the agreement's partners must meet more stringent criteria to merit inclusion in a global safeguard remedy. Even if those criteria are met, imports from Canada and Mexico may ultimately be excluded from any remedy for political and/or compensation reasons in the NAFTA Carve-Out. See WTO Panel, *supra* note 114, at para. 7.1984 (asserting that the President ignored contrary findings when concluding Canada and Mexico did not contribute to the serious injury incurred); WTO Appellate Body, *supra* note 69, at para. 111–12 (identifying an instance where Argentina applied safeguards according to a MERCOSUR Carve-Out); WTO Appellate Body, *supra* note 69, at para. 2 (stating that the U.S. excluded Canada when imposing safeguard measures on wheat gluten).
171. See WTO Appellate Panel, *supra* note 155, at para. 9.2 (finding that while imports from Canada were included in the U.S. finding of "serious injury," they were excluded in application of the safeguard measures); Ho, *supra* note 30, at 829 (reporting that Bush administration tariffs on steel, which averaged 30%, were not applied to imports from Canada, Israel, Jordan or Mexico). See generally Emilie Beavers, *Bankruptcy Law Harmonization in the NAFTA Countries: The Case of the United States and Mexico*, 2003 COLUM. BUS. L. REV. 965, 979 (2003) (noting that the U.S. also has a bilateral trade agreement with Vietnam).
172. WTO Panel, *supra* note 114, at para. 7.1982 (noting Japan's argument that a presumption of bias should exist when the U.S. fails to explain the basis of its decision); WTO Appellate Body, *supra* note 69, at para. 96 (acknowledging that if all imports were admitted in determining "serious injury" by increased imports, but the safeguard did not cover all the sources of those imports, then the definition of an "imported product," as used in Articles 2.1 and 2.2 would be inconsistent).
173. See WTO Appellate Body, *supra* note 69 (arguing that past AB decisions dictate that a trading partner may only impose a safeguard where the subject imports contributed to serious injury); see also Bhala & Gantz, *supra* note 20, at 467–68 (indicating that safeguards are imposed where there is no evidence that the trading partner committed an unfair trade practice). See generally Tim Triplett, *ITC Insider's Perspective on Section 201*, METAL CENTER NEWS, July 1, 2002, at 4 (recognizing that significant steel importers are excluded from the remedy).
174. See WTO Agreement on Safeguards (Apr. 15, 1994) (setting the conditions for application of a safeguard), available at http://www.wto.org/english/tratop_e/safeg_e/safeint.htm#provisions (last visited Feb. 16, 2004); Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1, 84–86 (2001) (reiterating the requirement of an evaluation of all relevant factors in assessing the imposition of a safeguard); see also Van Arnam & Sullivan, *supra* note 164, at 34 (maintaining that an exclusion is permissible only if the facts explicitly support the safeguard).

Neither the practice of including regional trading partners or the NAFTA Carve-Out has been ruled on yet by a Panel or AB.¹⁷⁵ The AB has refrained from deciding the consistency of the NAFTA Carve-Out with the SA because the ITC has not yet supplied enough information to make such a determination.¹⁷⁶ In other words, the concept of a Carve-Out may not be *per se* violative of the SA and the GATT, but its legality cannot yet be determined because the U.S. has not thoroughly explained to its trading partners and the WTO how it arrives at this exclusion.¹⁷⁷

Although the AB and Panel have not declared the NAFTA Carve-Out *per se* invalid, the ITC's explanation of the legal basis for such an exclusion was so weak in *Steel* that it was struck down.¹⁷⁸ In previous safeguard cases, the NAFTA Carve-Out was saved from a declaration of inconsistency and instead called a "moot point" or not necessary for full consideration because the measure was declared inconsistent with the SA on other grounds.¹⁷⁹

In *Wheat Gluten*, the central issue involved the United States' use of NAFTA provisions that required the U.S. to exclude Canada from its so-called "global" safeguard action.¹⁸⁰ Countries subject to the U.S. safeguard action challenged the WTO consistency of these provisions

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175. See WTO Appellate Body, *supra* note 69 (declining to rule on the NAFTA "Carve-Out"); see also Bhala & Gantz, *supra* note 20, at 468–69 (citing AB skepticism; however, not ruling on the NAFTA Carve-Out *per se*). See generally *Over Strenuous Objections from EU, Japan, and Other WTO Members, U.S. Imposes Temporary Tariff Safeguards to Reduce Steel Imports as Way of Assisting Struggling U.S. Steel Industry*, 8 INT'L L. UPDATE 30, 30 (2002) (commenting on EU distress over the NAFTA Carve-Out).
176. See Bhala & Gantz, *supra* note 20, at 468–69 (indicating a lapse in causation analysis); see also Van Arnam & Sullivan, *supra* note 164, at 34 (stating that the USITC lacked reasoning in support of its conclusions). See generally <http://www.wto.org> (reflecting that nowhere in the WTO archives is there a ruling on the legality of the Carve-Out).
177. See Bhala & Gantz, *supra* note 20, at 468 (noting that there was a failure in ITC causation analysis); see also Van Arnam & Sullivan, *supra* note 164, at 34 (asserting that the U.S. has not provided adequate data in support of its actions). But cf. WTO Appellate Body, *supra* note 69 (finding that complainants failed to establish that the USITC's analysis was inconsistent with the SA and GATT).
178. See WTO Appellate Body, *supra* note 69 (striking down the application of safeguard measures by the U.S.). See generally WTO Appellate Body, *supra* note 69 (holding that the U.S. acted inconsistently with the SA and GATT); WTO Appellate Body, *supra* note 69 (indicating that the proffered legal basis for exclusion was inadequate).
179. See WTO Appellate Body, *supra* note 127 (indicating that the measure was found to be inconsistent because the United States had violated the overarching requirement); see also WTO Appellate Body, *supra* note 69 (declaring the measure inconsistent because of failure to demonstrate the existence of unforeseen circumstances). See generally WTO Appellate Body, *supra* note 69 (finding the safeguard measure inconsistent on other alternate grounds).
180. Under section 302 of the NAFTA Implementation Act (19 U.S.C. § 1311, P.L. 108-144), the ITC is required to make separate injury findings for Canada and Mexico based on more stringent criteria. Specifically, an affirmative injury finding requires that imports from Canada and Mexico account for a substantial share of total imports and contribute importantly to serious injury or threat of serious injury to the domestic industry. See WTO Appellate Body, *supra* note 69 (disputing whether the U.S. could exclude Canadian imports based on global injury and causation investigations); see also Curtiss & Kashdan, *supra* note 92, at 355 (indicating that NAFTA has prevented Canada from becoming involved in global safeguard actions on agricultural products such as wheat gluten); Gantz, *supra* note 125, at 1070 (commenting on the argument that the NAFTA panel could not assess the validity of global safeguard measures because the SA has not been expressly incorporated).

due to the exclusion of Canada from the relief measure,¹⁸¹ even though the ITC included Canadian imports when determining injury.¹⁸² The ITC conducted two separate investigations on the effect of imports on the U.S. wheat gluten industry: the first examined imports from all sources, including Canada,¹⁸³ and the second analyzed imports only from Canada.¹⁸⁴ Because an investigation on imports from all sources, excluding Canada, was not conducted, the AB held that the ITC injury analysis was insufficient for application of a safeguard measure.¹⁸⁵ The AB could not rule on the *per se* consistency of the NAFTA Carve-Out because the U.S. was already found to have violated the parallelism requirement by including Canada in the injury analysis, but excluding it from the measure.¹⁸⁶

The *Line Pipe* ruling reaffirmed the aspects of nonconformity found in *Wheat Gluten*.¹⁸⁷ In *Line Pipe*, the AB found that the U.S. did not rebut Korea's *prima facie* case for U.S. viola-

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181. See WTO Appellate Body, *supra* note 69 (contending that the U.S. could not exclude Canada from relief measures); accord Bhala & Gantz, *supra* note 98, at 191 (positing that controversy arises when countries subject to injury determinations are not entitled to the relief measures). See generally Stephen Clapp, *U.S. Ends Wheat Gluten Dispute with EU*, FOOD CHEMICAL NEWS, June 11, 2001, at 10 (providing that the import restrictions on wheat gluten did not apply to Canada).
 182. See WTO Appellate Body, *supra* note 69 (indicating that the U.S. conducted a global injury investigation, including but not limited to, Canada); see also Bhala & Gantz, *supra* note 98, at 191 (stating that in *Wheat Gluten*, Canadian imports were included in USITC injury determinations); Dean Saul, et al., *Canadian Legal Developments*, 33 INT'L L. 879, 883 (2001) (stating that although the safeguard was excluded, it was included in assessing injury).
 183. See WTO Appellate Body, *supra* note 69 (summarizing the USITC's examination of global import partners, including Canada); accord WTO Appellate Body, *supra* note 69 (presenting another dispute settlement report on the effect of imports on U.S. markets). See generally Bhala & Gantz, *supra* note 98, at 191 (analyzing the investigation undertaken in *Wheat Gluten*).
 184. See WTO Appellate Body, *supra* note 69 (commenting on another USITC inquiry analyzing solely Canadian imports); accord WTO Appellate Body, *supra* note 69 (indicating another instance in which ITC investigations failed in causal analysis). See generally Bhala & Gantz, *supra* note 98, at 191 (explaining that in *Wheat Gluten* imports from Canada were excluded from safeguard protection).
 185. See WTO Appellate Body, *supra* note 69 (concluding that the U.S. acted inconsistently with its obligations under the SA for imposition of safeguard measures); see also John R. Schmertz, Jr., *WTO Appellate Body Reviews U.S.-EU Wheat Gluten Dispute*, INT'L L. UPDATE, Jan. 2001 at n.1 (announcing the WTO reversal of safeguard measures imposed on wheat gluten because the analysis excluded Canada). See generally Saul, *supra* note 182, at 881 (2001) (reciting the AB's ruling that the analysis leading to the quota on wheat gluten was internally flawed).
 186. See WTO Appellate Body, *supra* note 69, at para. 187(c) (upholding the Panel's decision that the United States violated the parallelism requirement of the Agreement on Safeguards); see also Bhala & Gantz, *supra* note 98, at 192 (discussing the WTO's failure to rule on whether it was proper to exclude free trade zone partners from safeguard measures); Frances Williams, *WTO Upholds Ruling on Gluten EU Exports U.S. Quotas*, FIN. TIMES (London), Dec. 23, 2000, at 7 (addressing the WTO Appellate Body Report which did not rule on whether the partners in a free trade zone were exempted from the safeguard measures and ruled that the United States had violated the requirement of parallelism).
 187. See Husisian, *supra* note 88, at 467 (describing the reasoning behind the WTO decisions that struck down the United States safeguard measures). See generally WTO Appellate Body, *supra* note 101, at para. 264 (holding that the United States safeguard measures were inconsistent with the Agreement on Safeguards); WTO Appellate Body, *supra* note 69, at para. 187(c) (asserting that the United States violated the parallelism requirement of the Agreement on Safeguards).

tion of Articles 2 and 4 in its use of the NAFTA Carve-Out.¹⁸⁸ The AB found that the U.S. violated the parallelism requirement “without providing a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources by themselves satisfied the conditions for the application of a safeguard measure.”¹⁸⁹ However, the issue was declared a moot point because the insufficiency of the safeguard was already established by other methodological problems in the ITC’s analysis.¹⁹⁰

In *Steel*, the Panel noted that some of the steel safeguard measures were not applied to imports from Canada, Mexico, Israel and Jordan (U.S. free trade agreement partners),¹⁹¹ but the ITC injury determination included imports from all sources.¹⁹² Because of the discrepancy in scope between the determination and the application of the measure, the U.S. had to “establish explicitly, with a reasoned and adequate explanation, that imports” from sources other than those excluded from the measure met the conditions for the application as set out in Arti-

188. See WTO Appellate Body, *supra* note 101, at para. 196 (concluding that the United States failed to show that Korea’s claim was without merit). See generally Bhala & Gantz, *supra* note 98, at 192 (arguing that the United States properly took into account the necessary factors before imposing the safeguard measures on non-NAFTA countries); *Seoul Files Suit Against U.S. with WTO*, KOREA HERALD, June 10, 2000 (explaining Korea’s posture on the claim it brought against the United States).

189. See WTO Appellate Body, *supra* note 101, at para. 196 (stating that the United States failed to meet its burden of demonstrating that the safeguard measures were justified); see also Bhala & Gantz, *supra* note 98, at 192 (discussing the standard that the United States needed to meet in order to have a favorable ruling on its safeguard measures). See generally Kim Mi-hui, *Korea Wins WTO Steel Pipe Suit*, KOREA HERALD, Mar. 11, 2002 (reporting on the WTO ruling in favor of Korea).

190. Because the ITC included Canada and Mexico in the injury analysis, but excluded them from the measure’s application without providing a sufficient explanation, the Panel could not judge whether the NAFTA Carve-Out was permissible. See WTO Appellate Body, *supra* note 101, at para. 197–98 (noting that it did not reach the question as to whether it was proper to exclude free-trade zone partners from safeguard measures); see also Bhala & Gantz, *supra* note 98, at 192 (stating that the WTO abstained from ruling on the validity of the exclusion of Mexico and Canada from the safeguard measures). See generally Guohua, *supra* note 28, at 187 (noting that the WTO found that the United States had violated the Agreement on Safeguards on three occasions by using a flawed methodology in its analysis).

191. See WTO Appellate Body, *supra* note 69, at para. 13, 433 (noting that the United States excluded the imports of its free trade agreement partners from the safeguard measures). See generally Guohua, *supra* note 28, at 187 (stating that the United States safeguard measures have excluded its free-trade agreement partners in the past); Mi-hui, *supra* note 189 (highlighting the United States practice of not including imports of its free-trade zone partners in its safeguard measures in cases before *Steel*).

192. For instance, the Panel found the measure applied to certain carbon flat-rolled steel (CCFRS) was in violation of the parallelism requirement. See WTO Panel, *supra* note 114, at para. 11.2, (finding the measure applied to certain carbon flat-rolled steel to be in violation of the parallelism requirement); see also WTO Appellate Body, *supra* note 69, at para. 443 (stating that the USITC used the imports from all countries in its investigation as to whether safeguards were necessary). See generally Afilalo, *supra* note 113, at 773 (describing the USITC procedures used in deciding whether safeguard measures were necessary in the *Steel* case).

cles 2.1 and 4.2 of the SA.¹⁹³ The *Steel* Panel declared that the application of the NAFTA Carve-Out violated the SA's parallelism requirement.¹⁹⁴

As articulated in *Line Pipe*, the domestic authority's report is consistent with the requirements of the SA when it has established explicitly through a reasoned and adequate explanation that the imports covered by the measure satisfy the conditions for its application.¹⁹⁵ "[T]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."¹⁹⁶ The U.S. explained in the ITC report that imports from non-NAFTA sources had increased and concluded that the underselling and the decline of domestic steel prices was equally applicable to non-NAFTA imports.¹⁹⁷ However, the Panel found the U.S. arguments legally flawed¹⁹⁸ because they did not explicitly establish that imports from non-NAFTA sources satisfied the legal requirements for imposition

193. See WTO Panel, *supra* note 114, at para. 10.570 (stating that the United States failed to establish that the difference between the determination and the application of the safeguard measures was justified). For the sake of brevity, when using the term "NAFTA imports," it actually includes imports from Canada and Mexico, in addition to Jordan and Israel; see also WTO Appellate Body, *supra* note 69, at para. 433–44 (explaining the standard the United States needed to meet to justify the unequal application of its safeguard measures). See generally WTO Appellate Body, *supra* note 101, at para. 188 (articulating the standard to be followed in cases where safeguards were unevenly applied).

194. See WTO Appellate Body, *supra* note 69, at para. 533 (upholding the Panel's decision that the United States safeguard measures did not comply with the parallelism requirement and were inconsistent with the Agreement on Safeguards). See generally Edward Alden & Tobias Buck, *Removing Tariffs Would Not Damage U.S. Steel Industry*, FIN. TIMES (LONDON), Dec. 2, 2003, at 12 (addressing the WTO's decision that found that the United States measures violated the Agreement on Safeguards); Guy de Jonquieres, *Waging a Trade War by the Book: Europe's Planned Retaliatory Sanctions on U.S. Exports Could End in a Tit-for-Tat Cycle*, FIN. TIMES (LONDON), Apr. 22, 2002, at 15 (asserting that the United States' unequally applied safeguards would be met with retaliatory measures from the affected countries).

195. See WTO Appellate Body, *supra* note 101, at para. 188 (stating the standard that the United States needed to meet in order for its safeguards to comply with the Agreement on Safeguards). See generally WTO Appellate Body, *supra* note 69, at para. 433–44 (following the standard set in *Wheat Gluten* and *Line Pipe* where safeguards were unequally applied and were ultimately struck down); Alden & Buck, *supra* note 194, at 12 (referring to the WTO's ruling which found the United States in violation of the Agreement on Safeguards).

196. See WTO Appellate Body, *supra* note 101, at para. 188 (explaining the meaning of an element required to show that the safeguards implemented conform to the Agreement on Safeguards).

197. See WTO Panel, *supra* note 114, at para. 10.571 (stating the factors the President of the United States considered in making the determination imposing safeguard measures); see also Afilalo, *supra* note 113, at 773 (explaining the factors considered by the ITC in its report recommending safeguard measures); Henry, *supra* note 20, at 401 (discussing the factors and procedures followed by the ITC in deciding whether safeguards would be appropriate).

198. See WTO Panel, *supra* note 114, at para. 10.603 (disagreeing with the United States' arguments); see also Chen, *supra* note 88, at 412–13 (noting the Panel's finding that the United States safeguard measures were not in conformity with the GATT); Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 324–25 (2003) (addressing the Panel's decision regarding the United States safeguard measure imposed on steel products).

of the measures.¹⁹⁹ Specifically, the U.S. claim that statements of underselling were equally applicable to imports from U.S. trading partners excluded from the measure does not explicitly establish that imports from non-U.S. trading partners justify safeguards.²⁰⁰ The Panel noted that a clear explanation was especially due in this case because the ITC report had determined that imports from Canada and Mexico represented a substantial share of total imports²⁰¹ and that Mexico contributed importantly to serious injury.²⁰² Thus, the fundamental legal defect at issue in violating the parallelism requirement is the failure to fulfill the causation requirement.²⁰³

The U.S. also failed to examine any factor other than increased imports which could have contributed to the causation of serious injury to the domestic industry.²⁰⁴ The *Steel* Panel

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199. See WTO Panel, *supra* note 114, at para. 10.603 (concluding that the United States failed to establish explicitly that injury from non-NAFTA sources alone justified the safeguard measures imposed); see also Alice Stayton Clark et al., *International Trade*, 37 INT'L LAW. 399, 409–10 (2003) (stating the Appellate Body decision which found that the United States violated the parallelism requirement). See generally Hankook Ilbo, *South Korea Will Urge U.S. to Drop Safeguard Against Foreign Steel Imports*, KOREA TIMES, Nov. 12, 2003 (discussing the WTO decisions by the Panel and the Appellate Body which found the United States steel safeguards to be illegal).
200. See WTO Panel, *supra* note 114, at para. 10.603 (finding that the ITC failed to establish that non-NAFTA sources alone met the requirements for the imposition of safeguards). See generally Guohua, *supra* note 28, at 187 (stating that the United States safeguard measures have excluded its trade partners in the past); Mi-hui, *supra* note 189 (discussing the United States practice of not including imports from its trade partners from its safeguard measures in cases before *Steel*).
201. See WTO Panel, *supra* note 114, at para. 10.603 (stating that the United States had to explain why it included all countries in its investigation, but excluded its trading partners from the measures); see also U.S. Int'l Trade Commission, *Steel, Volume I: Determinations and View of Commissioner*, USITC Pub. 3479, Inv. No. TA-201-73 (Dec. 2001) (including findings regarding NAFTA countries in the ITC's steel investigation). See generally David Friedman, *Steel Tariffs: Stop Politicking, Fix Trade Policy*, L.A. TIMES, Dec. 7, 2003, at M2 (explaining the United States' imposition of safeguard measures on certain steel products which excluded its trading partners).
202. See WTO Panel, *supra* note 114, at para. 10.603 (observing that the ITC's investigation concluded that Mexico was part of the injury); see also U.S. Int'l Trade Comm'n, *Steel, Volume I: Determinations and View of Commissioner*, USITC Pub. 3479, Inv. No. TA-201-73 (Dec. 2001) (finding that Mexico was an important part of the injury to the domestic steel industry). See generally Afilalo, *supra* note 113, at 773 (referring to the ITC's conclusion that certain steel imports were causing substantial injury to the domestic markets).
203. See WTO Panel, *supra* note 114, at para. 10.604 (concluding that the safeguard measures were inconsistent with the GATT because the ITC failed to establish that the injury by non-NAFTA countries alone warranted the measures); see also Afilalo, *supra* note 113, at 774 (explaining that the ITC did not establish that there was a cause-and-effect relationship between non-NAFTA imports and the domestic industry injury in its safeguard measures recommendation). See generally Bhala & Gantz, *supra* note 98, at 191 (mentioning the concept of parallelism and its cause-and-effect requirements).
204. See WTO Panel, *supra* note 114, at para. 10.603 (stating that the United States failed to examine other factors that could have contributed to the injury). See generally Henry, *supra* note 20, at 401 (mentioning the factors weighed in the ITC analysis and the procedures followed by the ITC in deciding whether safeguards are appropriate); Guohua, *supra* note 28, at 187 (arguing that the United States has used a causation analysis in its imposition of safeguard measures that has been disapproved by the WTO several times).

stated that it may not be necessary to separate and distinguish the effects of other factors,²⁰⁵ but the purpose is to establish a cause and effect between the injury and the remedy imposed.²⁰⁶ Considering the effects of all imports when the measure is imposed on only a subset of imports is not sufficient to establish that increased imports from non-NAFTA sources caused the serious injury required as the legal basis for safeguard action under the SA.²⁰⁷ In other words, the U.S. cannot prove a “general and substantial relationship of cause and effect between all imports and serious injury”²⁰⁸ and assume that the injury resulted only from non-NAFTA sources.²⁰⁹ The two groups of imports are not necessarily the same or different, necessitating separate analyses.

The Panel additionally faulted the U.S. for failing to explicitly disclose that Israel and Jordan were excluded from the analysis.²¹⁰ Even if such an omission may only be insignificant, the

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205. See WTO Panel, *supra* note 114, at para. 10.605 (stating that not every situation called for an examination of all factors injuring the domestic industry); see also Ravi Kanth, *WTO Ruling to Benefit Top Asian Steel Makers, but U.S. Will Drag Feet, Raise Legal Hurdles: Analysts*, BUS. TIMES SINGAPORE, Nov. 12, 2003 (addressing the WTO's ruling that the United States failed to reasonably explain the circumstances that led to the imposition of safeguard measures). See generally Henry, *supra* note 20, at 401 (stating the ITC conclusions).
206. See WTO Panel, *supra* note 114, at para. 10.605 (asserting that a causal link needs to be demonstrated before imposing safeguard measures); see also Kanth, *supra* note 205 (stating that the United States needed to establish the cause-and-effect relationship between imports and injury in order to impose safeguard measures); Christy Ledet, *Causation of Injury in Safeguards Cases: Why the U.S. Can't Win*, 34 LAW. & POL'Y INT'L BUS. 713, 740 (2003) (discussing findings that the United States should have established that imports from non-trading partners justified the imposition of safeguards).
207. See WTO Panel, *supra* note 114, at para. 10.605 (finding that the United States failed to show that an analysis of the effect of imports from all sources justified the imposition of safeguards only on non-NAFTA countries). See generally Meng Yan, *First WTO Complaint Filed*, CHINA DAILY, Mar. 15, 2002 (reporting on the safeguard measures imposed by the United States on steel imports from non-NAFTA countries); *South Korea Considers Various Countermeasures Against U.S. Steel Tariffs Increase*, BRITISH BROAD. CORP., Mar. 6, 2002 (discussing the United States decision to impose safeguard measures on steel imports from countries outside its free-trade area to protect its domestic industry).
208. See WTO Panel, *supra* note 114, at para. 10.606 (stating that a general relationship is not enough to establish a causal link). See generally Henry, *supra* note 20, at 401 (stating the ITC findings on imports that led to the imposition of safeguards); Elizabeth Olson, *WTO Loophole Allows a Surge in Protectionism*, N.Y. TIMES, June 13, 2002, at W1 (observing that the United States imposed safeguards only on some countries while exempting its trading partners).
209. See WTO Panel, *supra* note 114, at para. 10.606 (asserting that a general relationship is not sufficient to establish the connection between imports and injury); see also Ho, *supra* note 30, at 826 (2003) (stating that the United States exempted its trade partners from the steel safeguard measures); *Brussels, Geneva, and Washington, DC*, THE ECONOMIST, May 11, 2002 (noting that the safeguard measures imposed excluded the United States' free-trade partners).
210. See WTO Appellate Body, *supra* note 114, at para 10.608 (finding that the panel faulted the United States for not including Israel and Jordan in their analysis). See generally Ho, *supra* note 30, at 829 (noting that Israel and Jordan were not subject to the steel tariff); Naomi Koppel, *U. S. Steel Tariffs Are Illegal, Says World Trade Organization*, DETROIT NEWS, July 12, 2003, at 7-D (stating that the WTO panel found the United States acted illegally by omitting countries with which it had a free trade agreement from its report on the effect of imports).

ITC must still prove that it is not.²¹¹ The Panel conceded that the present facts may allow a finding of injury;²¹² nevertheless, the U.S. still needs to establish that possibility with a reasoned and adequate explanation.²¹³ The Panel's request is not illogical, for the Panel cannot assess the legal basis for action when there is no explanation.²¹⁴ Without an explanation, the only way for the Panel or complainants to examine the U.S. safeguard measure would be to conduct a *de novo* review,²¹⁵ an action prohibited by the SA.²¹⁶ Both the Panel and complainants have expressed their dissatisfaction at the U.S. practice of making these mere assertions of compliance in the ITC report without substantiating its claims.²¹⁷ In response, the U.S. invari-

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211. See generally Gantz, *supra* note 47, at 50 (stating that it is the ITC's job to analyze the existence of any threats to U. S. industry caused by importation); Priest, *supra* note 3, at 1042–43 (discussing the ITC's role in investigating imports and their effects on domestic industries); Stirk, *supra* note 96, at 683 (reiterating that the ITC failed to thoroughly prove all that it was required to prove in the *Steel* injury cases).
 212. See generally Afilalo, *supra* note 113, at 767 (indicating that an injury is a necessary element for implementing safeguards); Dan Ikenson, *Eliminating Steel Tariffs Is a No-Brainer; By Revoking Trade Taxes, President Bush Would Help Steel Consumers, Boost Manufacturing, Open World Trade Talks and Improve His Political Standing*, DETROIT NEWS, Oct. 1, 2003, at 9A (noting that the U.S. International Trade Commission's report stated that 150,000 steel workers were helped by the tariffs); Mann & Williams, *supra* note 50, at 9 (emphasizing that there must be serious injury or threat of serious injury in order to implement the safeguard).
 213. See WTO Appellate Body, *supra* note 114, at para 10.307 (affirming that panel requires proof that there is a "reasonable and adequate explanation" for the link between imports and injury); see also *U. S. President Formally Rescinds U.S. Steel Tariffs Before Official Expiration Date; European Union Follows Suit as to Its Retaliatory Measures*, *supra* note 71 (stressing that the United States did not provide a sufficient explanation); WTO Appellate Body *Largely Upholds Panel Report Disapproving U. S. 2002 Steel Safeguard Measures*, *supra* note 70, at 11 (reporting that the United States did not provide a "reasonable and adequate explanation" concerning the country's injury).
 214. See generally Jean Heilman Grier et al., *Business Regulation: International Trade*, 36 INT'L LAW. 361, 386 (2002) (establishing that the ITC's findings of injury were not in accordance with the WTO policy); Murphy, *supra* note 8, at 977 (positing that the safeguard was effected based on the ITC's findings that the United States domestic market was being injured); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 488 (2000) (discussing the importance of obeying the WTO panel's decisions on each individual member).
 215. See generally Ehlermann & Ehling, *supra* note 140, at 1533–37 (assessing past approaches taken regarding the use of *de novo* review in WTO dispute cases); Herbert C. Shelley et al., *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summaries: The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749, 1775 (1996) (defining *de novo* review as used in U.S. federal courts); Terence P. Stewart & Mara M. Burr, *The WTO's First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT'L L. & COM. REG. 481, 566–68 (1998) (noting that the WTO panelists believe that it is not within their capacity to "engage in *de novo* review").
 216. See generally Bhala & Gantz, *supra* note 20, at 615 (emphasizing that *de novo* review is not the appropriate standard of review for WTO actions). See generally Ehlermann & Ehling, *supra* note 140, at 1533–34 (noting the refusal of the WTO to use *de novo* review in past cases); Lichtenbaum, *supra* note 146, at 1241 (stating that the WTO adopted a deferential reasonableness standard over *de novo* review in recent cases).
 217. See Afilalo, *supra* note 113, at 777 (noting that the ITC did not adequately substantiate their claims about the reason for the steel industry's decline but instead listed potential unrelated causes). See generally Charnovitz, *supra* note 10, at 832 (explaining that the U.S. tariffs may have been implemented for calculated reasons with "selective deliberateness"); Friedman, *supra* note 201, at M-7 (stating that the WTO Panel found that the U.S. steel safeguards were not justified).

ably counter-argues that the SA does not impose an obligation to explain its methodology,²¹⁸ rather, it merely requires a report explaining its findings.²¹⁹ The U.S. cannot argue itself out of this point because the *Steel* Panel explicitly stated that a country imposing a safeguard is “under an obligation to account for the fact that excluded Free Trade Agreement partner imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.”²²⁰ If the U.S. employs a similar safeguard with similar minimal explanation, it should contrive an alternative argument in its defense, rather than claiming the obligation simply does not exist. However, the U.S. will probably continue to argue that there is no obligation because it refuses to recognize requirements imposed by WTO Panels and ABs in efforts to clarify the ambiguous SA.²²¹

The concept of the NAFTA Carve-Out is most likely consistent with the SA as long as Mexico and Canada are not contributing to injury,²²² but a determination of the Carve-Out’s *per se* viability will be postponed until the U.S. provides the comprehensive and transparent

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218. See generally Edward Alden, *Washington Mulls New Steel Duties: Change in Law Would Hit Importers Even If Bush Bows to WTO and Lifts Tariffs*, FIN. TIMES (LONDON), Nov. 12, 2003, at 1 (acknowledging that different methods were considered to remedy the problem of imports causing U.S. domestic market injury); Choudhury, *supra* note 83 (claiming that the eight complainants to the WTO did not challenge the U.S. methodology); Press Release, Commission of the European Communities (RAPID), U.S. Loses Another Two WTO Steel Panels, (Aug. 1, 2002) (acknowledging that in past cases U. S. methodology has been held to be inconsistent with WTO policy).
 219. See generally John R. Magnus, C. Christopher Parlin, & Navin Joneja, *International Trade*, 34 INT’L LAW. 501, 501 (2000) (noting that a nation must meet the SA standard and comply with GATT when implementing a safeguard); T. Nandakumar, *International Spice Marketing and the Uruguay Round Agreements*, INT’L TRADE FORUM, Jan. 12, 1997, at 18 (outlining the standard for implementing safeguards); see generally Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, LAW & POL’Y INT’L BUS., Sept. 22, 2002, at 109 (commenting that the United States findings had been previously questioned by the WTO).
 220. See WTO Appellate Body, *supra* note 114, at para 10.606 (quoting the panel decision which found that Free Trade Agreement partners were probably also responsible for injury to the domestic steel industry).
 221. For further discussion of the U.S. argument for deference to its own laws, see *infra* Section III. See Elizabeth Olson, *Europeans Press Fight in W.T.O. Against American Tariffs on Steel*, N.Y. TIMES, May 28, 2002, at C4 (illustrating the Bush administration’s belief that it is correctly utilizing the WTO safeguard measures). See generally Murphy, *supra* note 9, 901–02 (outlining how the United States has utilized the WTO safeguard measures to counter a steel import surge); Elizabeth Olson, *supra* note 208, at W1 (detailing the growing relationship between the WTO’s safeguard provisions and protectionism).
 222. See generally Mi-hui, *supra* note 189 (detailing the first major victory in the WTO tribunal against the United States for exempting Canada and Mexico from safeguard measures); Kenneth Purchase, *Trade Tribunal Fails to Protect Canadian Steel Industry*, LAW. WKLY., Dec. 6, 2002 (assessing the U.S. steel safeguard measures and their relationship to Canada and NAFTA); *Over Strenuous Objections from EU, Japan, and Other WTO Members, U.S. Imposes Temporary Tariff Safeguards to Reduce Steel Imports as Way of Assisting Struggling U.S. Steel Industry*, *supra* note 175 (highlighting the debate surrounding the United States’ use of safeguard provisions and whether they were rooted in legitimate provisions of the WTO).

analysis that the AB has reiterated in several of its decisions.²²³ The NAFTA Carve-Out is vulnerable when either Canada or Mexico is excluded from a safeguard despite failing to meet the legal requirements for exclusion.²²⁴ A strong argument could be made that a NAFTA partner could be legally excluded from the scope of a global safeguard action if a reasonable and adequate justification is provided.²²⁵ However, it is not certain whether the NAFTA Carve-Out would hold as consistent with WTO rules in a future challenge. The U.S. will likely confront opposition to this policy in future safeguard actions under section 201.

3. Unforeseen Developments

Another controversial aspect of U.S. safeguard measures, as identified by the WTO Panel and AB, is the demonstrated extent of unforeseen developments as required by the WTO.²²⁶ Pursuant to Article XIX(1)(a) of the GATT, the demonstration of “unforeseen developments” is required prior to application of a safeguard measure.²²⁷ The AB in *Argentina Footwear* ruled that safeguard actions should show that “unforeseen developments” led to the influx of imports

223. See generally WTO Panel, *supra* note 114, at para. 11.1 (holding that the U.S. steel tariffs were invalid under international trade regulations); *id.* at para. 7.633 (July 11, 2003) (reviewing United States studies which supported the need for steel tariffs); Andrews, *supra* note 54, at C12 (discussing the burden of proof which the United States must satisfy in order to overcome the WTO steel tariff challenges); Paul Blustein & Jonathan Weisman, *U.S. Loses Appeal on Steel Tariffs; WTO Decision Lets EU Retaliate*, WASH. POST, Nov. 11, 2003, at A1 (reporting on the latest WTO decision which held that the U.S. steel tariffs violate international trade rules).

224. See generally Mark R. Sandstrom, *Prevention and Settlement of Economic Disputes Between Japan and the United States: Part II: I Dispute Avoidance and Dispute Settlement: Rules of Origin: Considerations for Investment and Trade in North America*, 16. ARIZ. J. INT'L & COMP. L. 217, 222–24 (1999) (emphasizing the problems associated with free trade agreements and tariff schedules); Edward Alden, *Steel Industry Pushes for More Tariffs, Imports Companies Press Washington to Take Action Against Developing Countries*, FIN. TIMES (LONDON), Jan. 12, 2003, at 6 (noting the United States practice of excluding certain nations, such as Canada and Mexico, from steel tariffs); Ingrid A. Mohn, *NAFTA Implementation Puts U.S. Exporters in Enviably Position*, BUS. AM., Apr. 1994, at 35 (outlining the implementation and economic benefits of NAFTA).

225. See generally Irwin P. Altschuler & Claudia G. Pasche, *The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico*, 28 WAKE FOREST L. REV. 7, 13–20 (1993) (outlining the anti-tariff provisions within NAFTA); Richard O. Cunningham, *Sovereignty Revisited: Settlement of International Trade Disputes—Challenges to Sovereignty—A U.S. Perspective*, 24 CAN.-U.S. L.J. 103, 117–19 (1998) (analyzing the United States' efforts to control imports in light of the WTO and NAFTA); A. Gary Shilling, *The Last Straw*, FORBES, Jan. 3, 1994, at 262 (criticizing the protectionist aspects of NAFTA).

226. See Agreements on Trade in Goods—14 Agreements on Safeguards, Dec. 15, 1993, Part II Annex 1A, RESULTS OF THE URUGUAY ROUND, 1994 (regulating use of safeguard regulations) available at http://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htm; WTO Panel, *supra* note 114, at para. 11.1 (concluding that the United States “failed to provide a reasoned and adequate explanation demonstrating that unforeseen developments had resulted in increased imports causing serious injury to the relevant domestic producers”). See generally Hizon, *supra* note 144, at 109–10 (explaining how safeguard provisions and the need for unforeseen developments are related).

227. Article XIX(1)(a) of the GATT states: “If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement....” (emphasis added). General Agreement on Tariffs and Trade, art. XIX, available at http://www.kentlaw.edu/classes/scho1/CourseDocs/Relevant%20Provisions_Class%2035.pdf (outlining how safeguard measures may be implemented by member nations). See WTO Appellate Body, *supra* note 69, at para. 1–5 (reviewing the panel decision which found that Argentina's regulations were inconsistent with the WTO safeguard rules). See generally Hizon, *supra* note 144, at 109–10 (reviewing the WTO safeguard provisions and the necessity for unforeseen developments).

causing or threatening serious injury to the domestic industry.²²⁸ However, neither section 201 nor the WTO SA reference unforeseen developments.²²⁹ The language of Article XIX does not explicitly require it;²³⁰ rather, it is an additional requirement imposed by the WTO AB necessary to prove the legality of a safeguard.²³¹

The U.S. joined submitted third-party briefs in *Argentina Footwear* at both the panel and Appellate Body levels, supporting Argentina's safeguard measures and arguing against inclusion of the unforeseen developments provision.²³² In support of its argument, the U.S. argued that

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228. See WTO Appellate Body, *supra* note 69, at para. 76–81 (assessing the validity of the European Communities' appeal that there was "fundamental error" made by the Panel when it referred to the 'express omission of the criterion of unforeseen developments' in the *Agreement on Safeguards*"). See generally John Maggs, *Argentina Steps Around WTO on Footwear Tariff*, J. COM., Mar. 10, 1997, at 3A (reporting on Argentina's utilization of WTO safeguard provisions to implement tariffs on footwear importers); Paula L. Green, *U.S. Steps Up Footwear Spat*, J. COM., Aug. 27, 1999, at 3 (detailing the origins of litigation between the U.S. and Argentina concerning footwear tariffs).
229. See WTO Appellate Body, *supra* note 69, at para. 76–82 (analyzing relevant WTO regulations pertaining to safeguard provisions to determine whether "unforeseen developments" are necessary); see also WTO Appellate Body, *supra* note 69, at para. 131 (concluding that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'"). See generally World Trade Organization, *Agreement on Safeguards*, at http://www.wto.org/english/tratop_e/safeg_e/safeint.htm#provisions (summarizing the GATT safeguard provisions and how they are generally interpreted within the WTO).
230. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5) and (6), T.I.A.S. 1700, 55 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e/doc (governing emergency action on imports of particular products); WTO Appellate Body, *supra* note 69, at para. 76–82 (assessing arguments brought forward by Argentina regarding the proper relationship between Article XIX of the 1994 GATT and the WTO safeguard provisions). See generally Ruth E. Olson, Note, *GATT Legal Implications of Safeguards in the Context of Regional Trade Arrangements and Its Implications for the Canada-United States Free Trade Agreement*, 73 MINN. L. REV. 1488, 1501–03 (1989) (presenting the contours of Article XIX of the GATT).
231. See WTO Appellate Body, *supra* note 69, at para. 76–79 (noting that although requirements for unforeseen developments are not explicitly mentioned in the WTO safeguard agreements, a proper interpretation of all the relevant materials indicates that they are necessary). The argument for why the AB can impose the requirement of unforeseen developments when it is not explicitly stated in the SA is that it is not really an additional requirement, but a judicial interpretation of ambiguous terms. Thus, the AB is acting within its authority when it interprets the SA and GATT to require something that is not explicitly stated in the SA. See WTO Appellate Body, *supra* note 69, at para. 80–81 (discussing the European Union's argument for inclusion of the term "unforeseen developments" when invoking safeguard agreements and tariffs). See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5) and (6), T.I.A.S. 1700, 55 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc (governing, under Article XIX:1(a), the safeguard provisions such as the footwear tariff implemented by Argentina).
232. The U.S. argument was based on the premise that the GATT Article XIX provision referenced in Article 1 of the SA was not intended to be applied as part of the SA. Article 1 of the SA establishes rules for the application of safeguard measures provided for in Article XIX of the GATT. In the U.S. view, the framers of the SA saw the unforeseen developments provision in GATT Article XIX as a grey-area measure, which is precisely the type of measure the WTO membership sought to avoid and is prohibited from employing. The U.S. argument was rejected by the AB in holding that it was not a grey-area measure. See WTO Appellate Body, *supra* note 69, at paras. 60–65 (joining Argentina in their appeal from the WTO decision); see also WTO Appellate Body, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 8.47 (June 25, 1999) (comparing the various arguments brought forth concerning the use and necessity of the term "unforeseen development"); WTO Appellate Body, *supra* note 232, at para. 8.51 (referring to the United States third-party submission in this case).

“unforeseen developments” is not a requisite for safeguard action,²³³ and its omission from the SA must be given meaning.²³⁴ The AB ultimately found no conflict between the two agreements,²³⁵ ruling in accordance with the generally accepted principle that all WTO agreement provisions apply equally regardless of whether they are referenced-in from the GATT or originating within the SA.²³⁶

In *Lamb Meat*, the U.S. contended that the unforeseen development could be inferred from the ITC factual record and demonstrated during the dispute settlement process.²³⁷ Although statistics supported the U.S. contention, there was no mention in the published ITC report of any conclusion to the effect that the development had a profound effect on the U.S. market for lamb meat and was unforeseen.²³⁸ Therefore, it did not constitute a conclusion that

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233. See WTO Appellate Body, *supra* note 69, at para. 63 (quoting the U.S. argument that “unforeseen developments” are no longer a necessary component to establishing a need for safeguard measures); see also WTO Appellate Body, *supra* note 232, at para. 8.47 (illustrating difference of terms between Article XIX and the WTO Safeguards Agreement). See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5) and (6), T.I.A.S. 1700, 55 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc (quoting from Article XIX that “if, as a result of unforeseen developments . . . the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary . . . to suspend the obligation in whole or in part or to withdraw or modify the concession”).
234. See WTO Appellate Body, *supra* note 69, at para. 63 (discussing the U.S. argument that the omission of the term “unforeseen developments” was a conscious exclusion by the drafters); see also WTO Appellate Body, *Korea—Safeguard Measure on Imports of Certain Dairy Products*, WT/DS//AB/R, para. 64–66, (Dec. 14, 1999) (noting the U.S. argument that “unforeseen developments” were being misinterpreted). See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5) and (6), T.I.A.S. 1700, 55 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc (mandating the necessity for unforeseen developments before safeguard provisions may be implemented).
235. See WTO Appellate Body, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, para. 74 (March 27, 1998) (stating that there is nothing in the WTO Agreement that changes Argentina’s obligations under Article VIII of the GATT); see also Joel P. Trachtman, *Decisions of the Appellate Body of the World Trade Organization*, 9 EUR. J. INT’L L. 2 (1998), at <http://www.ejil.org/journal/Vol9/No2/sr.html> (reporting on the WTO’s decision that the IMF obligations were in conflict with WTO law). See generally Siegel, *supra* note 141, at 575 (explaining that a Cooperation Agreement cannot modify a WTO consultation requirement).
236. See WTO Appellate Body, *supra* note 69, at para. 74 (explaining that there is no conflict between GATT and the WTO Agreement). See generally Elizabeth Olson, *International Business: Target Practice in Geneva on the Global Trade Body*, N.Y. TIMES, May 16, 1998, at D1 (noting that all countries have complied with WTO rulings); Siegel, *supra* note 141, at 575 (reconciling a Cooperation Agreement and a WTO consultation requirement).
237. See WTO Appellate Body, *supra* note 69, at para. 33 (stating the legal argument of the United States that the USITC record demonstrated unforeseen developments); see also Curtiss & Kashdan, *supra* note 92, at 355 (citing the instant case and noting the claim by the United States that imports are a substantial cause of serious injury to the domestic producers); Bhala & Gantz, *supra* note 20, at 467–68 (reporting the findings of the United States Trade Commission over 1999 and 2000 as having found serious injury as a result of imports).
238. See WTO Appellate Body, *supra* note 69 (referring to a section in “Support for Growers” that implies that the United States foresaw an increase in imports). See generally Charnovitz, *supra* note 10, at 818–19 (reciting the standard under GATT Article XIX for suspending trade obligations); Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1419 (2001) (referring to Article XIX of the GATT regarding imports that cause or threaten to cause serious injury and how this article is difficult to apply in a labor context).

the development constituted an unanticipated change that created conditions in which increased imports were causing or threatening to cause serious injury.²³⁹

In *Steel*, several arguments were put forth on both sides of the issue. Complainants argue the ITC report did not adequately demonstrate the existence of unforeseen developments.²⁴⁰ The U.S., on the other hand, claims that unforeseen developments are any change that is unexpected, and the increased imports can be a result of them, but need not be caused by these developments.²⁴¹ Specifically, the ITC report listed the Asian and Russian economic crises as unforeseen developments under Article XIX,²⁴² which started a chain of events leading to increased steel imports and the corresponding injury to the U.S. steel industry.²⁴³ A compelling argument against the U.S. is, since the Asian and Russian economic crises were macroeconomic²⁴⁴ and did not affect the steel industry in particular,²⁴⁵ these events could theoretically

239. The U.S. contended that a shift in the product mix or the increase in the lamb cut size was an unforeseen development before the AB. See WTO Appellate Body, *supra* note 69, at para. 7.44; see also *id.* at para. 7.42 (stating that it is not possible to conclude from the USITC report that the change in the product or cut size was an unforeseen development). See generally Bhala and Gantz, *supra* note 20, at 630 (noting that the Appellate Body has failed to clearly provide substantive guidance for interpreting the meaning of “unforeseen circumstances”).

240. See WTO Appellate Body, *supra* note 69 (referring to the United States’ appellant’s submission, which stated that the interpretation of the phrase “in such quantities” is that the requirement that the level of imports at or near the end of the period of investigation must be higher than at some unspecified earlier point in time); see also WTO Appellate Body, *supra* note 69, at para. 51 (noting that Brazil argued against using reports from the USITC to demonstrate the existence of unforeseen developments; *id.* at para. 69 (outlining China’s arguments regarding the standard for determining “unforeseen developments”).

241. See WTO Appellate Body, *supra* note 69, at para. 23 (describing the United States’ argument on how to measure an increase in imports).

242. See WTO Appellate Body, *supra* note 69, at para. 269 (stating that the United States did not raise the issue of whether Russian and Asian crises were “unforeseen developments”). See generally David E. Sanger, *Trade Deficit Hit New High in 1998*, N.Y. TIMES, Feb. 20, 1999, at A1 (reporting that the claim that exports have created more high-skilled, high-wage jobs has been negatively affected by the Asian financial crisis); *International Briefs: Reuters Says Profit Slipped 3% in Quarter*, N.Y. TIMES, July 23, 1998, at D5 (noting that the fallout from the financial crisis in Asia has spread to other places).

243. The United States’ first written submission, para. 971, citing ITC Second Supplementary Report, p. 3, *cited in Steel*, *supra* note 45, at para. 6.104. See WTO Appellate Body, *supra* note 69, at para. 308 (stating that although the USITC shows that the financial crises in Russia and Asia had a general effect on the American economy, it did not show that they caused serious injury to the relevant domestic producers); see also *International Business: Russia Asks U.S. to Reconsider Steel Limit*, N.Y. TIMES, Aug. 8, 2000, at C4 (citing the collapse of the Russian economy as the reason Russia sold its steel at below-market prices).

244. See generally Karen W. Arenson, *On the Frontier of a New Economics*, N.Y. TIMES, October 31, 1982, at section 3, column 1 (providing examples of macroeconomic elements); Jennifer L. Rich, *Growth in Brazil’s Economy is Slower Than Expected*, N.Y. TIMES, Aug. 16, 2001, at W1 (illustrating a macroeconomic crisis); *Macroeconomics*, MERRIAM-WEBSTER ONLINE DICTIONARY, (February 18, 2004) at <http://www.merriam-webster.com/cgi-bin/dictionary?book=Dictionary&va=macroeconomic> (defining macroeconomics as “a study of economics in terms of whole systems especially with reference to general levels of output and income and to the interrelations among sectors of the economy”).

245. See generally WTO Appellate Body, *supra* note 69, at para. 315 (stating that the unforeseen developments justifying safeguards must result in an increase in imports of the specific product that is subject to the safeguard); Sanger, *supra* note 242, at A1 (reporting that rather than an increase in imports, the United States has experienced a decrease in exports); Sanger, *supra* note 242, at A1 (stating that although imports to the United States from Russia were expected to surge, they never did.)

justify safeguard measures in almost any sector of the economy in any member country of the WTO.²⁴⁶ The U.S. disagreed with the complainants' contention that unforeseen developments and the increased imports must occur very close in time, and preferably occur at the time of the safeguard's implementation,²⁴⁷ because there is no language in Article XIX of the GATT regarding the duration of the unforeseen requirements.²⁴⁸ Complainants explained that if the U.S. actually demonstrated the existence of the foreign economic crises, cited in the ITC report as an unforeseen development, then the crises could be relevant.²⁴⁹

Further, the ITC report did not even provide data on whether the exports from the countries affected by the crises increased imports,²⁵⁰ or even if such imports increased to the U.S.

246. See WTO Appellate Body, *supra* note 69 (referring to the United States' appellate submission, broadly defining the phrase "in such quantities"); see also Olson, *supra* note 208, at W1 (illustrating that the use of safeguards may be justified in practically any situation). See generally Andrews, *supra* note 54, at C12 (noting the United States' liberal use of trade restrictions that are seemingly unjustifiable).

247. See WTO Appellate Body, *supra* note 69, at para. 23 (stating the United States' contention that the increase in imports does not have to occur near the time of the safeguard's implementation); see also *id.* at para. 354 (reporting the standard that should be used when measuring the time over which an increase in imports occurred); *The American Society of International Law, World Trade Organization (WTO) Appellate Body Report: United States—Definitive Safeguard Measures in Imports of Certain Steel Products*, November 10, 2003 (summarizing the Appellate Body's decision) available at <http://www.asil.org/ilib/ilib0620.htm#j4>.

248. United States' second oral statement. See WTO Panel, *supra* note 114, at para. 6.3 (presenting an argument of the United States that unforeseen developments do not need to be recent to meet Article XIX requirements); see also WTO First Written Submission of the United States of America, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-249, 251-254, 258-259, para. 948 (Oct. 4, 2002) (arguing that the sole temporal requirement of Article XIX is the imposition of safeguard measures after a finding of unforeseen developments). See generally General Agreement on Tariffs and Trade, March 1969, Article XIX, 4 B.I.S.D. at 36-37 (1999) (stating that a party has a right to suspend obligations as a result of unforeseen developments).

249. See WTO Panel, *supra* note 114, at para. 7.107 (stating the complainants' argument that there would be relevant tariff concessions to consider if increased imports had resulted from the Russian economic crisis); see also *International Law in Brief*, AM. SOC'Y INT'L L., July 25, 2003 (explaining complainants' argument that events cited by the International Trade Commission, including the Russian and Asian financial crises, could not constitute unforeseen developments) available at <http://www.asil.org/ilib/ilib0613.htm#j7> (last visited Feb. 28, 2004); see also WTO Appellate Body *Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 11 (discussing the Appellate Body's affirmation of the Panel's conclusion that the United States had failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports).

250. See WTO Panel, *supra* note 114, at para. 7.122 (stating complainants' argument that elements cited by the International Trade Commission as unforeseen requirements would require a logical connection to a resulting increase in imports of products under investigation); see also WTO Request for Consultations by Chinese Taipei, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS274/1, G/L/584, G/SG/D29/1, at 2 (Nov. 11, 2002) (asserting that the United States' application of safeguard measures violated provisions of GATT 1994 and the Agreement on Safeguards because there was no increase in imports for many of the products under investigation); WTO Request for Consultations by New Zealand, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS258/1, G/L/551, G/SG/D26/1, at 2 (May 21, 2002) (arguing that the safeguards were in violation of the Agreement on Safeguards because there was an absence of an increase in the quantity of imports).

market.²⁵¹ This exemplifies yet again how a reasoned and adequate explanation could increase the likelihood of success for its safeguard measures. Additionally, the U.S. imposed 11 different safeguard measures on various steel products,²⁵² but the ITC report does not distinguish the unforeseen developments related to steel production for the selected products;²⁵³ rather, the data consists of selected statistics on *some* of the products in only *some* of the exporting countries.²⁵⁴ In the opinion of the complainants and of the Panel, that is not compelling enough.²⁵⁵

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251. See WTO Panel, *supra* note 114, at para. 7.130 (noting New Zealand's observation of requests made to the International Trade Commission to identify unforeseen developments that led to an increase in the import of steel products into the United States); see also WTO First Written Submission of the Government of Japan, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS249, para. 176 (Aug. 30, 2002) (arguing that the United States safeguards are illegal because the government failed to demonstrate a “recent,” “sudden,” “sharp,” and “significant” increase in steel product imports). See generally Senator Arlen Specter, Dumped Steel, speech from the Congressional Record (Feb. 28, 2002) (discussing the onslaught of subsidized and dumped steel coming into the United States) available at <http://usembassy.state.gov/tokyo/wwwhec0455.html>.
 252. See President of the United States of America, Steel Products Proclamation, To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products, Proclamation No. 7529, 67 Fed. Reg. 10,553, 10554–55 (Mar. 5, 2002) (proclaiming the implementation of safeguard measures on certain steel products); see also Press Release, Embassy of Brazil, Withdrawal of Steel Safeguards by United States (Aug. 12, 2003) (discussing the imposition of safeguard measures by the United States on ten categories of steel products) available at <http://www.brazil.org.uk/page.php?cid=1787>; Press Release, Brussels, EU Adopts Temporary Measures to Guard Against Floods of Steel Imports Resulting From U.S. Protectionism (Mar. 27, 2002) (noting the United States' imposition of import tariffs on international steel) available at http://europa.eu.int/comm/trade/goods/steel/pr_270302.htm.
 253. See WTO Appellant's Submission of the United States, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, AB-2003-3, para. 80 (Aug. 21, 2003) (discussing the Panel's conclusion that the ITC made no attempt to differentiate between the effects of unforeseen developments on different product sectors); see also WTO Appellate Body, *supra* note 69, at para. 3.11 (citing the Panel's finding that the United States failed to adequately demonstrate that increased imports of specific steel products resulted from unforeseen developments); WTO Request for Consultations by Brazil, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS259/1, G/L/552, G/SG/D27/1, at 2 (May 23, 2002) (arguing that the United States failed to establish that increased imports and the condition of importation were a result of unforeseen developments).
 254. See WTO Panel, *supra* note 114, at para. 7.523 (citing complainants' argument that the ITC failed to use pertinent information related to recent decreases in imports); see also *Impact of the Section 201 Safeguard Action on Certain Steel Products; Hearing Before the House Comm. on Ways and Means*, 108th Cong. 108-15 (Mar. 26, 2003) (statement of Chairman Crane) (noting the exclusions and exemptions of the initial safeguard relief for certain products and countries); President of the United States of America, Steel Products Proclamation, To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products, Proclamation No. 7529, 67 Fed. Reg. 10,553, 10554–55 (Mar. 5, 2002) (discussing the varied findings of the ITC with respect to certain steel products and importing countries).
 255. See WTO Panel, *supra* note 114, at para. 7.540 (emphasizing complainants' contention that the United States had failed to properly consider intervening trends and show that an increase in imports was extraordinary and unexpected); see also WTO Written Rebuttal of the United States, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248-249, 251-254, 258-259, para. 174 (Nov. 26, 2002) (conceding that the findings of the ITC did not reveal that the unforeseen developments affected import levels of all steel products uniformly); Suzanne Marta, *Steel Deal Might Be Scrapped; Delta Brands' Pact Hinges on Bush's Stance on Imports*, DALLAS MORNING NEWS, Mar. 4, 2002, at 1D (citing an opinion that the ITC's recommendations on steel imports are too broad).

Based on the limited explanation in the ITC report, the U.S. merely concludes that injury to the domestic industry is attributable to all of these imported products.²⁵⁶ The U.S. countered that Article XIX contains only a limited requirement that unforeseen developments be specifically related to affected industry.²⁵⁷ Again, the United States' common refrain is, if an obligation is not explicitly and literally prescribed by the SA or the GATT, it is not a necessary prerequisite for legal safeguard action.²⁵⁸ In making that argument, the U.S. appears to ignore the maturation of the requirement as articulated in previous safeguard cases before the WTO.²⁵⁹ On its face, that perspective seems contrary to the spirit of the agreement;²⁶⁰ if the

256. See WTO Panel, *supra* note 114, at para. 7.1 (summarizing claims that the safeguard measures imposed by the United States were made even though there was no corresponding increase in imports for many of the imported steel products); see also WTO First Written Submission of the Government of Japan, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS249, para. 78 (Aug. 30, 2002) (admonishing the ITC's practice of grouping distinct steel products into a single product category, thus skewing the increased imports analysis); Kristine Henry, *Trade Panel Ruling Is Blow to Steelmakers; Certain Imports Don't Hurt Big U.S. Companies, It Says; Impact of Bush Tariffs Dulled; Five Countries Will Be Exempt From Duties*, BALT. SUN, Aug. 28, 2002, at 1C (noting International Trade Commission's determination that certain cold-rolled imports do not harm United States steel producers).

257. See WTO Panel, *supra* note 114, at para. 7.100 (discussing the United States' argument that neither the Agreement on Safeguards nor Article XIX require that unforeseen developments be limited to specific products); see also WTO Appellant's Submission of the United States, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, AB-2003-3, para. 79–80 (Aug. 21, 2003) (arguing that Article XIX does not specify a particular analysis to demonstrate unforeseen developments and does not require that impacts of these developments be differentiated between various imports). See generally Kanth, *supra* note 205 (noting the Panel's decision that the United States failed to provide a reasoned and adequate explanation as to how unforeseen developments resulted in increased imports).

258. See WTO Panel, *supra* note 114, at para. 7.184 (stating the United States' argument that nothing in Article XIX or the Agreement on Safeguards requires a "special" or "extraordinary" relation between unforeseen developments and an increase in imports); see also WTO Appellant's Submission of the United States, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, AB-2003-03, para. 58 (Aug. 21, 2003) (arguing that the Safeguards Agreement does not consider "timing" or "extent" to be relevant factors in determining whether a competent authority's explanations are reasoned and adequate). See generally Press Release, European Union, EU Welcomes WTO Ruling Confirming U.S. Steel Tariffs Are Illegal (Nov. 10, 2003), at <http://www.eurunion.org/news/press/2003/2003069.htm> (noting the WTO Appellate Body's decision that each safeguard measure imposed by the United States is in violation of WTO rules).

259. See WTO Appellate Body, *supra* note 127, at para. 7.40 (stating that a WTO member may only depart from the provisions of GATT 1994 or the Safeguards Agreement if expressly authorized); see also WTO Appellate Body, *supra* note 69, at para. 7.29 (summarizing the Panel's view that a lack of a specific publication requirement concerning unforeseen developments still requires findings related to all pertinent issues of fact and law); WTO Appellate Body, *supra* note 69, at para. 94–95 (noting the Panel's view that the Agreement on Safeguards and GATT 1994 require extraordinary prerequisites to safeguard action).

260. See Press Brief, WTO Ministerial Conference Singapore, Textiles (Dec. 8, 1996), at http://www.wto.org/english/thewto_e/minist_e/min96_e/textiles.htm (reporting that developing countries believe that safeguard provisions should be applied as sparingly as possible); see also Productivity Commission Report, Australia, *Pig and Pigmeat Industries: Safeguard Action Against Imports* at 9 (April 19, 1999) at <http://www.pc.gov.au/inquiry/pigs/final-report/index.html> (stating that the proliferation of trade restrictions in the 1970s and 1980s contravened the spirit of GATT); Garret Wilson, *The Safeguards Clause: The Rationale, Operations, and Prospects of GATT Article XIX*, Dec. 8, 1998 at <http://www.garretwilson.com/essays/economics/gattarticlexix.html> (noting that the ambiguous wording of the Safeguards Clause may invite exploitation of its use).

U.S. argument was taken to a logical extent, any WTO member could apply a safeguard in almost any situation.²⁶¹ This would not be a positive outcome in the WTO, as it could trigger a flood of protectionist measures to the detriment of the world's consumers.²⁶²

Interestingly enough, the complainants hint that the U.S. failed to even consider the existence of unforeseen developments in the ITC report because the only mention of the concept is in a footnote in the separate report of one commissioner, stating that "although this is required in WTO law, it is not required by U.S. law."²⁶³ In light of the fact that the ITC reports will be analyzed at a later date by the WTO, blatant disregard for WTO law should probably not be included in the report.

Because the ITC does not fully assess whether there are unforeseen developments under its current methodology,²⁶⁴ AB rulings will continue to fault U.S. safeguard action in the future if no change is made to U.S. law.²⁶⁵ If the U.S. incorporated an "unforeseen developments"

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261. See generally Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1515 (2000) (explaining a safeguard mechanism and WTO safeguard which apply to Chinese goods in certain circumstances); Husisian, *supra* note 88, at 467 (asserting that the United States has lost four straight WTO safeguard disputes which likely are precursors to a more rigorous approach by the WTO in regard to WTO safeguard disputes); Stewart, McDonough & Prado, *supra* note 96, at 658 (discussing safeguard activity in the context of the degree to which a country is developed).
 262. See Henry, *supra* note 20, at 383 (indicating that the EU, the American Institute for International Steel, Inc., and others condemn both U.S. companies for filing cases against foreign importers and the investigation by President Bush under section 201 of the 1974 Trade Act as protectionist measures to save inefficient U.S. companies); see also Priest, *supra* note 3, at 1026 (listing trading partners affected by protectionist tariffs, including Germany, Great Britain, Australia, South Korea, Japan, Russia, and China). See generally Paul, *supra* note 198, at 286 (discussing protectionist measures of inefficient industries under GATT).
 263. See WTO Panel, *supra* note 114, at para. 7.154 (noting the WTO requirement of including unforeseen developments). See generally Bhala & Gantz, *supra* note 98, at 155 (admitting that not every WTO AB member agrees that their jurisprudence should be considered international trade law); Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 16 (2003) (acknowledging a legitimacy problem with WTO policies which are too far removed from democratic lawmaking and consent).
 264. See Kenneth Kelly, *Empirical Analysis for Antitrust and International Trade Law*, 61 U. CIN. L. REV. 889, 889 (1993) (stating that the unforeseen developments analysis in section 201 of the Tariff Act of 1930 is known as the Act's escape clause). See generally Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246, 343 (1996) (discussing the result of unforeseen circumstances and other obligations on GATT member countries); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 412 (1994) (describing the GATT remedy for "unforeseen developments" that, along with trade concessions, cause increased imports which cause or threaten serious injury to domestic producers of similar products).
 265. See generally Jay L. Eizenstat, Comment, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 EMORY INT'L L. REV. 137, 164 (1997) (asserting that the United States no longer has the power to block adverse WTO panel reports); Scott Daniel McBride, Note, *Reforming Executive and Legislative Relationships After Reformulated Gasoline: What's Best for Trade and the Environment?*, 23 WM. & MARY ENVTL. L. & POLY REV. 299, 326 (1998) (noting that it is unrealistic to expect Congress to legislate to conform to WTO law because such intervention is an erosion of democracy); Jared R. Silverman, Comment, *Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 290 (1996) (stating that the Appellate Body has the power to declare conflicts between domestic law and the WTO, recommend a resolution of the conflict, suggest appropriate damages and authorize retaliatory sanctions).

provision into the ITC section 201 investigation, such an action would be more likely to facilitate compliance with WTO rules.²⁶⁶ Some type of *de juris* adjustment to section 201 methodology addressing this provision should be considered in conjunction with other SA issues.²⁶⁷

III. Implications

The *Steel* decision reaffirmed what prior panels and ABs had stated in dicta regarding problems with various elements of U.S. safeguard action. Therefore, the fact that the *Steel* Panel struck down these latest measures should have come as no surprise to the U.S., especially in the face of an immediate backlash from U.S. trading partners threatening retaliatory action.²⁶⁸ The latest AB and Panel decisions should be regarded as a wake-up call for a renewed look at the U.S. policy of engagement with its trade partners and the U.S. method of interaction with WTO rules.²⁶⁹ In addition, existing U.S. safeguard law and its implementation should be reevaluated and possibly modified in order for future U.S. safeguard action to be successful in the WTO, especially because of the scheduled elimination of textile tariffs in 2005.

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266. See generally Gifford, *supra* note 149, at 1084 (noting that as a result of unforeseen developments, a nation is permitted to suspend GATT obligations until the injury is remedied); Tamara Fillinger, Comment, *The Anatomy of Protectionism: The Voluntary Restraint Agreements on Steel Imports*, 35 UCLA L. REV. 953, 978 (1988) (stating that the purpose of the ITC procedure under section 201 is to provide temporary import relief for a domestic industry to make the improvements needed to adjust to import competition); Graham, *supra* note 1, at 219 (recognizing that President Bush's enactment of additional tariffs on certain steel imports based on the results of an ITC section 201 investigation was improper because foreign competitors faced the same circumstances as domestic steel companies).
267. See Peter Bernardi, *The Great Escape*, 7 DETROIT C.L. J. INT'L L. & PRAC. 69, 86 (1998) (emphasizing that the Agreement on Safeguards has not gone far enough in improving the escape clause). See generally Eun Sup Lee, *Safeguard Mechanism in Korea Under the WTO World*, 14 TRANSNAT'L LAW. 323, 324 (2001) (noting that the Agreement on Safeguards was designed to stop member countries from committing "gray area" measures, such as "voluntary export restraints (VERs), orderly marketing agreements (OMAs), basic price systems, export moderation, and export-import price monitoring systems"); Wise, *supra* note 7, at 567 (rationalizing that one way section 201 could be improved is to create a special procedure for trade diversion).
268. See Mary Fragola & Kevin Lencki, *GATT: Has the Implementation Process Been Compromised?*, 11 ST. JOHN'S J. LEGAL. COMMENT. 523, 539 (1996) (describing the possible retaliation by foreign countries against "healthy domestic industries" engaging in global trade in response to trade laws that protect the United States steel industry); see also Matthew B. Kirsner, *Consumer's Union of U.S., Inc. v. Kissinger: A Domestic Response to Soft Law in the International Normative System*, 2 J. INT'L LEGAL STUD. 41, 49 (1996) (stating that the United States' use of quotas created a risk of retaliation by foreign steel-producing nations); Benjamin A. Tisdell, Note & Comment, *"Steeling" the World: Economic and Antitrust Implications of Steel Industry Cartels as Alternatives to Trade Protectionism*, 97 NW. U. L. REV. 473, 474 (2002) (noting that several foreign governments responded to the United States' protective tariffs with retaliatory tariffs on both steel and non-steel products from the U.S.).
269. See Chen, *supra* note 88, at 412 (stating that the Panel report held that the United States' safeguard measures were inconsistent with the Agreement on Safeguards and GATT, and recommended that the United States conform its safeguard measures to GATT). See generally Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 501 (2001) (suggesting that because the Appellate Body's report will be enforced, the United States as the losing party must comply with the report or, upon authorization by the DSB, other aggrieved countries may take retaliatory actions toward the United States); Daniel M. Lopez, Comment, *The Continued Dumping and Subsidy Offset Act of 2000: "Relief" for the U.S. Steel Industry; Trouble for the United States in the WTO*, 23 U. PA. J. INT'L ECON. L. 415, 436, (2002) (noting that the Continued Dumping and Subsidy Offset Act ("CDSOA"), may lead to retaliatory actions against the United States).

A. Two Separate Systems

The latest steel controversy reveals the existence of two separate sets of rules, operating concurrently in the same system. The collective WTO agreements function as a set of rules for the use of all of the WTO members,²⁷⁰ while the U.S. plays by its own set of rules, which is a combination of politically influenced domestic law and selective utilization of WTO rules.²⁷¹ What makes the game inconsistent is that the rules which the U.S. is playing by are not clearly outlined and are often a mere pawn of political influence.²⁷² For instance, the U.S. “opts in” to the WTO rules when the U.S. is a plaintiff in the WTO seeking enforcement of WTO provisions.²⁷³ Also, it chooses to abide by AB decisions only when pressure from the international community hits a U.S. financial nerve.²⁷⁴ The threat of a multi-billion dollar trade war was the

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270. See James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 HARV. INT'L L.J. 533, 549 (2003) (rationalizing that there cannot be one set of rules for the United States and another for the rest of the world); see also Kevin C. Kennedy, *Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 613 (2001) (asserting that WTO rules apply to all member countries, regardless of whether they are rich or poor); Terence P. Stewart & Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 109, 110 (1998) (discussing the reasons why it is necessary for WTO members to adhere to their obligations under the WTO Agreement).
 271. See Ho, *supra* note 30, at 832 (discussing the underlying reasons for Bush's imposition of steel tariffs); see also Priest, *supra* note 3, at 1051 (noting the link between the election and Bush's imposition of steel tariffs). See generally Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000) (stating that WTO disputes are often met with noncompliance, creating a problem in enforcing WTO decisions).
 272. It is no secret that President Bush's hesitation to withdraw the *Steel* safeguard stems from his desire to appease the steel-producing states for re-election. The announcement of his decision led the EU to drop its planned retaliatory tariffs on central U.S. industries in states vital to Bush's re-election. See Stevenson, *supra* note 5, at A1 (describing the circumstances surrounding Bush's repeal of the steel safeguards); see also Nicholas J. Minella, Note, *Motives and Consequences of the FSC Dispute: Recent Salvo in a Long-Standing Trade War or Fashioning a Bargaining Chip?* 27 BROOK. J. INT'L L. 1065, 1097–98 (2002) (stating that the Bush administration's steel tariff angered the EU, but garnered support from the American steel industry); Petry, *supra* note 117, at 6 (noting that President Bush's repeal of the *Steel* safeguard occurred just before the EU was to levy protective tariffs against the U.S. steel industry).
 273. See William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1232–33 (1998) (observing that both Congress and the Supreme Court retain authority to disregard WTO provisions that are not in the nation's best interests); see also Scott McBride, Note, *Dispute Settlement in the WTO: Backbone of the Global Trading System or Delegation of Awesome Power?*, 32 LAW POL'Y & INT'L BUS. 643, 652–53 (2001) (noting that the U.S. views its membership in the WTO as a non-binding, contractual relationship between individual nations). See generally Chen, *supra* note 88, at 410 (arguing that the United States has resisted WTO regulations under the guise of sovereignty).
 274. See Bacchus, *supra* note 270, at 542–43 (stating that economic incentives often compel nations to obey WTO dispute settlements); see also Todd M. Rowe, Comment, *Global Technology Protection: Moving Past the Treaty*, 4 MARQ. INTELL. PROP. L. REV. 107, 115–16 (2000) (observing that special WTO provisions allow the United States to punish nations which adversely affect its financial interests, even though they are abiding by other WTO provisions). See generally Curtis Miller, Note, *The WTO: Biting the Hand That Fed It*, 44 WM. & MARY L. REV. 2319, 2332–33 (2003) (noting the difficulty in enforcing WTO regulations against powerful nations).

driving factor behind President Bush's decision to terminate the steel safeguard in late 2003,²⁷⁵ although the reasons he cites for his decision are "an improving economy and cost-cutting efforts by domestic steelmakers."²⁷⁶ An obvious result of this duality is the undermining of the multilateral trading system,²⁷⁷ which relies on members' cooperation for its success.²⁷⁸

The negative consequences of such competing rules can be illustrated with the unforeseen developments requirement. In the WTO system, showing unforeseen developments is a prerequisite for valid safeguard action.²⁷⁹ There is no unforeseen developments requirement in section 201.²⁸⁰ In every U.S. safeguards case before the WTO, the U.S. argues that unforeseen

275. See Leo Lewis, *Japanese Industrialists Poised to Crack the Biggest Game in Town*, THE TIMES (London), Dec. 27, 2003, at 58 (describing the Japanese steel industry's reaction to President Bush's repeal of the protective steel tariff); see also Jonathan Weisman, *Bush Lifts Steel Tariffs Early, Angering Unions*, THE WASH. POST, Dec. 7, 2003, at A3 (stating that the withdrawal of the steel tariff averted a trade war with Europe and Asia); *Bush Rescinds Tariffs on Imported Steel*, THE L.A. TIMES, Dec. 7, 2003 at 2C (noting that the lifting of the steel tariff avoided a costly trade war but angered domestic steel workers' unions).

276. It is ironic that President Bush failed to mention the main influence for his decision, in the face of a huge outcry from the U.S. steel industry. See Wayne Washington, *Bush Lifts Steel Import Tariffs, Industry Angry: Trade War Averted*, BOSTON GLOBE, Dec. 5, 2003, at A1 (describing union criticism that Bush's decision to lift the steel tariffs was a result of foreign financial pressure); see, e.g., Stevenson, *supra* note 5, at A1 (noting Bush's claim that his decision to repeal the steel tariffs was influenced by improvements in the economy); see also Bob Kemper & James P. Miller, *U.S. Lifts Steel Tariffs, Bush Averts Trade War with Europe*, CHI. TRIB., Dec. 5, 2003, at A1 (stating that the EU threatened to impose \$2.2 billion in retaliatory tariffs if the U.S. did not lift its own protective steel tariffs).

277. See Susan E. Vitale, Note, *Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms*, 7 WASH. U. J.L. & POL'Y 223, 238–39 (2001) (describing the WTO's multilateral structure); see also Inaamul Haque, *Reflections on the WTO Doha Ministerial: Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 AM. U. INT'L L. REV. 1097, 1102–03 (2002) (noting that international cooperation is vital to the WTO's multilateral system); Steve Charnovitz, *The Boundaries of the WTO: Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 31 (2002) (assessing the WTO's stated purpose in providing multilateral, equitable trade resolutions between states).

278. See Shanker A. Singham, *Is It Time For an International Agreement on Uncompetitive Public Sector Practices?*, 27 BROOK. J. INT'L L. 35, 39–40 (2001) (asserting that a multilateral system must be flexible to foster cooperation); see also Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 418 (1996) (stating that the WTO relies upon voluntary cooperation from its members); Tracy M. Abels, Comment, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467, 488–89 (1996) (noting that multilateralism and cooperation comprise the spirit of the WTO).

279. See Charnovitz, *supra* note 10, at 819 (explaining that the WTO Agreement on Safeguards releases countries from their trade obligations in the face of financial injury or sanctions); see also Diller & Levy, *supra* note 8, at 681 (noting that WTO obligations can only be suspended where the threatened injury stems from "unforeseen developments"); Stewart, McDonough & Prado, *supra* note 96, at 662–63 (arguing that the "unforeseen developments" requirement must be narrowly defined in order to be workable).

280. See Gantz, *supra* note 47, at 93–94 (stating that a section 201 action only requires that increased imports be a substantial cause or threat of serious injury to competitive, domestic producers); see also Bhala & Gantz, *supra* note 20, at 626 (noting that U.S. safeguards law does not contain an unforeseen developments requirement); Priest, *supra* note 3, at 1042–43 (explaining that section 201 authorizes the President to invoke the safeguards if increased quantities of imports will cause substantial injury to U.S. manufacturers).

developments occurred,²⁸¹ but when the complainants or the Panel contest the occurrence or the validity of such an explanation as valid unforeseen developments, the argument changes.²⁸² The U.S. switches gears and argues that there is an unforeseen developments requirement in the SA and it does not have to regard what previous ABs have articulated and reinforced as the requirement.²⁸³ The U.S. has never won on that premise (or on any other in a safeguards case),²⁸⁴ yet it continues with the same line of argument.²⁸⁵ It seems the problem may not be the ITC's analysis or section 201 itself, but the U.S. team's stubborn defense strategy.

A second example of the competing systems' inconsistency is revealed with the two causation standards. The WTO causation requirement is satisfied when imports "cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."²⁸⁶ The test under section 201 is whether "an article is being imported . . . in such

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281. See generally Schoenbaum, *supra* note 264, at 406 n.65 (stating that section 201 does not require the United States to show that an influx of foreign imports was the result of unforeseen developments). But see Bhala & Gantz, *supra* note 20, at 626 (noting two cases before the WTO Appellate Body in which the United States argued that unforeseen developments did not need to be shown); Gantz, *supra* note 47, at 91–92 (observing that the U.S. has decreasingly argued "unforeseen developments" when invoking section 201 safeguards).
282. See *WTO Appellate Body Largely Upholds Panel Report Disapproving U.S. 2002 Steel Safeguard Measures*, *supra* note 70, at 11 (discussing the 2002 steel safeguards case in which the WTO Appellate Body found that the United States failed to demonstrate the existence of unforeseen developments). See generally David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 515 (2000) (describing Mexico's challenge to the United States' invocation of safeguards against imported corn brooms). But see Lichtenbaum, *supra* note 146, at 1239 (noting a case in which the U.S. defended its safeguards against Costa Rican imports on the grounds of reasonableness).
283. See *WTO Appellate Body*, *supra* note 69 (holding that U.S. assertions of an "unforeseen developments" requirement in the Safeguard Agreement are in error); see also Kanth, *supra* note 205, at 1 (reporting the WTO Appellate Body holding which denounced the U.S. assertion of an "unforeseen development" requiring protective tariffs). See generally Sykes, *supra* note 80, at 287 (analyzing the absence of the "unforeseen developments" standard in the GATT Safeguard Agreement).
284. See Bhala & Gantz, *supra* note 20, at 467–71 (tracing a history of U.S. failures to win on Safeguard Agreement claims before the World Trade Organization); see also John E. Sacco, *WTO Confirms Ruling Against U.S. "201" Tariffs*, *World Trade Organization*, AM. METAL MARKET, May 6, 2003, at 1 (quoting a steel industry union statement which noted the failure of any nation to ever successfully bring a Safeguard Agreement claim before the World Trade Organization). See generally Chen, *supra* note 88, at 412–14 (mentioning that the final reports of the Panel on United States—Definitive Safeguard Measures on Imports of Certain Steel Products found the U.S. failed to make a WTO Safeguard Agreement claim).
285. See Bhala & Gantz, *supra* note 20, at 467–71 (following the continued use of the Safeguard argument by the United States defending itself before the World Trade Organization). See generally *WTO Appellate Body*, *supra* note 69 (finding that the United States incorrectly asserted a claim of "unforeseen developments" requiring safeguard protective tariffs); Kanth, *supra* note 205, at 1 (reporting the WTO Appellate Body holding which denounced the U.S. assertion of an "unforeseen development" requiring protective tariffs).
286. See Final Act Embodying the Results on the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Agreements on Trade in Goods, Part II, Annex 1A, Agreement on Safeguards, § 2, cl. 2 (presenting the threshold test of the World Trade Organization which must be satisfied before nations may impose import tariffs in order to protect domestic industry); see also Afilalo, *supra* note 113, at 767 (providing the WTO standard which must be met by nations seeking to protect domestic industry by instituting import tariffs); Blank, *supra* note 90, at 789 (stating the preconditions required by the WTO before a nation may take protective tariff action).

increased quantities as to be a substantial cause of serious injury, or the threat thereof.”²⁸⁷ The U.S. maintains that section 201 is a higher standard than in the SA.²⁸⁸ As evidenced by its WTO record, it apparently is not.²⁸⁹ A possible first step would be to rewrite section 201’s causation standard so it has the same wording as the SA. However, this may cause the U.S. to “lose face” before the international community. Another possibility is to raise the ITC’s implementing standard up to the WTO standard, while maintaining the current phrasing.

Not only are there two separate systems functioning concurrently, but there is no attempt to integrate the two.²⁹⁰ This duality cannot be ignored for a few reasons. First, as is apparent from this analogy and from the real-world events, the game does not run smoothly when at least one of the participants is playing by its own rules.²⁹¹ Second, because each WTO case involves a different product, producer, or exporting country, there is no strict precedent that

287. See United States Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1988) (establishing the standard under which the U.S. may introduce trade tariffs on foreign products in order to protect domestic industry); see also Bhala & Gantz, *supra* note 98, at 179 (mentioning the “substantial injury” standard for section 201 action by the U.S.); Gantz, *supra* note 47, at 12 (asserting that section 201 requires a showing of “serious injury to a domestic industry” before the President may levy protective tariffs on competing imports).

288. See Charles Tiefer, *Sino 301: How Congress Can Effectively Review Relations with China After WTO Accession*, 34 CORNELL INT’L L.J. 55, 79–82 (2001) (stating that the United States standard for invoking protective trade tariffs is more stringent than the corollary WTO standard). See generally Paul J. Wilhelm, *American Steel Can Compete—If the Rules Are Fair; U.S. Trade Laws Must Be Amended to Account for Global Overproduction and Currency Devaluations*, PITT. POST-GAZETTE, July 5, 1999, at A17 (asserting that section 201 standards for initiating Safeguard Agreement tariffs are more strict than those provided by the WTO); Richard Lawrence, *Trade Scene by Richard Lawrence: A Resurrection for 201 in ’01?*, J. COM., Feb. 8, 2001, at WP (mentioning that protective tariffs instigated by the U.S. under section 201 have not met the WTO standards for instituting Safeguards).

289. See *WTO Opens Sanctions Door by Ruling Against U.S. Steel Tariffs*, PAKISTAN PRESS INT’L INFO. SERVICES, Nov. 10, 2003, LEXIS, Nexis Library, Wire Service Stories (addressing the failure of U.S. domestic policy to meet the more stringent guidelines required by the WTO in imposing Safeguard tariffs); see also *Nucor Warns of Devastating Impact on U.S. Trade if Steel Tariffs Are Removed; DiMicco Calls WTO Ruling a Threat to U.S. Sovereignty*, PR NEWswire, Nov. 11, 2003, LEXIS, Nexis Library, Wire Service Stories (comparing the official position of the U.S. of compliance with World Trade Organization Safeguard Agreement requirements and the record of the WTO Appellate Body in Safeguard Agreement disputes). See generally Frances Williams, *EU Confident as WTO Sets Up Steel Tariff Panel*, FIN. TIMES (London), June 4, 2002, at 10 (addressing the feud between the U.S. and the World Trade Organization respecting the standard for implementing protectionist tariffs under the WTO Safeguard Agreement).

290. See Gantz, *supra* note 47, at 91–96 (providing a parallel illustration of section 201 and the World Trade Organization Safeguard Agreement mechanisms). See generally Howard D. Samuel, *A Trade Plan for the New Congress*, J. COM., Nov. 9, 1998, at A5 (plotting suggested amendments to the 1999 Trade Act in order to align section 201 with the WTO Safeguard Agreement); *Bethlehem Steel Chief Testifies About Trade Laws and Impact on Steel Industry*, PR NEWswire, Feb. 25, 1999, LEXIS, Nexis Library, Wire Service Stories (illustrating the division between section 201 and WTO Safeguard Agreement standards and a need to harmonize section 201 with said standards).

291. See Guy de Jonquieres, *supra* note 194, at 25 (commenting on the potential for a devastating trade war between the United States and Europe due to conflicting opinions on the application of the WTO Safeguard Agreement). See generally *Wheat Gluten Quota Extension?*, FOOD INGREDIENT NEWS, Jan. 2001, LEXIS, Nexis Library, Wire Service Stories (observing the damaging economic effect from clashing ITC and WTO policies on the wheat gluten market); *CITAC STF: World Trade Organization Ruling Adds Urgency to Steel Consumer’s Plea for President Bush to Terminate the Steel Tariffs Now*, PR NEWswire, Nov. 10, 2003, LEXIS, Nexis Library, Wire Service Stories (illustrating the negative effect of Safeguard tariffs to the U.S. economy and job market).

clearly delineates the permissible grounds on which safeguard action can be taken.²⁹² Because both sets of rules are vague and do not offer specific guidelines, that the guidance panel and AB decisions provide for future safeguard action is especially important.²⁹³ Thus, the permissible situations in which safeguard action may be employed must be extracted from these cases and applied to future action.²⁹⁴ However, the U.S. seems to ignore these cases, embracing the literal approach that each case is entirely new, so prior cases have no precedential value.²⁹⁵ As embodied in the DSU, the WTO DSB was intended as a binding decision on members and is not viewed with such disposability as the U.S. interpretation suggests.²⁹⁶ The vague WTO safeguard rules have undoubtedly taken on more meaning since their creation,²⁹⁷ broadly delineat-

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292. See Afilalo, *supra* note 113, at 771–73 (postulating different rationales under which countries might presume that Safeguard actions would be permitted). See generally Edward Alden et al., *Brussels Threatens Tariffs on U.S. Steel and Textiles*, FIN. TIMES (London), Mar. 16, 2002, at 8 (presenting differing opinions on when a nation may legally invoke Safeguard Agreement tariffs to protect domestic industry); *Getting Tougher with WTO: U.S. Plans to Assert Itself on Trade Rules*, HOUSTON CHRON., Jan. 1, 2003, at 1 (examining the dispute between the United States and the World Trade Organization over when Safeguard action may legally be taken).
293. See Stewart, McDonough & Prado, *supra* note 96, at 661–64 (maintaining the vital importance of the Appellate Body of the World Trade Organization to clarify its interpretation of the Safeguards Agreement). See generally Friedman, *supra* note 201, at M2 (stressing the convoluted application of the World Trade Organization test for proper actions under the Safeguard Agreement); Michael Mann, *U.S.-EU Steel Talks Remain in Deadlock*, FIN. TIMES (London), Mar. 20, 2002, at 13 (noting the disagreement between the EU and United States regarding the use of safeguard tariffs on foreign steel and textile imports).
294. See Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 980 (1996) (explaining that the appellate review body of the WTO takes past precedent heavily into account when deciding new cases although past decisions are not binding). But see Husisian, *supra* note 88, at 466 n.32 (citing to an instance where the Court of International Trade did not set a WTO precedent even though the case under consideration is almost identical in substance to the previous WTO case). See generally Roberts, *supra* note 86, at 536 (describing the value and efficiency of giving past WTO decisions precedential value).
295. See William H. Barringer, *Rule Based International Trade in the Aftermath of President Bush's Steel Import Relief*, METRO. CORP. COUNSEL, May 2002, at 4 (citing President Bush's decision regarding steel imports as an example of the U.S. ignoring WTO precedents and making unilateral decisions regarding trade policy). See generally Bhala & Gantz, *supra* note 20, at 499–500 (describing the decision-making process of the Appellate Body of the WTO and the importance of relying on precedent to bring stability and credibility to international trade standards); David A. Yocis, Note, *Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations*, 76 N.Y.U. L. REV., 1259, 1267 (2001) (claiming that a primary purpose for the creation of the DSU was to prevent the United States from acting unilaterally and ignoring established international norms).
296. See Priest, *supra* note 3, at 1056 (describing President Bush's strategy for not abiding by the WTO's decision regarding U.S. steel tariffs). See generally David A. Gantz, "Negotiating the Free Trade Labyrinth: Your Map to the 21st Century": *Introduction to the World Trading System and Trade Laws Protecting U.S. Business*, 18 WHITTIER L. REV. 289, 297 (1997) (heralding the DSU as a highly effective method for obtaining binding resolutions to disputes among WTO members). But see Pauwelyn, *supra* note 271, at 340 (suggesting that a traditionalist view of the WTO system does not see WTO decisions as legally binding).
297. See Brightbill, *supra* note 132 (stating that DSB reviews of WTO safeguard actions helped strengthen and clarify existing safeguard standards); see also Stirk, *supra* note 96, at 683 (demonstrating how the AB works to clarify SA standards). See generally *WTO Rules Against U.S. Import Quota on ROK Line Pipe*, KOREA TIMES, Oct. 31, 2001 (providing an example of the DSB being utilized by the WTO to enforce safeguard rules).

ing the acceptable situations in which action may be taken.²⁹⁸ The U.S. selectively adheres to WTO decisions, treating the WTO DSB as an optional framework.²⁹⁹ However, when the U.S. brings a case against another, less powerful WTO member, the U.S. expects more than mere selective compliance.³⁰⁰ Choosing to disregard the WTO when the multilateral body does not suit the United States' need has the effect of undermining the rules-based system for all the players involved.³⁰¹ Honoring WTO commitments is not only a constructive way, but the only way to facilitate trade relations and global cooperation among the 146 members of the WTO.³⁰²

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298. See Blank, *supra* note 90, at 789 (listing the specific parameters established by the WTO Agreement on Safeguards); Chen & Gu, *supra* note 79, at 1171 (describing the conditions under which safeguards measures apply and those under which they do not); see also Magnus, Parlin, & Joneja, *supra* note 219 (discussing a panel decision finding that the parameters established by WTO safeguard standards had not been met).
299. See Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 472–73 (2002) (citing instances in which the United States, and others, have failed to abide by DSB decisions). See generally Paul B. Stephan, *American Hegemony and International Law: Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 69 (2000) (theorizing that the WTO serves as a vehicle for implementation of U.S. policy). But see George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 478 (1998) (alleging that the United States readily complies with adverse WTO rulings).
300. See Kimberly A. Czub, *Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPS Standards, and the United States*, 33 CASE W. RES. J. INT'L L. 191, 228 (2001) (discussing instances wherein the United States has imposed unilateral trade sanctions against developing countries); see also Andreas F. Lowenfeld, *ASIL Insight: GATT 94: A First Look at Some Institutional Innovations*, AM. SOC'Y INT'L L. NEWSL. (Mar. 1994) (positing that the United States has a history of unilaterally enforcing remedies against other WTO members). See generally Carlos M. Vazquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS., June 22, 2002, at 555 (rationalizing that powerful nations have historically used their positions of power to force compliance of international rules by developing countries).
301. See Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 147 (2001) (stating that the failure of countries like the United States to abide by adverse decisions promulgated by the WTO has the potential to undermine the entire system); Stirk, *supra* note 96, at 714 (explaining that when the United States fails to abide by WTO rulings, its own interests, as well as those of the international WTO system, are negatively affected); see also *E.U. Reports on U.S. Barriers to Trade and Investment*, 10 INT'L L. UPDATE, Jan. 2004 (reporting that the United States' noncompliance with several WTO DSU decisions has damaged trade between the U.S. and the EU).
302. As of April 4, 2003, there were 146 members in the WTO. See WTO, *Understanding the WTO: The Organization—Members and Observers*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 18, 2004) (listing all WTO members and their dates of membership); Kelly Jude Hunt, Comment, *International Environmental Agreements in Conflict with GATT—Greening GATT after the Uruguay Round Agreement*, 30 INT'L LAW. 163, n.235 (1996) (pointing out that commentators in the field of international environmental law believe WTO member cooperation is necessary if the WTO is to be effective); Charles Levy, *Implementing TRIPS—A Test of Political Will: Agreement on Trade Related Aspects of Intellectual Property Rights*, 31 LAW & POL'Y INT'L BUS., March 22, 2000, at 789 (positing that the WTO system breaks down when member nations do not cooperate).

Two systems pose a problem for another very important reason: textile quotas are scheduled for elimination in 2005.³⁰³ When that occurs, the U.S. market will become inundated with foreign textiles,³⁰⁴ predictably harming the already sensitive and dwindling U.S. textile market.³⁰⁵ When the U.S. market becomes overwhelmed with the new flood of imports, the U.S. will inevitably turn to WTO dispute settlement with a deluge of safeguard actions to protect U.S. industry (ironically defeating the elimination of quotas).³⁰⁶ Hopefully this scenario will not occur, but its possibility indicates that the U.S. needs to work out the kinks in its ITC analysis under section 201 so its future safeguard actions prove successful.

B. Solutions

Short of altering the U.S. policy of engagement with the WTO, there are alternative means of improving the success of U.S. global safeguard actions.³⁰⁷ Proposed solutions include

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303. See Marilyn Geewax, *Chinese Textiles Restricted; Industry Praises Bush Crackdown on Some Imports*, ATLANTA J. CONST., Nov. 19, 2003, at 1C (reporting that textile quota eliminations are scheduled to be completed by 2005, and that imports from China have already increased 117 per cent in 2002); Steven S. Wesier & Arthur W. Bodek, *Customs Sending Textiles to Detention*, J. COM., May 17, 2000, at 20 (finding that the U.S. is simultaneously increasing its enforcement of textile imports as it moves to eliminate textile quotas). *But see* Richard Gwyn, *Rich States Turn Backs on Poor Once More*, TORONTO STAR, Sept. 17, 2003, at A25 (admonishing the U.S. for not eliminating its textile quotas according to schedule).
 304. See Yogi Aggarwal, *India Textile Exports Set to Soar in 2005 as Quotas Expire*, BUS. TIMES SING., Feb. 16, 2004 (calculating that India's exports can increase as much as 18 per cent annually when the U.S. lifts textile quotas in January 2005); Ton Han Shih, *Quota Worries Drive Textile Firm Abroad*, S. CHINA MORNING POST, Dec. 20, 2003, at 3 (expressing concern that while the U.S. is scheduled to eliminate all textile quotas by 2005, quotas may be unilaterally re-imposed for China); Luen Thai, *Cha-Cha to the Rhythm of Textile Quotas: Luen Thai Plans to Make the Most of Any Relaxation in Global Agreements Covering the Garment Industry*, FIN. TIMES (London), Jan. 21, 2004, at 10 (predicting that when the textile quotas are eliminated in January 2005, China's exports will rise dramatically).
 305. See Second Report to the Congressional Textile Caucus on the Administration's Efforts on Textile Issues, Dep't of Commerce Report (Oct. 2003) (highlighting administrative efforts to help improve growth of the U.S. textile industry, including safeguard actions and the integration of accelerated textile quotas) available at http://www.ita.doc.gov/media/pdf/101403_textile_working_group_report.pdf (last visited Feb. 28, 2003); *see also* *Yorks Textile Group to Pull Out of States*, YORKSHIRE EVENING POST, Feb. 4, 2004, at 1 (explaining how the U.S. textile market decline has pushed firms to bankruptcy); Donald W. Patterson, *Textile Companies "Cautiously Optimistic"; Both Sides Await a Decision on the Industry's Request for Quotas on Some Textile Imports from China*, NEWS & RECORD (Greensboro, N.C.), Nov. 18, 2003, at A4 (reporting that economical difficulties in the textile market require the implementation of safeguards).
 306. Cf. *India: "Protectionism Hitting Steel Exports to Developed Nations,"* BUS. LINE, Dec. 19, 2000 (suggesting that India take safeguard action under WTO regulations due to problematic import flooding). *See generally* *Sectoral Trade Disputes: Lumber and Steel Before the Senate Finance Comm.*, 107th Cong. (2002) (statement of Ambassador Peter Allgeier) (indicating that U.S. trade laws and international agreements allow implementing safeguard actions when domestic industries are threatened by a flood of imports resulting in injury); Robert Zoellick, *The Reigning Champions of Free Trade*, FIN. TIMES (LONDON), Mar. 13, 2002, at 19 (indicating that global demand for U.S. steel can be remedied by safeguard action).
 307. See de Jonquieres, *supra* note 194, at 25 (noting the limited and unsuccessful use of safeguards by the U.S.); *see also* *Jumbuck Doesn't Stop There*, AUSTL. FIN. REV., Oct. 27, 2000, at 14 (referring to a WTO ruling against the U.S. for safeguard actions found to have violated global trade rules). *But see* Blustein & Weisman, *supra* note 223, at E3 (reasoning that invoking safeguard provisions is the best temporary protection for industries).

amending the SA,³⁰⁸ changing the U.S. legal defense to WTO claims,³⁰⁹ or modifying the U.S. implementation of section 201 to align with the SA.³¹⁰ The SA is an ambiguous agreement.³¹¹ It offers general guidelines on how to implement safeguard measures,³¹² but it lacks specificity as to what exactly is required to ensure compliance with its provisions.³¹³ Furthermore, there exists no official interpretation of the SA.³¹⁴ Because of this, the panel and AB have continued

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308. See Jill Lynn Nissen, Note, *Achieving a Balance Between Trade and the Environment; The Need to Amend the WTO/GATT to Include Multilateral Environmental Agreements*, 28 LAW & POL'Y INT'L BUS. 901, 902 (1997) (suggesting that the text of WTO/GATT be amended to include MEA safeguards to protect against unilateral action by a country, thereby promoting development). See generally *Trade War Looms over Steel Tariffs*, THE AUSTRALIAN, Nov. 12, 2003, at 9 (acknowledging that only the Bush administration could amend or revoke safeguard measures to end the steel tariffs); Carl Mortished, *EU Threatens Sanctions over Steel Tariffs*, TIMES (LONDON), Nov. 11, 2003, at 21 (remarking that the EU's demand to Washington to end safeguard action by the U.S. was useless because only the president may amend safeguard measures).
309. See Corbett B. Daly, *WTO Rejects U.S. Appeal on Steel Subsidies*, CBS MARKETWATCH, Nov. 10, 2003, at 1 ("Appellate Body recommends . . . the United States to bring its safeguard measures . . . into conformity with its obligations under WTO rulings"); see also Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States*, 8 TUL. J. INT'L & COMP. L. 233, 243 (2000) (recognizing that the WTO requirements are the best ways to prevent discriminatory treatment among domestic citizens); Eric Allen Engle, *The Professionalization Thesis: The TBR, the WTO and World Economic Integration*, 11 CURRENTS: INT'L TRADE L.J. 16, 23 (2002) (providing statistical evidence showing that the WTO is an effective settlement mechanism).
310. See Wilhelm, *supra* note 288, at A17 (commenting that the Fair Trade Enhancement Act was proposed in order to "bring Section 201's stringent standards more in line with the WTO safeguard measures"); see also Priest, *supra* note 3, at 1042 (comparing the language of the WTO Agreement on safeguards and section 201 and finding that the latter should be rescinded). See generally Aubry Smith, Note, *Executive Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267, 1267 (1996) (recommending that Congress adjust WTO dispute resolution with the Trade Act of 1974's provision requiring Congress to be present at every stage of the adjudicative proceeding).
311. See Ehlermann, *supra* note 28, at 77 (asserting that the lack of records during the Uruguay Round renders it nearly impossible for the Appellate Body to interpret WTO text); see also Bhala and Gantz, *supra* note 20, at 536 (explaining that uncertainty of the WTO provisions leads countries to bring multiple unsuccessful claims); Gerhart, *supra* note 160, at 1045 (addressing the many inconsistencies of GATT/WTO, particularly the exceptions to almost every rule).
312. See WTO Agreement on Safeguards, art. 11.1(b); see also Vanda Lamm, *The Utilization of Nuclear Energy and International Law*, 80 AM. J. INT'L L. 415, 416 (1986) (stating that Safeguards Agreements are international agreements setting out guidelines pertaining to nuclear materials); Charnovitz, *supra* note 277, at 39–41 (stating that the Safeguards Agreement guidelines voluntary export restraints).
313. See Chen & Gu, *supra* note 79, at 1183 (suggesting that the safeguard measure provision requiring "serious injury" be expanded in order to provide greater certainty in determining whether the standard has been met); see also Zviad V. Guruli, *What Is the Best Forum for Promoting Trade Facilitation*, 21 PENN. ST. INT'L L. REV. 157, 171 (2002) (revealing that the establishment of defined multilaterally binding rules for the trade industry would strengthen WTO agreements); Afilalo, *supra* note 113, at 765 (claiming that the broad language of the safeguard agreement may be manipulated by countries to validate destructive application of the safeguards and utilized as a "safety valve" allowing parties to avoid trade obligations).
314. See K. Kristine Dunn, Note, *The Textiles Monitoring Body: Can It Bring Textile Trade into GATT?*, 7 MINN. J. GLOBAL TRADE 123, 123 (1998) (commenting that quotas on foreign textiles are often imposed by state trade officials without proving the required burden under the safeguard measure); see also John M. Jennings, Comment, *In Search of a Standard: "Serious Damage" in the Agreement on Textiles and Clothing*, 17 NW. J. INT'L L. & BUS. 272, 284 (1996) (illustrating the ambiguity of safeguard measures being applied on a member-by-member basis, resulting in favorable treatment to certain countries); Palmetier & Mavoroidis, *supra* note 85, at 399 (criticizing the text and sources of the WTO agreement and the problems in interpreting it).

to develop their interpretations of provisions of the SA, raising questions of what is required to implement a valid safeguard measure³¹⁵ and whether the AB is overstepping its legal bounds by addressing the domestic laws and regulations of WTO member countries.³¹⁶ The DSB's willingness "to adopt recommendations that required a change to members' laws and regulations was apparent in 2001. This policy forced countries to weigh the need to reconcile their WTO obligations, as interpreted by the Dispute Settlement Mechanism, with their domestic agendas."³¹⁷ It may seem that the WTO is attempting to define new standards of performance for parties that invoke a safeguard,³¹⁸ but the fact that the AB's developing interpretation is consistently opposite to the U.S. position³¹⁹ is cause for discussion on how to make future U.S. safeguards compliant with WTO rules.

1. Clarification of the WTO Agreement on Safeguards

A clarification of the SA may improve the U.S. safeguard success rate in the WTO.³²⁰ Because the SA is an ambiguous text and there exists no official clarification of WTO analytic

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315. See Chen, *supra* note 88, at 412–13 (reporting the Panel decision that the U.S. safeguards for steel imports were inconsistent with WTO standards and that they should be changed to conform with GATT standards); see also Roberts, *supra* note 86, at 525 (indicating that members interpret provisions of existing agreements to be in accordance with customary maxims of interpretation of international law); Hizon, *supra* note 144, at 105 (referring to safeguard measures as the "ugly duckling" and describing them as an "escape clause mechanism" for avoiding trade obligations under the WTO agreement and providing too much leeway to its members).
 316. See Grier, *supra* note 214, at 375 (addressing cases where the Appellate Body has examined the domestic laws of WTO member countries); Carl Baudenbacher, *Judicialization and Globalization of the Judiciary: Foreword: Globalization of the Judiciary*, 38 TEX. INT'L L.J. 397, 401 (2003) (stating that judicial globalization has caused international law to overlap with domestic constitutional law); Larry Lee, *Reading the Seattle Manifesto: In Search of a Theory*/Lou Wallach & Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy: An Assessment of the World Trade Organization*, 78 N.Y.U. L. REV. 2305, 2314 (2003) (book review) (noting that WTO tribunals systematically rule against domestic laws).
 317. Grier, *supra* note 214, at 375. See generally Bello, *supra* note 278, at 417 (noting that the WTO relies on voluntary compliance to enforce its decisions); Faten Sabry, *The Development and Effectiveness of the WTO's Dispute Settlement Body*, 10 MICH. ST. U. J. INT'L L. 521, 522–23 (2001) (examining the role of domestic political pressure in resolving a trade dispute).
 318. See Bhala & Gantz, *supra* note 98, at 190 (discussing the WTO Appellate Body's standards for invoking a safeguard measure). See generally Guohua, *supra* note 28, at 179–82 (examining the WTO Appellate Body's criteria for satisfying the causation requirement in section 201); Bernardi, *supra* note 267, at 80 (arguing that the substantial cause standard is too restrictive for an optimal escape clause).
 319. See Henry, *supra* note 20, at 406–08 (noting that the WTO Dispute Settlement Body has found that U.S. trade law is sometimes in violation of its international obligations); see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 361–62 (2000) (discussing the contrast between U.S. policy and the Appellate Body's position on the requirements necessary to implement safeguards); WTO Appellate Body, *supra* note 69 (outlining the United States arguments that conflict with the findings of the Appellate Body).
 320. See Stewart, McDonough & Prado, *supra* note 96, at 663 (arguing that a clarification of the "unforeseen developments" language in the safeguard agreement may be necessary in order for the safeguard agreement to be used appropriately). See generally Gerhart, *supra* note 160, at 1064–65 (maintaining that the rule-based system of the WTO requires more flexibility); Guruli, *supra* note 313, at 171 (discussing alternatives for trade facilitation).

procedure,³²¹ the Panel and AB have an inordinate amount of flexibility in the interpretation of that ambiguity.³²² As demonstrated by the history of safeguard disputes in Section II, this vagueness has consistently led to rulings against U.S. measures.³²³ The AB judges are possibly raising the bar for successful import relief measures in each successive safeguards case.³²⁴ An elucidation of the SA that specifically outlines what is required for a successful safeguard measure may offer a level of predictability in determining whether future safeguards are in conformity with the WTO *before* the AB renders its decision.³²⁵

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321. See Gerhart, *supra* note 108, at 1064–65 (discussing the ambiguities in the WTO system); see WTO Analytical Index: Agreement On Safeguards, available at <http://www.wto.org> (last visited Feb. 17, 2004) (providing an unofficial interpretation of Safeguard Agreement Provisions). See generally Charnovitz, *supra* note 277, at 41 (noting that clarification of WTO provisions would enhance fairness in the workers' rights arena).
322. See Uruguay Round Agreement Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17, at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17 (last visited Feb. 18, 2004) (identifying the standing of the Appellate Body and the procedures of appellate review); Konstantin J. Joergens, *True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding*, 30 LAW & POL'Y INT'L BUS. 193, 212–14 (1999) (examining the decision-making process employed by the Panel and the Appellate Body); see also J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353, 383–84 (2002) (maintaining that the WTO Appellate Body has the flexibility to develop procedural law in its interpretation of WTO provisions).
323. See WTO Appellate Body, *supra* note 69, at 368–69 (finding U.S. safeguard measures inconsistent with Article 2); Paul, *supra* note 198, at 324–25 (using the U.S. as an example of a nation that adopts safeguard measures that are subsequently determined to be invalid); see also Olson, *supra* note 208, at W1 (stating that several U.S. safeguard measures had been challenged as impermissible under the Safeguard Agreement and were subsequently struck down).
324. See Gantz, *supra* note 47, at 95 (stating that in order to invoke safeguard relief to protect against import competition, a complaining country must submit an adjustment plan detailing the steps they will take in utilizing the safeguard measure). See generally Stirk, *supra* note 96, at 701–02 (noting the Appellate Body requirement that other possible causes of injury be analyzed in determining the causation element of a safeguard measure); Chen & Gu, *supra* note 79, at 1172 (highlighting China's difficulties in implementing safeguards under the WTO framework).
325. See James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, INT'L & COMP. L. Q. 50.2 (248) (2001) (arguing that by outlining principles of interpretation, the WTO agreements will be more easily understood). See generally Ehlermann & Ehling, *supra* note 140, at 1560 (proposing a new WTO competition agreement and a review of the dispute settlement system); Gavin Goh & Andreas R. Ziegler, *Retrospective Remedies in the WTO After Automotive Leather*, J. INT'L ECON. L. 2003.6(545), 252–23 (2003) (positing that it is the responsibility of the WTO members to clarify the rules and procedures of the WTO agreement).

However, such a clarification would allow less U.S. recourse to safeguard measures because the U.S. could not use the current ambiguity in the SA to its advantage in borderline cases.³²⁶ As the SA becomes less ambiguous, so do U.S. violations of the SA.³²⁷ A clearly defined SA could have the effect of constraining U.S. options in employing safeguard measures by allowing fewer circumstances in which we could impose them.³²⁸

The U.S. must also consider the consequences of attempting to open the SA for renegotiation.³²⁹ Both U.S. domestic industry and Congress are opposed to renegotiation of any trade agreement provision that would weaken the U.S. ability to impose safeguards and protect domestic industry.³³⁰ Congress negatively views WTO decisions as eroding U.S. bargained-for trade remedy protections,³³¹ which will in turn negatively affect American workers and jeopar-

326. See Afilalo, *supra* note 113, at 778 (arguing that the ambiguities in the Safeguard Agreement create too much of a selective-exit strategy). See generally Andrej Zwaniecki, *Temporary Safeguard Measures Justified Under WTO Rules*, USTR Spokesman Says, STATE DEP'T (Nov. 10, 2003) (stating the United States' current interpretation of permissible safeguards under the Safeguard Agreement); Bruce Odessey, *Bush Administration Outlines Strategy on WTO Dispute Settlement; Report to Congress Criticizes Some Panel, Appellate Body Rulings*, STATE DEP'T (Jan. 2, 2003) (outlining the Bush administration's strategy on the WTO Dispute Settlement).

327. See Priest, *supra* note 3, at 1041–42 (noting the differences between the language in section 201 of the Act and the WTO Agreement on Safeguards). But see Chen & Gu, *supra* note 79, at 1171 (implying that these very minimal procedural requirements and general obligations of the WTO safeguards are in fact supposed to ensure uniformity and consistency in use by member governments). See generally Corr, *supra* note 150, at 61–63 (discussing generally, the economic and social discrepancies between the WTO nations and ambiguity of the Safeguards Agreement).

328. See Henry, *supra* note 20, at 397–98 (reporting that the WTO system is clearly defined, yet instead of following the stated purpose of making rulings, it usually becomes a forum for consultation); see also Priest, *supra* note 3, at 1041–42 (implying that more clearly defined terms would further assist section 201 and the WTO Safeguards in coexisting).

329. See Stirk, *supra* note 96, at 714 (stating that Congress may feel that any negotiation or modification to the U.S. policy on WTO Safeguards may be viewed as a weakening of U.S. trade law). See generally International Trade Update, Kaye Scholer LLP, *Single WTO Panel to Hear Member Complaints Against U.S. Steel Measures*, (Aug. 2, 2002) (noting that any modification by the United States to the SA or U.S. interpretation or policy thereto, would result in high costs of compensatory payments to offset impacts of section 201).

330. In Dec. 1999, the USTR posted a Federal Register Notice, requesting public comments and seeking industry concerns as part of an effort to develop negotiating positions in the upcoming Free Trade Area of the Americas (FTAA) trade negotiations. Public comments submitted in response to the Notice indicate that domestic industry generally supports the strengthening of U.S. safeguard laws and opposes any efforts to adopt more restrictive standards than permitted by WTO agreements. Request for Public Comment Regarding Negotiations Toward a FTAA, 64 Fed. Reg. 72, 715 (Dec. 28, 1999). See Stirk, *supra* note 96, at 714 (stating that according to Congress, any negotiation or modification to the U.S. policy on WTO Safeguards may be viewed as a weakening of U.S. trade law). See generally Rosenthal & Vermeylen, *supra* note 155, at 873 (stating that one of the U.S. defensive goals during negotiations in the Uruguay Round was to prevent WTO Agreements from weakening relevant U.S. laws).

331. See Stirk, *supra* note 96, at 714 (demonstrating Congress' negative view on any modification of WTO safeguard agreements because such action would weaken U.S. trade law and policy). See generally Rosenthal & Vermeylen, *supra* note 155, at 873 (stating one of the U.S. defensive goals during negotiations in the Uruguay Round was to prevent WTO agreements from weakening relevant U.S. laws); International Trade Update, *supra* note 329 (implying a high cost of compensatory payments to other countries and therefore causing a negative congressional view on any U.S. adherence to WTO decisions).

dize public support for a liberal trading system.³³² Thus, any changes to section 201 will likely meet with congressional opposition.³³³

If the U.S. proposes to reopen the SA, negative effects may accompany such action.³³⁴ A U.S. proposal to amend the SA could be viewed by other countries as an offensive action or as an obvious attempt to change the SA in favor of the U.S. in light of its negative WTO case record.³³⁵ A U.S. offer to renegotiate should appear defensive, or as a good-faith effort to clarify the standard for safeguard action for the benefit of all member countries, instead of just the U.S. Additionally, it will be difficult to attain multilateral agreement on a new safeguards provision.³³⁶ The chances of U.S. success should be considered before a call for a clarification is made because the U.S. could wind up in a less strategic position.

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332. See Theodore P. Rosner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 483 (2000) (stating that many would like to see more deference by the WTO to national regulatory authorities rather than WTO involvement out of concern for negative impact of trade laws or environmental protection and conservation); see also John R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 287 (2003) (arguing that international trade law is internally inconsistent with institutions and therefore may distort economic efficiency and result in negative growth). See generally Priest, *supra* note 3, at 1030–31 (discussing the negative economic effect of globalization and WTO actions on the American worker).
333. See, e.g., Trade Promotion Authority, H.R. Con. Res. 3009, 107th Cong. (2002) (enacted) (seeks provisions in trade agreements that do not weaken domestic protections); H.R. Con. Res. 256, 107th Cong. (2001) (expressing the sense of Congress that USTR should oppose any changes at the next WTO ministerial conference that weaken existing trade remedy laws); Trade Law Reform Act, introduced by Sen. Durbin on May 26, 2001 (seeks to strengthen section 201 by replacing the causation standard with a lower threshold by which industries can prove injury); H. Con. Res. 256, 107th Cong. (2001), introduced by Rep. Phil English; Transparency and Fairness Trade Act of 2001, H.R. 2770, 107th Cong. (2001), introduced by Rep. Jim Kolbe (expands the meaning of “interested party” to include any industrial users of imported merchandise subject to a section 201 or 301 investigation for the purposes of filing a petition initiating an ITC injury investigation).
334. See Stirk, *supra* note 96, at 714 (stating that Congress may feel that any negotiation or modification to the U.S. policy on WTO Safeguards may be viewed as a weakening of U.S. trade law). See generally Rosenthal & Vermeylen, *supra* note 155, at 873 (stating one of the U.S. defensive goals during negotiations in the Uruguay Round was to prevent WTO Agreements from weakening relevant U.S. laws).
335. See Chen, *supra* note 88, at 409–11 (discussing recent U.S. actions regarding WTO safeguards and other multilateralism issues which have been met with strong defensive words of violent condemnation from injured nations); see also Ho, *supra* note 30, at 844 (noting that the United States would be using its leverage to push for more liberalization in services, finances and manufactured goods, while blocking the European Union's core efforts to create super-national governance). See generally Terence P. Stewart & Amy Ann Karpel, *Review of the Dispute Settlement Understanding: Operation of Panels*, 31 LAW & POL'Y INT'L BUS. 593, 600, 607–08 (2000) (discussing the general discomfort and disagreement with United States proposals to the WTO by the European Union and other WTO nations).
336. See Laura Altieri, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Trade and Economic Affairs: NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 854 (2003) (stating that because of the number of industries affected, multilateral agreements are very difficult, yet could be productive if reached). See generally James F. Rill, *A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 331–32 (1997) (expressing the preference for, but difficulty in attaining multilateral agreements coupled with appropriate safeguards); Corr, *supra* note 150, at 61–63 (discussing generally the economic and social discrepancies among the WTO nations, and ambiguity of the Safeguards and the difficulty of amending them in any way).

2. More Comprehensive WTO Briefs

The U.S. could improve its success before the DSB by presenting more comprehensive briefs, including a more explicit explanation of the ITC's injury and causation determination, and the connection between domestic industry's injury and increased imports.³³⁷ For example, the AB in *Line Pipe* iterated that it only discovered information pertaining to the NAFTA Carve-Out during the oral hearing "in response to [the AB's questioning]."³³⁸ The AB states in its decision that it wants a "reasoned and adequate explanation of how the facts would support such a finding."³³⁹ Because the U.S. did not provide a clear explanation of how the U.S. may have satisfied the parallelism requirement,³⁴⁰ the AB ruled that the U.S. failed to rebut Korea's prima facie case.³⁴¹ As a consequence, the AB did not address the permissibility of the NAFTA Carve-Out.³⁴² That only postponed a negative ruling until the Panel's decision in *Steel*.

337. See generally Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 600 (1996) (stressing the importance of presenting a well-developed case to the Appellate Body); Jonathan C. Spierer, *Dispute Settlement Understanding: Developing a Firm Foundation for Implementation of the World Trade Organization*, 22 SUFFOLK TRANSNAT'L L. REV. 63, 74-75 (1998) (outlining the process leading up to the Appellate Body's interim decision); Sprance, *supra* note 273, at 1248-50 (noting that factual findings are made after a careful review of the parties' written and oral submissions to the panel).

338. See WTO Appellate Body, *supra* note 127, at para 6.7 (detailing the panel report issued by the Appellate Body regarding the trade dispute between the U.S. and Korea). See generally Bhala & Gantz, *supra* note 98, at 183 (discussing the NAFTA exclusion for Canada and Mexico from safeguards imposed by the U.S. on imports); Elizabeth Olson, *Europeans Challenge U.S. Limits on Steel Imports*, N.Y. TIMES, Dec. 2, 2000, at C2 (maintaining that WTO rules allow for safeguard measures only when they are temporary and applied to all countries equally).

339. See WTO Appellate Body, *supra* note 127, at para 4.265 (emphasizing the importance of a reasoned and adequate explanation for the way in which a domestic industry is injured by foreign imports). See generally Afilalo, *supra* note 113, at 768 (indicating that a country instituting safeguard measures must prove that the increase of imports directly caused injury to domestic industry); Guohua, *supra* note 28, at 181 (announcing the Appellate Body's requirement that a country provide an express explanation of how domestic industry is harmed by an influx of foreign imports).

340. See Bhala & Gantz, *supra* note 98, at 191-92 (noting that the U.S. failed to establish the requirement of proving a causal relationship between the injury to the steel industry and imports of foreign steel). See generally Afilalo, *supra* note 113, at 769 (explaining the parallelism requirement as a need to show a cause-and-effect relationship between increased imports and serious injury to domestic industry); Zhu Lanye, *U.S.-China WTO Roundtable: The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT'L & COMP. L.J. 221, 187 (2003) (discussing the reasons U.S. safeguard measures were found to be inconsistent with GATT).

341. See Bhala & Gantz, *supra* note 98, at 181 (outlining the issues addressed by the Appellate Body in the *Line Pipe* case). See generally Chen, *supra* note 88, at 412-14 (noting that the U.S. was found to have acted inappropriately in taking safeguard measures); Lee D. Hamilton, *U.S. Anti-Dumping Decisions and the WTO Standard of Review: Deference or Disregard?*, 4 CHI. J. INT'L L. 265, 266 (2003) (commenting on the success countries such as Korea have had in challenging U.S. safeguards as inconsistent with GATT).

342. See Bhala & Gantz, *supra* note 98, at 180 (outlining the issues addressed by the Appellate Body in the *Line Pipe* case, none of which include the NAFTA Carve-Out). See generally Henry, *supra* note 20, at 408-09 n.196 (referring to the exemption of Canada and Mexico from U.S. tariffs because of the North American Free Trade Agreement). But see Tim Golden, *In Mexico, It's All a Matter of Trade*, N.Y. TIMES, Feb. 7, 1993, at A15 (showing that Mexico had been subject to punitive tariffs by the United States in the past).

It is interesting to note that the U.S. advocated the use of a “reasoned explanation” in this context previously before the WTO.³⁴³ In *Argentina Footwear*, as a third-party participant, the U.S. argued “the Panel correctly found that Argentina’s measure cannot be sustained where the underlying decision does not demonstrate that Argentina considered the relevant evidence and provided a reasoned explanation of its conclusions.”³⁴⁴ Although such a conclusion was not asserted in defense of a U.S. safeguard, the argument reveals that the U.S. acknowledges more comprehensive briefs may be necessary to prove consistency with the SA.³⁴⁵

3. Modification of U.S. Methodology

Another possible solution to the unsuccessful U.S. safeguard record in the WTO is the modification of the U.S. implementation of section 201.³⁴⁶ In every U.S. safeguard measure struck down by the AB, the AB faulted the ITC’s analysis as incomplete.³⁴⁷ The AB found fault with the U.S. methodology for determining injury and causation in all three safeguards cases

343. See Ehlermann & Ehring, *supra* note 140, at 1534 (noting that an assessment was needed to determine whether Argentine authorities had provided a reasoned explanation of relevant facts). See generally Lee, *supra* note 89, at 257-58 (1999) (illustrating that a finding of a causal connection between foreign imports and domestic industry needed to be supported by a reasoned explanation); McGee & Yoon, *supra* note 151, at 266 (discussing U.S. involvement in past trade disputes in the international community).

344. See Lichtenbaum, *supra* note 146, at 1253 (discussing the inadequacies of the evidence put forth by Argentina in justifying safeguard measures). See generally Guohua, *supra* note 28, at 180 (listing some necessary criteria for satisfying WTO requirements in imposing safeguard measures); Lanye, *supra* note 340, at 234-35 (outlining the involvement of third-party participants in international trade disputes).

345. See generally John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT’L L. REV. 1173, 1220 (1999) (outlining the process of submitting information to the WTO Appellate Body); Guohua, *supra* note 28, at 182 (suggesting that a detailed analysis is crucial for making a finding of causation between imports and domestic injury); Stewart & Karpel, *supra* note 335, at 598-99 (commenting on the importance of written submissions by parties in the Appellate Body’s interim decisions).

346. See Henry, *supra* note 20, at 408-09 (outlining arguments about the shortcomings of the section 201 process). See generally Graham, *supra* note 1, at 206 (examining the procedure of a section 201 investigation); Edmund L. Andrews, *Bush Scales Back Tariffs on Steel*, N.Y. TIMES, Aug. 22, 2002, at A1 (indicating dissatisfaction with the U.S. government’s exclusion of some imports from the section 201 remedy).

347. See William H. Barringer, *supra* note 295, at 4 (indicating that the ITC determination failed to establish a causal connection between imports and injury to the steel injury). See generally Ho, *supra* note 30, at 832 (questioning the reasons that ITC findings were accepted by the U.S. government); Edmund L. Andrews, *Pact to Cut Steel Production Doesn’t End Risk of Trade War*, N.Y. TIMES, Dec. 18, 2001, at C8 (discussing recommendations made by the ITC regarding safeguard measures for the U.S. steel industry).

before the AB.³⁴⁸ Problems included inadequate explanation of methodology used,³⁴⁹ incomplete analysis or analysis which was not representative of the domestic industry.³⁵⁰ Issues with causation and analysis included inadequate explanations of attributing injury to domestic industry rather than other factors,³⁵¹ and not explicitly demonstrating that imports were the cause of a threat or of injury.³⁵²

If the ITC conducted a more thorough investigation prior to determining injury and used a more transparent methodology, certain aspects of U.S. safeguard action which the AB has found troubling may be solved. However, if the U.S. presents more data and information regarding its analysis, the U.S. may leave itself with less flexibility in implementing safeguards

348. See WTO Appellate Body, *supra* note 69, at para. 187 (finding that the U.S. acted inconsistently with its obligations under the Agreement on Safeguards); see also WTO Appellate Body, *supra* note 69, at para. 197 (holding that the U.S. inadequately explained its finding that there was a serious injury). See generally Request for the Establishment of a Panel by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, Aug. 8, 2001, WT/DS214/4, para. 6 (Aug. 10, 2001) (requesting a panel to evaluate claims that the U.S. violated provisions of GATT and the Agreement of Safeguards).

349. See WTO Appellate Body, *supra* note 69, at para. 163 (suggesting the U.S. did not provide an adequate, reasoned and reasonable explanation); see also Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 1, at art. 4, para. 2(a) (1994), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 17, 2004) (stating that the method of determining “serious injury” shall be to “evaluate all relevant factors”). See generally Request for the Establishment of a Panel by the European Communities, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, Feb. 6, 2004, WT/DS294/7, para. 4 (last visited Feb. 15, 2004) (arguing that the U.S. uses inadequate methods to determine dumping margins).

350. See WTO Appellate Body, *supra* note 69, at para. 187(a) (indicating that the U.S. determination was incomplete because it failed to evaluate all relevant factors); see also WTO Appellate Body, *supra* note 69, at para. 197(c) (affirming a decision that the U.S. determination was based on data not sufficiently representative of the domestic industry); Bhala & Gantz, *supra* note 20, at 468 (discussing how the U.S. failed to show that it used the proper factors in determining domestic injury).

351. See Request for the Establishment of a Panel by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, Aug. 8, 2001, WT/DS214/4, para. 6 (Aug. 10, 2001) (suggesting that the U.S. analysis was not adequately based on injury caused to the domestic industry); see also Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 1, at Art. 4, para. 2(b) (1994) (stating that a determination of serious injury shall not be made unless there is evidence of a threat of injury to the domestic industry) available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Feb. 17, 2004). See generally WTO Appellate Body, *supra* note 69, at para. 187(c) (implying that the U.S. investigation was not adequate to reach the conclusion that Canadian imports were a threat to cause serious injury to the domestic industry).

352. See WTO Appellate Body, *supra* note 69, at para. 98 (finding that the U.S. did not make an explicit determination regarding increased imports from Canada); see also WTO Appellate Body, *supra* note 69, at para. 62 (arguing that the U.S. used an inadequate determination of causation, thereby restricting imports that did not create a serious injury). See generally Request for the Establishment of a Panel by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, Aug. 8, 2001, WT/DS214/4, para. 6 (Aug. 10, 2001) (claiming that the measures used by the U.S. did not sufficiently demonstrate a causal link between the imports and serious injury to the domestic industry).

in borderline cases.³⁵³ A clearer SA would also reduce the amount of discretion which the President has under section 201.³⁵⁴

An advantage to modifying the domestic implementation of the law itself is the avoidance of the difficulties of gaining multilateral agreement in international negotiations.³⁵⁵ However, then the U.S. would be changing its domestic law in response to international pressure,³⁵⁶ which raises the related issue of whether the AB is overstepping its bounds by displaying a lack of appropriate deference for United States domestic law.³⁵⁷ The overreaching scope of WTO decisions has also been recognized by representatives of U.S. industry affected by safeguard measures,³⁵⁸ who have remarked that “Panels have gone out of their way to fill in the gaps in the WTO agreements, creating new law on an international level, imposing new obligations

353. See Priest, *supra* note 3, at 1042 (suggesting that U.S. restrictions on some imports would not survive if they were subject to a different test for determining injury to the domestic industry); see also Romero, *supra* note 157, at 443 (indicating that a more transparent methodology would result in less flexibility for the evaluating nation). See generally Sykes, *supra* note 80, at 286 (asserting that the serious injury requirement, in the Agreement on Safeguards, is to limit the circumstances in which a nation can restrict imports).

354. See Trade Act of 1974 § 203, 19 U.S.C.S. § 2553(a)(1)(A) (2003) (stating that “the President *shall take all appropriate and feasible action within his power* [to] facilitate efforts by the domestic industry to . . . provide greater economic and social benefits than costs”) (emphasis added); see also WTO Appellate Body, *supra* note 69, at para. 1 (interpreting the difficult language and application of the Agreement on Safeguards, in a case involving Argentina’s safeguard measures on the importation of footwear); Afilalo, *supra* note 113, at 769–70 (suggesting that the causation element in the SA was drafted ambiguously, and that it allows nations to interpret causation aggressively in favor of their domestic industries).

355. See Afilalo, *supra* note 113, at 765 (proposing that the SA’s broad language gives nations the ability to take unilateral action to benefit domestic industries, rather than multilaterally); see also Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349, 350 (1995) (noting that the Uruguay Round of the General Agreement of Tariffs and Trade (GATT) was a particularly extensive and far-reaching international negotiation); Haque, *supra* note 277, at 1098–99 (describing the lengthy and arduous nature of bargaining in international negotiations).

356. See Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475, 1481–82 (2001) (reviewing Mary L. Dudziak, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000)) (discussing the distinction between international pressure and international legal pressure, that the latter requires change as a matter of law, and the former appeals to U.S. self-interest and morality); see also Priest, *supra* note 3, at 1056 (asserting that the U.S. should comply with the WTO’s ruling to avoid losing international support). See generally Ronald Laurie, *It’s Time to Invent a New Patent Law*, LEGAL TIMES, Oct. 15, 1990, at 25 (stating that international pressures to reform domestic policies have been encountered in the field of patent law).

357. According to the DSU, the DSB “cannot add to or diminish the rights and obligations provided in the covered agreements.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1125, 1227 (1994) (stating that “the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”); see also *id.* at 1237 (asserting that the AB may not alter the rights and obligations of a party through its findings and recommendations); Silverman, *supra* note 265, at 278 (interpreting the DSU as meaning that neither the DSB, nor the AB, may alter the substantive rights and obligations of a party).

358. See Steve Seidenberg, *Defiance of WTO: A Growing Trend*, NAT’L L.J., Apr. 7, 2003, at A9 (discussing the effects of retaliatory safeguard measures by foreign nations, with a representative of the domestic cattle industry); see also Miller, *supra* note 274, at 2333 (describing the origin of the “beef hormone” dispute that is affecting the domestic cattle industry). See generally Henry, *supra* note 20, at 395–97 (outlining the nature and purpose of the SA, and describing how it can be beneficial to some domestic industries, but also harmful to industries that feel the effects of retaliatory action).

that countries have not agreed to.”³⁵⁹ Because this is a problem faced by other member countries, this is a focus of the Doha Round of WTO negotiations.³⁶⁰

Although the modification of the U.S. implementation of section 201 may be a solution, a disadvantage is that such analysis will more clearly reveal U.S. weakness when a safeguard measure is noncompliant with the SA.³⁶¹ Similar to a clarification of the SA, a modification of section 201 implementation will not allow the U.S. to employ WTO-compliant safeguards in borderline cases.

IV. Conclusion

There are several points of conflict between section 201 and the SA that need to be addressed in order for future U.S. global safeguard actions to succeed.³⁶² In light of the U.S. safeguard record in the WTO, if the U.S. does not modify its implementation of section 201, or propose to amend the SA in a future round of WTO negotiations, the AB will likely con-

359. See Seidenberg, *supra* note 358, at A9 (quoting Kevin Dempsey, specialist in international trade and partner in the Washington, D.C., office of Dewey Ballantine); see also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 83–87 (2000) (detailing the rise of a “new international law,” being created by international organizations such as the WTO). See generally Aditi Bagchi, Note, *Compulsory Licensing and the Duty of Good Faith in TRIPS*, 55 STAN. L. REV. 1529, 1535 (2003) (arguing that the DSB does not have the authority to fill in gaps of international agreements in the same way that common law courts can amend incomplete contracts between private parties).

360. See Doha Ministerial Declaration, Nov. 14, 2001, WT/MIN(01)/DEC/1, para. 30, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Feb. 16, 2004) (agreeing that clarification of the DSU is necessary, and negotiations to that end will take place at the Doha Round); see also Grier et al., *supra* note 214, at 364 (describing the reasons for controversy over the DSU as being problems with compliance and the requirement of more transparency in settlement procedures); Vazquez & Jackson, *supra* note 300, at 555 (asserting that member nations will describe deficiencies in the DSU at the Doha Round negotiations).

361. See Chen, *supra* note 88, at 414–15 (questioning whether U.S. compliance with WTO requests for increased multilateral decision-making would impair domestic sovereignty); see also John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANS-NAT’L L. 157, 171 (1997) (outlining two possible weaknesses that may result from reforming domestic laws: diminution of the right or power to pursue certain domestic policies, and harmful effects which follow from allowing external influences to affect domestic policies). See generally Matthew Schaefer, *Sovereignty, Influence, Realpolitik and the World Trade Organization*, 25 HASTINGS INT’L & COMP. L. REV. 341, 341 (2002) (suggesting that compliance with the WTO will result in a loss of U.S. power in international policy-making).

362. See Husisian, *supra* note 88, at 467 (observing that the WTO Appellate Body has often found section 201 to be inconsistent with the WTO Safeguards Agreement); see also Priest, *supra* note 3, at 1042 (noting that the standards for implementing safeguards under the WTO Agreement are less stringent than those under section 201 of the 1974 Trade Act). See generally Applebaum, *supra* note 11, at 483 (stating that section 201 is somewhat rooted in the WTO Agreement on Safeguards).

tinue to rule against U.S. safeguard measures in the future.³⁶³ With each successive U.S. safeguard and most notably following the measures imposed on steel imports, the antagonism of the international community has steadily increased.³⁶⁴ As a result, it may be in U.S. interests to rectify the WTO-inconsistent aspects of its import relief measures in order to maintain the cooperation of, and regain more leverage in, the WTO.

363. See generally Deborah Haynes, *WTO Opens Sanctions Door by Ruling Against U.S. Steel Tariffs*, AGENCE FRANCE PRESSE, Nov. 10, 2003, LEXIS, Nexis Library, Wire Service Stories (reporting on inconsistencies between United States trade policies and World Trade Organization Safeguard Agreement requirements); *WTO Upholds Decision That U.S. Steel Tariffs Flout Rules*, AFX NEWS LIMITED, Nov. 10, 2003, LEXIS, Nexis Library, Wire Service Stories (sketching the continuing failure of the United States to withstand World Trade Organization challenges to its steel safeguard actions); *WTO Upholds Steel Complaint Against U.S.*, BUS. NEWS AMERICAS-ENGLISH, Nov. 10, 2003, LEXIS, Nexis Library, Wire Service Stories (predicting the short-term implications of the World Trade Organization condemnation of United States steel safeguard actions).

364. See Graham, *supra* note 1, at 218-20 (noting that U.S. safeguard measures have received a harsh reception in the international community); see also Paul Meller, *Europe Lists U.S. Imports It Plans to Tax*, N.Y. TIMES, Mar. 23, 2002, at C1 (suggesting that retaliatory action will be taken by other countries in response to U.S. safeguard measures); *WTO to Rule on Possible Steel Quotas*, N.Y. TIMES, Sept. 17, 2002, at C17 (outlining retaliatory measures that have already been taken by foreign countries affected by U.S. tariffs).

In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2000

2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003)

Complaint of U.S. citizen was dismissed because the plaintiff failed to establish that the foreign defendant was “doing business” or “transacting business” in New York.

I. Holding

In *In re Ski Train Fire in Kaprun, Austria, on November 11, 2000*,¹ the Southern District of New York granted defendant’s motion,² dismissing the plaintiffs’ complaint³ for lack of personal jurisdiction.⁴ The court’s decision was primarily based on the fact that defendant, Gletscherbahnen Kaprun AG (“GBK”),⁵ was not “doing business” in New York,⁶ as required by New York C.P.L.R. 301,⁷ and did not “transact business” in New York⁸ under C.P.L.R. 302(a)(1).⁹ The court further held that plaintiffs¹⁰ failed to establish that GBK committed tortious acts which caused injury “within New York.”¹¹ Because the court found a lack of personal

1. 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003) (hereinafter “*Ski Train*”).

2. *Id.* at *1 (stating that defendant’s motion to dismiss was based on lack of personal jurisdiction, improper service of process, and *forum non conveniens*).

3. *Id.* at *2 n.2 (explaining that the plaintiffs’ complaints were consolidated and amended for pre-trial purposes).

4. *Id.* at *31.

5. *Id.* at *3. GBK is a private corporation that owns and operates a ski resort in Austria.

6. *Id.* at *15.

7. C.P.L.R. 301.

[P]ersonal jurisdiction may still be acquired over a foreign corporation “doing business” in New York in accordance with present case law . . . If a corporation which has submitted itself to the jurisdiction of the New York courts by acts performed within the state, as provided in § 302, is sued on a cause of action that did not arise from any of the acts, it would be necessary to determine from prior law whether there is personal jurisdiction because § 302 limits the jurisdiction acquired under it to a cause of action arising from the performance of the acts.

8. *In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2000*, 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003), at *26.

9. C.P.L.R. 302(a)(1):

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

10. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *1 (stating that the plaintiffs were the family members of eight Americans who died in a ski train accident on November 11, 2000, in Kaprun, Austria).

11. *Id.* at *30–31. Under C.P.L.R. 302(a)(3), to get personal jurisdiction over a foreign defendant, the defendant’s actions must have caused injury “within New York.”

jurisdiction,¹² it did not need to address issues of improper service of process and *forum non conveniens*.¹³

II. Facts

On November 11, 2000, a ski train caught fire in Kaprun, Austria, killing 155 people.¹⁴ This action was brought by the family members of eight Americans who died in the fire, suing for damages, declaratory, and injunctive relief against the manufacturers and operators of the ski train.¹⁵ The plaintiffs argued that as owner and operator of the ski resort where the accident occurred,¹⁶ GBK was responsible for the train that caught fire,¹⁷ and was therefore liable for the deaths of their family members.¹⁸ The plaintiffs sought to choose New York as the venue for their suit;¹⁹ however, GBK moved to dismiss based on lack of personal jurisdiction, improper service of process, and *forum non conveniens*.²⁰

III. Plaintiff's Jurisdictional Allegations

The plaintiffs argued that the Southern District of New York had personal jurisdiction over GBK based on GBK's (1) Web site advertising, (2) promotional activities, and/or (3) tortious activities.²¹ These jurisdictional arguments were premised on the statutory authority of C.P.L.R. sections 301 and 302(a).²² Plaintiffs also suggested that jurisdiction was proper because of GBK's alter ego as Verbund-Austrian Hydro Power, and GBK's purchase of products or components from U.S. companies.²³ The court, however, dismissed these latter arguments as lacking merit.²⁴

12. See *supra* note 4.

13. See *supra* note 2 and accompanying text; *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *3 n.4.

14. In re Ski Train Fire in Kaprun, Austria, on November 11, 2000, 2003 U.S. Dist. LEXIS 17958, at *2 (S.D.N.Y. Oct. 8, 2003).

15. *Id.*

16. In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2000, 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003), at *3.

17. *Id.*

18. *Id.*

19. Kern v. Oesterreichische Elektrizitaetswirtschaft AG, 178 F. Supp. 2d 367 (S.D.N.Y. Nov. 16, 2001).

20. See *supra* note 2 and accompanying text.

21. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *4.

22. *Id.* at *13 n.37. Although plaintiffs failed to explicitly identify statutory authority for their jurisdictional arguments, they allude to sections 301 and 302(a) of the C.P.L.R.

23. *Id.* at *4 n.8.

24. *Id.* The court ruled that GBK's alter ego is irrelevant because it already held that it lacked jurisdiction over Verbund-Austrian Hydro Power AG in New York, and that the plaintiffs failed to allege that any of the companies that GBK purchased products or components from were located in New York.

A. GBK's Website Activity

GBK advertises through its Web site,²⁵ which is hosted by an Austrian company, Salzburg-Online.²⁶ Visitors to GBK's Web site have the capability to directly e-mail GBK representatives, and link to Web sites operated by third parties.²⁷ Through these third-party links, visitors can make transactions such as reservations for hotels, resorts, and apartments in Kaprun.²⁸ Visitors cannot, however, purchase anything directly from GBK through its Web site.²⁹

B. GBK's Other Marketing Activities

In addition to its Web site, GBK allegedly³⁰ promotes its services through U.S. wholesalers and agents,³¹ who market GBK's products for English-speaking persons in the U.S., and on U.S. military bases in Europe.³² Additionally, GBK allegedly offered discounts to "New York Bases or Businesses."³³ Plaintiffs also argued that GBK specifically targeted the U.S. military bases on which plaintiffs' decedents resided, by offering extremely attractive vacation packages.³⁴

C. GBK's Tortious Activities

The plaintiffs' final basis for personal jurisdiction was that GBK committed tortious activities that caused injury "within New York."³⁵ The plaintiffs offered two acts that gave rise to this claim: (1) GBK's tortious activities that caused the accident,³⁶ and (2) GBK's alleged spoliation of evidence.³⁷ As to the latter claim, plaintiffs alleged that GBK violated a court order requiring GBK to preserve evidence related to the accident.³⁸

25. <http://www.kitzsteinhorn.at/english/default.htm>.

26. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *5 (stating that GBK's Web site is hosted by Salzburg-Online, an Austrian company).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at *7 n.18. GBK denied this allegation, and asserted that its only advertising in New York was through its Web site.

31. *Id.* at *7-8. Specifically, plaintiffs alleged that GBK advertised through "Adventures on Skis," a Massachusetts company that advertises through the Internet.

32. *Id.* at *6.

33. *Id.* at *7.

34. *Id.* at *8. Among other things, the plaintiffs contended that defendant offered flexible reservations, waiver of cancellation policies, discounted hotel and lift tickets, and guaranteed accommodations.

35. *Id.* at *26. Under C.P.L.R. 302(a)(3), personal jurisdiction over a foreign defendant may be obtained by establishing that the defendant committed a tortious act outside of New York, that caused injury "within New York."

36. *Id.*; *supra* note 14.

37. *In re Ski Train Fire in Kaprun, Austria*, on Nov. 11, 2000, 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003), at *8 (alleging that GBK has "sought to interfere with, avoid and/or evade" the court order).

38. *Id.* It is interesting to note that in its order, the court reserved GBK's right to later assert jurisdictional defenses.

IV. The District Court's Analysis

The court began its analysis by stating the legal standard regarding personal jurisdiction:³⁹ the plaintiff bears the burden, by a preponderance of the evidence, to make a *prima facie* showing of jurisdiction.⁴⁰

The court then explained the two-step process for determining whether a federal court has personal jurisdiction over a defendant:⁴¹ (1) the plaintiff must demonstrate, under the forum state's laws, that the court has personal jurisdiction on the defendant;⁴² and (2) the court must find that jurisdiction under the forum state's laws satisfies due process.⁴³ The forum state is the state where the action was originally filed,⁴⁴ and in this case it was New York.⁴⁵

The court next examined the plaintiffs' arguments under sections 301 and 302(a) of the C.P.L.R.⁴⁶

A. Section 301

Under section 301,⁴⁷ a foreign corporation may be sued in New York for all purposes if it is currently in the state, or is "doing business" in the state.⁴⁸ The plaintiff can establish that the foreign defendant was "doing business" in New York by showing that the corporation was "engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction."⁴⁹

39. *Id.* at *9 (stating that a court must dismiss any action for which it does not have personal jurisdiction over the defendant); Fed. R. Civ. P. 12(b)(2).

40. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *9; *Kernan v. Kruz-Hastings, Inc.*, 175 F.3d 236, 240 (2d Cir. 1999); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998) (stating that the plaintiff bears the burden of showing that the court has jurisdiction over the defendant).

41. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *11.

42. *Id.*; *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997) (analyzing whether the court had jurisdiction over the defendant); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).

43. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *11; *Bensusan Rest. Corp.*, 126 F.3d at 27 (indicating that jurisdiction must satisfy due process); *Metropolitan Life Ins. Co.*, 84 F.3d at 567 (setting forth the two-part test for determining whether a court has jurisdiction over a defendant).

44. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *11; *In re Ski Train Fire in Kaprun, Austria* on November 11, 2000, 257 F. Supp. 2d 717, 723 (S.D.N.Y. Apr. 22, 2003); *In re Ski Train Fire in Kaprun, Austria* on November 11, 2000, 230 F. Supp. 2d 392, 399 (S.D.N.Y. Aug. 14, 2002).

45. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *11; *see also id.* at *13 ("[a]ccordingly, this opinion only addresses whether GBK is subject to personal jurisdiction in New York" and not any other state in the U.S. where an action against GBK may be brought).

46. *See supra* note 22 and accompanying text.

47. C.P.L.R. 301.

48. *Id.*; *In re Ski Train Fire in Kaprun, Austria*, on Nov. 11, 2000, 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003), at *13; *Aerotel Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. Apr. 14, 2000).

49. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *14 (quoting *Aerotel Ltd.*, 100 F. Supp. 2d at 191-92) (quoting *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 536 (1967) (quotation marks omitted)).

The court held that GBK's marketing activities⁵⁰ did not amount to "doing business in New York."⁵¹ First, the plaintiffs failed to show how GBK's advertising abroad amounted to "doing business" in New York.⁵² The court explained that even if GBK was "doing business" in the United States,⁵³ that does not amount to doing business in New York.⁵⁴ Second, plaintiffs failed to show that GBK's promotions to "New York Bases and Businesses"⁵⁵ were of a sufficient frequency or volume to constitute "doing business" in New York.⁵⁶ Finally, the court stated that although GBK's Web site is accessible in New York, this alone was insufficient to obtain general jurisdiction under section 301.⁵⁷

B. Section 302(a)(1)

New York's long-arm statute, section 302(a)(1),⁵⁸ confers jurisdiction over a foreign defendant if it "transacts business" within the state, and the claim "arises out of that business activity."⁵⁹

The court first addressed plaintiffs' claim that GBK "transacted business" through its Web site.⁶⁰ In order to determine whether Web site activity amounts to "transacting business," the court analyzed the nature and quality of Web activity on GBK's site.⁶¹ A "passive" Web site, where no information is exchanged, cannot confer jurisdiction.⁶² Conversely, a Web site where the defendant clearly does business will confer jurisdiction.⁶³ In between these two extremes are "interactive" Web sites, which will generally support a finding of jurisdiction.⁶⁴ The court

50. See *supra* notes 31–34.

51. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *15.

52. *Id.*

53. *Id.* The court assumed, *arguendo*, that GBK's advertising amounted to "doing business" in the United States.

54. *Id.*; *In re Ski Train Fire in Kaprun, Austria* on November 11, 2000, 230 F. Supp. 2d 403, 408 (S.D.N.Y. Sept. 19, 2002).

55. See *supra* note 33.

56. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *15.

57. *Id.*; *In re Ski Train Fire*, 230 F. Supp. 2d at 408.

58. C.P.L.R. 302(a)(1). Section 302(a)(1) states: "[A] court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state".

59. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *16 (stating that "[a] nondomiciliary 'transacts business' in New York if it 'purposefully avails [itself] of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws'"); *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986) (quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967)).

60. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *17.

61. *Id.*; *Alpha Int'l, Inc. v. T-Reprods, Inc.*, 2003 U.S. Dist. LEXIS 11224, at *3 (S.D.N.Y. July 1, 2003) (holding that the court had personal jurisdiction over the defendant because defendant's Web site enabled visitors to purchase the item in controversy).

62. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *18; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (stating that the defendant's Web site was not passive, rather it was purposefully availing the defendant to the forum state).

63. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *18; *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (indicating that when a defendant clearly does business over the Internet, that conduct will confer jurisdiction).

64. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *18; *Alpha Int'l, Inc.*, 2003 U.S. Dist. LEXIS 11224, at *3.

assumed, *arguendo*, that GBK's Web site was interactive,⁶⁵ yet still held the Web site could not confer jurisdiction because the plaintiffs failed to show how the Web site was related to the accident.⁶⁶

The court then addressed whether GBK's alleged use of U.S. wholesalers⁶⁷ and offerings of discounts to U.S. military personnel⁶⁸ could confer jurisdiction under section 302(a)(1).⁶⁹ The court found both arguments insufficient to hold that GBK "transacted business" in New York.⁷⁰ First, even if GBK used wholesalers in the U.S., the plaintiffs failed to show how this amounted to contacts between GBK and New York.⁷¹ Second, plaintiffs' "vague allegations" regarding New York "Bases or Businesses"⁷² do not make a connection between the discounts and the accident.⁷³

The plaintiffs also argued that because GBK directed advertising to U.S. military bases abroad,⁷⁴ it should be subject to jurisdiction under the International Agreements Claims Act⁷⁵ or the Foreign Claims Act.⁷⁶ The court quickly dismissed this argument for lack of merit, stating that "neither statute contains any language supporting this interpretation."⁷⁷ Both statutes are intended to confer jurisdiction over U.S. citizens who commit crimes abroad,⁷⁸ not over foreigners that commit torts on U.S. citizens.⁷⁹ Additionally, the court stated that even if GBK's activities amounted to contacts with the U.S., this was not sufficient for contacts with

65. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *19; *see also id.* at *20 n.57 (stating that "[b]ecause there is no nexus between GBK's Web site and plaintiffs' claims, I need not determine whether GBK's Web site is 'interactive'").

66. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *19 (explaining that the plaintiffs failed to allege that any of the victims ever even visited the Web site); *Ainbinder v. Potter*, 282 F. Supp. 2d 180, 187 (S.D.N.Y. Sept. 22, 2003).

67. *See supra* note 31.

68. *See supra* note 34.

69. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *21.

70. *Id.*

71. *Id.*

72. *See supra* note 33.

73. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *21-22.

74. *See supra* note 34.

75. 10 U.S.C. § 2734a.

76. 10 U.S.C. § 2734(a); *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *22; *see id.* at *23 n.65 (discussing how plaintiffs cite the International Agreements Claims Act as 10 U.S.C. § 2734(a), but that section is actually the Foreign Claims Act).

77. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *22; *id.* at *23 n.67 (citing the applicable text of the International Agreements Claims Act and the Foreign Claims Act).

78. *Id.* at *24. Plaintiffs rely on several cases, involving crimes by U.S. military personnel on overseas bases, in support of its argument that jurisdiction is proper under the International Agreements Claims Act or the Foreign Claims Act.

79. *Id.* at *25.

New York.⁸⁰ Therefore, plaintiffs' argument failed because it didn't show how GBK's activities amounted to contacts with New York.⁸¹

C. Section 302(a)(3)

Under section 302(a)(3),⁸² jurisdiction can be obtained over a foreign defendant who commits a tort outside the state, but injures a person "within New York."⁸³ The plaintiff must show that the defendant either regularly does or solicits business in the state⁸⁴ or "derives substantial revenue from interstate commerce and expects . . . the tortious act to have consequences in [New York]."⁸⁵ The plaintiffs argued that section 302(a)(3) should confer jurisdiction over GBK⁸⁶ because of its role in the accident, and due to its alleged violation of a court order requiring GBK to preserve evidence.⁸⁷

As to GBK's tortious acts that allegedly caused the accident, the court held that plaintiffs failed to show that injury was caused "within New York."⁸⁸ After applying the "situs-of-injury" test,⁸⁹ the court determined that the accident caused injury in Kaprun, Austria.⁹⁰ Therefore, despite the fact that victims of the accident were citizens of New York, this was not sufficient to show injury "within New York"⁹¹ under section 302(a)(3).⁹²

The plaintiffs also argued that GBK's spoliation of evidence was a "tort committed outside of New York, causing injury to persons within New York."⁹³ The court dismissed this argument because even if GBK violated the order, an order can only bind those within its juris-

80. *Id.*

81. *Id.*

82. C.P.L.R. 302(a)(3).

83. *Id.*; In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2000, 2003 U.S. Dist. LEXIS 22139 (S.D.N.Y. Dec. 9, 2003), at *26.

84. C.P.L.R. 302(a)(3). Section 302(a)(3) states, for personal jurisdiction, the foreign defendant either "regularly does or solicits business, or engages in any other persistent course of conduct."

85. *Id.*; *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *26.

86. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *26–28.

87. *Supra* notes 36–38.

88. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *26–27.

89. *Id.* at *27 (stating that the situs-of-injury test is used by New York courts to determine whether there is injury within the state); *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001).

90. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *27. (suggesting that the focus is where the accident occurred); *DiStefano*, 286 F.3d at 84–85.

91. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *28 n.79. Because the court declined to find injury "within New York," the other elements of section 302(a)(3) did not have to be addressed.

92. *Id.* at *27 (explaining that the situs-of-injury test asks where the "original event" occurs); *DiStefano*, 286 F.3d at 85 (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990)).

93. *Id.* at *29.

diction.⁹⁴ Accordingly, both of the plaintiffs' propositions for jurisdiction under section 302(a)(3) were insufficient.

V. Conclusion

The District Court for the Southern District of New York concluded that the plaintiffs' failed to establish personal jurisdiction over GBK, through sections 301 and 302(a), either because of insufficient contacts with New York, or because GBK did not cause injury within the state.⁹⁵

Based on the facts of the case, the court properly dismissed the plaintiffs complaint. Additionally, the court's decision was consistent with the New York C.P.L.R., and supported by case law. The district courts have consistently applied the "situs-of-injury" test when determining whether an injury occurred within New York.⁹⁶ Based on the courts' analysis in these cases, it is clear that although some harm is felt in New York, jurisdiction will not be conferred unless the harm was the first effect of the tort committed.⁹⁷

Although it will be more burdensome on the plaintiffs to sue GBK in Austria, rather than in the U.S., the alternative scenario would have been even worse because of its potentially large and damaging implications on international law. If the court asserted personal jurisdiction over GBK, in light of its minimal contacts with New York, it would allow jurisdiction to be conferred over foreigners who simply maintain a Web site that was accessible in New York. For all intents and purposes, such a holding would allow personal jurisdiction to be obtained over any defendant who simply maintained a Web site, because the majority of Web sites are universally accessible. Furthermore, if the court found sufficient basis for jurisdiction, it would be departing from previous New York cases which hold that the Web site must have some commercial purpose directed toward the state.⁹⁸ This result would surely deter some individuals from maintaining non-commercial Web sites, because the potential liability in a foreign nation would greatly increase. By refusing to confer jurisdiction over GBK, the court is continuing to provide uniformity in its decisions regarding whether and when a Web site is enough basis for jurisdiction over a foreign defendant, and allowing for predictable results in the future.

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94. *Id.*; *Doctor's Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302 (2d Cir. 1999)

95. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *13-31.

96. *Am. Para Prof'l Sys., Inc. v. Labone, Inc.*, 175 F. Supp. 2d 450 (E.D.N.Y. Nov. 13, 2001); *Steuben Foods Inc. v. Morris*, 2002 U.S. Dist. LEXIS 13827 (W.D.N.Y. May 29, 2002); *Hartford Fire Ins. Co. v. M/V "MSC INSA"*, 2003 U.S. Dist. LEXIS 22806 (S.D.N.Y. Dec. 18, 2003).

97. *Ski Train*, 2003 U.S. Dist. LEXIS 22139, at *13-31.

98. *Girl Scouts of the U.S. v. Steir*, 2003 U.S. Dist. LEXIS 24582 (S.D.N.Y. Sept. 4, 2003) (holding that the Web site served no commercial purpose; therefore, the defendants did not transact business within New York); *Hsin Ten Enter. U.S. v. Clark Enters.*, 138 F. Supp. 2d 449 (S.D.N.Y. Dec. 29, 2000) (stating that defendants' conducting of business through its Web site enabled New York to confer jurisdiction over it).

Att'y Gen. Of Can. ex rel. Her Majesty the Queen v. Gorman

769 N.Y.S.2d 369 (Civ. Ct., Queens Co. Dec. 12, 2003)

The proponent of a motion seeking recognition and enforcement of a foreign judgment obtained upon default, through a motion for summary judgment in lieu of complaint also defaulted upon, has the burden of making a prima facie case that there is personal or proper jurisdiction in order to satisfy the grounds for enforcement of foreign judgments under New York C.P.L.R. 5304(a)(2).

I. Holding

In *Att'y Gen. of Can. ex rel. Her Majesty the Queen v. Gorman*, the Civil Court of the City of New York, Queens County, denied the Attorney General of Canada's motion for summary judgment brought pursuant to New York C.P.L.R. 3213.¹ The motion was made on default and sought to enforce a Canadian money judgment, awarded upon the default of the defendant, Jill Gorman.² The court held that the proponent of such motion has the burden of making a prima facie case that mandatory non-recognition grounds for foreign judgments under C.P.L.R. 5304(a) do not exist.³ The court dismissed the motion without prejudice and allowed leave to file a new motion supporting a prima facie case of personal or proper jurisdiction over the defendant by the Canadian courts and to provide a statement of the relevant Canadian law on the methods of service of process used.⁴

II. Background and Procedural Posture

The plaintiff in the Canadian action obtained a money judgment against Gorman after Gorman defaulted.⁵ The plaintiff then filed a motion for summary judgment in the Civil Court of the City of New York, Queens County, pursuant to C.P.L.R. 3213, asking the court to exercise its "ministerial function" in enforcing the Canadian judgment.⁶ The plaintiff was authorized to bring such a motion pursuant to C.P.L.R. 5303.⁷ In filing its motion, the plaintiff failed to provide the court with an explanation of the facts leading to the action against

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1. *Att'y Gen. of Can. ex rel. Her Majesty the Queen v. Gorman*, 769 N.Y.S.2d 369, 375 (Civ. Ct., Queens Co. 2003) (hereinafter "*Gorman*"); see also N.Y. C.P.L.R. 3213 (providing that "when an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint").
 2. *Gorman*, 769 N.Y.S.2d at 370.
 3. *Id.* at 373–74; see also C.P.L.R. 5304(a) (stating that foreign judgments are not conclusive if: "1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; 2. The foreign court did not have personal jurisdiction over the defendant").
 4. *Gorman*, 769 N.Y.S.2d at 375.
 5. *Id.* at 370.
 6. *Id.*; see also C.P.L.R. 3213.
 7. C.P.L.R. 5303 (providing that a foreign judgment which is conclusive, except as provided in C.P.L.R. 5304, "is enforceable by" . . . "a motion for summary judgment in lieu of complaint").

Gorman in Canada.⁸ Likewise, the plaintiff failed to offer to the court any proof of service of process in the Canadian action or even a description of the manner in which service of process had been effectuated.⁹ The plaintiff's motion stated that the defendant was currently residing in New York,¹⁰ that she had been served personally in the foreign action¹¹ and that jurisdiction by the Canadian courts was proper.¹² The motion included a copy of the Canadian judgment certified by a notary public and affidavits of service in the New York action.¹³

III. Court's Analysis

A. Recognition of Foreign Judgments in the New York Courts

The court recognized the principle of comity as defined in *Hilton v. Guyot*.¹⁴ In that case, the United States Supreme Court defined "comity of nations" as "the extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation."¹⁵ However, the court noted that currently there is no international agreement regarding the mutual acceptance of foreign judgments among nations in which the United States is a participant, which leaves the recognition of such judgments to the states.¹⁶ The Uniform Foreign Money-Judgments Recognition Act ("the Act"), approved in 1962 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, has been adopted by a majority of the states.¹⁷ The Act allows for recognition of foreign judgments in the state courts and serves to increase the likelihood that other nations will recognize judgments from the states that have adopted the Act based on the notion of reciprocity.¹⁸ The Act was codified in New York in 1970 in Article 53 of the New York C.P.L.R.¹⁹

8. *Gorman*, 769 N.Y.S.2d at 370.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 374.

13. *Id.* at 370.

14. *See* *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); *see also* *Gorman*, 769 N.Y.S.2d at 370.

15. *See* *Hilton*, 159 U.S. 113, 163 (1895); *see also* *Gorman*, 769 N.Y.S.2d at 370.

16. *Gorman*, 769 N.Y.S.2d at 371; *see also* J. Noelle Hicks, Note, *The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 156–57 (2003) (stating that the enforcement of foreign judgments is a matter of state, not federal law).

17. *Gorman*, 769 N.Y.S.2d at 371. *See generally* Cedric C. Chao & Christine S. Neuhoﬀ, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 165 (2001) (listing the jurisdictions that have adopted the Act and the date of adoption).

18. *Gorman*, 769 N.Y.S.2d at 371; *see also* Hicks, *supra* note 16, at 163–64 (observing the result of the adoption of the Act in the enforcement of judgments in the United States and abroad). *See generally* Violeta I. Balan, Note, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 239 (2003) (enumerating the mandatory and discretionary grounds for non-recognition of foreign judgments under the Act).

19. *Gorman*, 769 N.Y.S.2d at 371; *see also* C.P.L.R. 5301–5309 (codifying the Act).

Under C.P.L.R. 5303, the New York courts are required to enforce a foreign judgment unless one of the mandatory non-recognition grounds of C.P.L.R. 5304(a) applies.²⁰ Also, the courts may refuse enforcement when the discretionary non-recognition grounds under C.P.L.R. 5304(b) apply.²¹ The statute also authorizes the filing of a motion for summary judgment pursuant to C.P.L.R. 3213 for parties seeking to enforce a foreign judgment.²² Parties may seek recognition and enforcement of a judgment based on a judgment on the merits as well as a default judgment without having to retry the merits of their case as long as the foreign judgment is conclusive under C.P.L.R. 5304.²³

The *Gorman* court set forth the three mandatory grounds which provide for non-recognition of a foreign judgment when the foreign court:²⁴ 1) "did not provide for impartial forums";²⁵ or 2) "did not provide procedures that are compatible with due process";²⁶ or 3) "did not have personal jurisdiction over the defendant."²⁷ The foreign judgment would not be considered conclusive and it would be unenforceable under C.P.L.R. 5304 if any mandatory non-recognition grounds exist.²⁸ The *Gorman* court mentions the discretionary non-recognition grounds under which the court may refuse to recognize a foreign judgment.²⁹ The discretionary non-recognition grounds are: 1) lack of subject matter jurisdiction; 2) insufficient notice; 3) fraud in obtaining the judgment; 4) the cause of action is repugnant to public policy; 5) conflicting final judgments exist; 6) the proceeding was contrary to an agreement by the parties; and 7) if jurisdiction was based on personal service, the foreign forum was a seriously inconvenient forum.³⁰

The court also discussed C.P.L.R. 3213,³¹ which allows for the filing of motions for summary judgment in lieu of a complaint when the proponent is seeking the enforcement of a judgment.³² The court stated that the statute requires a certified copy of the judgment to be

20. *Gorman*, 769 N.Y.S.2d at 371; see also C.P.L.R. 5303 (requiring the enforceability of foreign judgments when they are conclusive); see also C.P.L.R. 5304(a) (enumerating the mandatory criteria for non-enforceability of foreign judgments).

21. *Gorman*, 769 N.Y.S.2d at 371; see also C.P.L.R. 5304(b) (listing the discretionary grounds under which a court may refuse enforcement of a foreign judgment, including: lack of subject-matter jurisdiction, insufficient notice, fraud, cause of action is contrary to public policy).

22. C.P.L.R. 3213.

23. C.P.L.R. 5304; see also Chao & Neuhoff, *supra* note 17, at 153 (discussing the enforceability of foreign judgments entered on default).

24. *Gorman*, 769 N.Y.S.2d at 371–72; see also C.P.L.R. 5304(a).

25. *Gorman*, 769 N.Y.S.2d at 372; see also C.P.L.R. 5304(a)(1).

26. *Gorman*, 769 N.Y.S.2d at 372; see also C.P.L.R. 5304(a)(1).

27. *Gorman*, 769 N.Y.S.2d at 372; see also C.P.L.R. 5304(a)(2).

28. See Hicks, *supra* note 16, at 164 (highlighting the requirement under the Act that a foreign judgment be conclusive in order to be enforceable and discussing when a foreign judgment would not be considered conclusive).

29. *Gorman*, 769 N.Y.S.2d at 372 n.1 (enumerating the discretionary non-recognition grounds).

30. C.P.L.R. 5304(b).

31. *Gorman*, 769 N.Y.S.2d at 370, 373.

32. C.P.L.R. 3213.

attached to the motion.³³ In this case, the certified copy attached was not certified by the Canadian court; rather, it was certified by a notary public.³⁴ Nonetheless, the court found this certified copy to satisfactorily meet the requirement of the statute.³⁵ Furthermore, the court asserted that the lack of a discussion of the facts leading to the Canadian action would not affect its analysis in deciding whether to permit the enforcement of the judgment sought by the current motion.³⁶ When a party is seeking the recognition of a foreign judgment on default, the merits of the original claim will not be retried.³⁷

B. Standard of Review

The court stated that ascertaining the level of scrutiny to be used in a case where a motion for summary judgment was made on default and grounded on a foreign judgment taken on default was an issue of first impression for this court.³⁸ The court discussed New York case law regarding the applicability of C.P.L.R. 5304.³⁹ It concluded that the proponent of the motion for summary judgment has the burden of making a prima facie case that the mandatory non-recognition grounds of C.P.L.R. 5304(a) do not apply.⁴⁰

C. Mandatory Requirements Under C.P.L.R. 5304(a)

The court found that the two mandatory non-recognition requirements under C.P.L.R. 5304(a)(1) did not apply in this case.⁴¹ The court said that Canadian judgments have been previously recognized in the New York courts.⁴² The court also noted that New York courts widely recognize that the Canadian system is one where impartial tribunals exist and where due process principles similar to the ones in the United States are observed.⁴³

However, the court did not reach the same conclusion in regard to the personal jurisdiction requirement under C.P.L.R. 5304(a)(2).⁴⁴ The conclusory statements regarding service of process and proper jurisdiction that were made in support of the motion were insufficient to

33. *Gorman*, 769 N.Y.S.2d at 373.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See* Chao & Neuhoﬀ, *supra* note 17, at 153 (asserting that the merits of a claim will not be reconsidered when enforcing a foreign judgment).

38. *Gorman*, 769 N.Y.S.2d at 370, 373.

39. *Id.* at 372–74 (stating the holding in *Ackermann v. Levine*, 788 F.2d 830, 842 n.12 (2d Cir. 1986) and quoting *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co., Inc.*, 299 A.D.2d 47, 49 (3d Dep’t 2002)).

40. *Gorman*, 769 N.Y.S.2d at 373–74.

41. *Id.* at 373; *see also* C.P.L.R. 5304(a)(1).

42. *Gorman*, 769 N.Y.S.2d at 373 (referring to *Wimmer Canada* as an example).

43. *Gorman*, 769 N.Y.S.2d at 373 (quoting *Clarkson Co. Ltd. v. Shaheen*, 544 F.2d 624, 630 (2d Cir. 1976)).

44. *Id.* *See* C.P.L.R. 5304(a)(2) (providing that a “foreign judgment is not conclusive if” . . . “the foreign court did not have personal jurisdiction over the defendant”).

satisfy the court.⁴⁵ The court analyzed cases where other states' judgments had been brought for enforcement in the New York courts.⁴⁶ In those cases, there were affidavits or other evidence of service of process that established personal jurisdiction in those courts.⁴⁷ The court also discussed *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co., Inc.*,⁴⁸ a New York case where a Canadian judgment was enforced.⁴⁹ In that case, the court said that the proponent had the burden of showing that the mandatory non-recognition grounds did not exist.⁵⁰ The *Gorman* court concluded that case law imposes the requirement that in a motion for summary judgment made on default, the proponent bears the burden of making a prima facie case of the foreign court's personal jurisdiction.⁵¹ In this case, the motion lacked any evidence as to the manner in which service of process had been executed.⁵² There was no support for the Canadian court's personal jurisdiction besides the plaintiff's conclusory statements that personal service had been effectuated and that jurisdiction was proper.⁵³ The court refused to enforce the foreign judgment without a clear showing that the other forum had obtained personal jurisdiction over the defendant.⁵⁴ It rejected the idea of limiting itself to being nothing more than a "rubber stamp" for foreign judgments, even if this meant having to place a heavier burden on its dockets.⁵⁵

IV. Conclusion

A decision contrary to *Gorman* would render the court nothing more than a mere passive conduit for foreign judgments. A clear showing that the proponent has met the statutory requirements of C.P.L.R. 5304 is sound public policy. It would not be good policy to allow foreign plaintiffs to come to New York and enforce judgments without support for the requisite personal jurisdiction in the foreign forum solely in the name of judicial economy. The attainment of judicial economy should never be placed ahead of the court's duty of judicial integrity. This decision does not overburden the proponent nor does it undermine the enforcement of foreign judgments. It only requires the party seeking enforcement of the foreign judgment to put forth enough evidence to demonstrate that personal jurisdiction has been obtained in the foreign court. This can be accomplished by merely attaching an affidavit of service of process to

45. *Gorman*, 769 N.Y.S.2d at 374.

46. *Id.* (discussing *Dominican Sisters of Ontario, Inc. v. Dunn*, 272 A.D.2d 367, 707 N.Y.S.2d 215 (2d Dep't 2000) and *Desilets v. Desilets*, 262 A.D.2d 482, 483, 691 N.Y.S.2d 318 (2d Dep't 1999) (where the court found proper personal jurisdiction in out-of-state actions)).

47. *Gorman*, 769 N.Y.S.2d at 374.

48. *Id.*

49. *See Wimmer Canada*, 299 A.D.2d 47 (action where enforcement of a Canadian judgment was found to be proper).

50. *Id.* at 49.

51. *Gorman*, 769 N.Y.S.2d at 373-74.

52. *Id.* at 374.

53. *Id.*

54. *Id.* at 375.

55. *Id.* at 375.

the motion for summary judgment in lieu of complaint. The decision in this case is sound even though it may incidentally place a heavier burden on the New York courts. It is properly grounded in statutes and case law, as supported by the court's analysis, and has the dual effect of preserving the role of the court in enforcing foreign judgments as well as protecting the rights of absent parties.

Cristina Buitron

Aerovias Nacionales de Colombia S.A. Avianca and Avianca, Inc.

303 B.R. 1 (Bankr. S.D.N.Y. 2003)

A foreign company may file under Chapter 11 of the Bankruptcy Code without filing a parallel proceeding in its home country, where sections 305(a)(1), 305(a)(2), 304(c), and 1112(b) did not warrant dismissal or suspension of Debtors' petition under Chapter 11.

In *Aerovias Nacionales de Colombia S.A. Avianca and Avianca, Inc.*, the United States Bankruptcy Court for the Southern District of New York held that Debtor, a Colombian company, and its American subsidiary were permitted to file Chapter 11 petitions pursuant to the Bankruptcy Code.¹ Movants' motions to dismiss the Chapter 11 cases and to require filing in Colombia instead were denied.²

Debtor, Aerovias Nacionales de Colombia S.A. Avianca ("Avianca") is the leading airline of the Republic of Colombia.³ Avianca, a publicly traded corporation, is organized in accordance with Colombian law.⁴ It maintains administrative offices in Bogota, Colombia, and the United States.⁵ Avianca provides passenger and cargo flights within Colombia and internationally.⁶ At the time of its petition for bankruptcy, Avianca flew to fourteen locations in Colombia and twelve locations in other countries, including flying from two hubs in Bogota, Colombia, to Miami and New York City.⁷

Avianca's fellow debtor is its wholly-owned subsidiary, Avianca, Inc. ("Avianca, Inc.").⁸ Avianca, Inc. is organized under the laws of New York,⁹ and has its principal place of business in Miami, Florida.¹⁰ Avianca, Inc. serves as Avianca's agent within the United States, pursuant to a general agency agreement.¹¹ The agreement provides that Avianca, Inc. perform the services necessary for Avianca to operate an international commercial airline in the United States, including marketing and selling airline tickets, leasing facilities and purchasing supplies and parts.¹²

1. *Aerovias Nacionales De Colombia S.A. Avianca and Avianca, Inc.*, 303 B.R. 1, 47 (Bankr. S.D.N.Y. 2003) (hereinafter "*Avianca*").

2. *Id.*

3. *Id.* at 3.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 4.

11. *Id.*

12. *Id.*

In late 1999, in response to financial and operational difficulties, Avianca implemented several cost-cutting measures.¹³ Due to continued struggles, by early 2001, Avianca restructured with principal lessors and sold the right, title, and interest in its U.S. credit card receivables to the Bank of New York (B.O.N.Y.),¹⁴ which previously issued the notes under a Master Trust Agreement.¹⁵

In 2002, Avianca also executed an "integration" agreement with a Colombian commercial airline, Aerolineas Centrales de Colombia, SA Aces ("Aces"). The integration included the transfer of capital stock and operational synergies, including plane, route, and code-sharing agreements.¹⁶ Avianca and Aces also entered an alliance with Sociedad Aeronautica de Medellin Consolidad S.A. ("S.A.M."), whereby the three airlines sought to increase efficiency by integrating several management and administrative functions.¹⁷

Despite these measures, Avianca's financial situation declined, causing the corporation to file for Chapter 11 relief with the United States Bankruptcy Court of the Southern District of New York on March 21, 2003.¹⁸ At that time, secured creditors consisted of noteholders, totaling \$20,727,000,¹⁹ and Avianca's employees, whose debts consisted of pension obligations approximating \$98,229,000, secured in a form of trust in Colombia.²⁰ Additionally, Avianca owed unsecured creditors around the world who provided many different services and goods.²¹

At the start of the Chapter 11 case, Avianca obtained several "first-day orders," whereby the court approved payments to creditors of up to \$35.7 million, although the corporation did not expend the total amount.²² In these orders, Avianca was granted the authority to honor prepetition airline tickets and other agreements related to the airline's lifeblood.²³ Avianca was also permitted to pay foreign creditors who may have been able to take action against the corporation if Avianca had filed in a jurisdiction other than the United States.²⁴ However, in these motions, Avianca sought permission to pay only the prepetition claims of vendors and service providers in locations other than the United States and Colombia.²⁵ Avianca also filed motions seeking court permission to make payments to creditors in Colombia.²⁶

13. *Avianca*, 303 B.R. at 4.

14. *Id.* at 5.

15. *Id.* at 4.

16. *Id.* at 5.

17. *Id.* at 6.

18. *Id.* at 3.

19. *Id.* at 7.

20. *Id.*

21. *Id.*

22. *Id.* at 6, 10.

23. *Id.* at 6.

24. *Id.*

25. *Id.*

26. *Id.* at 11.

On March 28, 2003, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee"), consisting of seven members.²⁷ One member, Pegasus Aviation, Inc., filed an Emergency Motion to Dismiss the Debtors' Chapter 11 cases on April 11, 2003, while Ansett Worldwide filed a similar motion a few days later.²⁸ United Aerospace filed a separate pleading joining in the motions.²⁹ Debtors settled with Pegasus and Ansett, who subsequently withdrew their motions, but United Aerospace pursued its motion to dismiss the Debtors' Chapter 11 cases.³⁰

At the time its motion to dismiss was filed, creditors in both the United States and Colombia held a large amount of debt.³¹ The Debtors owed \$290,000,000 to aircraft lessors located primarily in the United States, as well as \$15,000,000 to other creditors in the United States.³² Additionally, the Debtors owed \$115,000,000 to Colombian creditors, consisting mainly of tax and employee pension obligations.³³ Lastly, creditors not located in the United States or Colombia were owed \$12,000,000.³⁴

Movants,³⁵ including United Aerospace, argued that the Debtors engaged in forum shopping by selecting the Southern District of New York to file their petition for bankruptcy.³⁶ Consequently, Movants sought dismissal pursuant to section 305 of the Bankruptcy Code,³⁷ alleging that it was not in the "best interests" of the Debtors or their creditors for this case to proceed in the United States, and that the court should compel Avianca to file in Colombia.³⁸ Movants contended that Avianca's choice to file in the United States created delay and uncer-

27. *Avianca*, 303 B.R. at 7 (noting that the Official Committee of Unsecured Creditors consisted of the pension fund and largest Colombian creditor CAXDAC, the pilot's union, the Banco de Bogota, Pegasus and Debis aircraft lessors, United Aerospace Corp. Inc. ("United Aerospace"), and an aircraft mechanical parts vendor).

28. *Id.* at 13.

29. *Id.*

30. *Id.* at 14.

31. *Id.* at 7-8 (noting that although debate existed as to the exact amount of debts, creditors held substantial debt in the United States and Colombia, the Colombian debt entailing fixed debt, the U.S. debt, etc. Colombian creditors likely held more fixed debt, while creditors in the United States would have held more debt provided that the aircraft leases were rejected and damages paid.).

32. *Id.* at 7 (recognizing that \$9,500,000 of the \$15,000,000 was an obligation of Avianca, Inc.).

33. *Id.*

34. *Id.*

35. *Id.* at 13, 15 (recognizing that in addition to Movant, United Aerospace, several small U.S. vendor creditors filed identical brief statements of support, namely Soundair, Inc., Med-Air, Inc., Med-Craft Inc., Associated Sales International, and EADS Sogerma Barfield, Inc.).

36. *Id.* at 15.

37. U.S. Bankruptcy Code § 305(a) (hereinafter "Bankr. Code") provides that:

the interests of creditors and the debtor would be better served by such dismissal or suspension;
or

(A) there is a pending foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

38. Aerovias Nacionales De Colombia S.A. *Avianca and Avianca, Inc.*, 303 B.R. 1, 15 (Bankr. S.D.N.Y. 2003).

tainty for all creditors, particularly U.S. creditors, demonstrated bad faith, and facilitated depletion by foreign creditors of the Debtors' assets.³⁹ Additionally, Movants contended that, contrary to the requirements of section 1112(b) of the Bankruptcy Code,⁴⁰ the Debtors would be unable to confirm the existence of an effective reorganization plan, because the majority of creditors were not subject to the jurisdiction of the Southern District of New York, and the Debtors had failed to begin a parallel proceeding in Colombia.⁴¹ Therefore, Movants sought dismissal of Avianca's case and an instruction that Avianca file a claim under Colombia's reorganization law, Law 550 of 1999 ("Law 550").⁴²

First, the court determined that Avianca was permitted to file under Chapter 11, because the corporation's bank account containing a few thousand dollars and the unearned portions of retainers paid to local attorneys constituted property under section 109(a) of the Bankruptcy Code.⁴³ The "property" requirement in regard to foreign corporations can be satisfied by a minimal amount of property located in the United States.⁴⁴

Next, the court discounted Movants' argument, based on section 305(a), concluding that the interests of creditors and Debtors would be better served by dismissal or suspension of Debtors' case.⁴⁵ Utilizing the test under section 305(a) that both creditors and Debtors interests must be "better served"⁴⁶ to warrant dismissal,⁴⁷ the court noted Avianca's demonstration that it would not be better served by dismissal or suspension.⁴⁸ Avianca showed that there was no indication that it could have obtained jurisdiction over its major financial creditors and lessors.⁴⁹ The Colombian equivalent of Chapter 11, Law 550 would not have provided jurisdiction or a way for Avianca to renegotiate its burdensome leases.⁵⁰ Furthermore, Avianca's filing

39. *Id.*

40. Bankr. Code § 1112(b), which provides in pertinent part that a Chapter 11 case may be converted into a liquidation or dismissed under Chapter 7 "for cause, including

continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

inability to effectuate a plan;

unreasonable delay by the debtor that is prejudicial to creditors. . . ."

41. *Avianca*, 303 B.R. at 16.

42. *Id.*

43. Bankr. Code § 109(a) allows a Chapter 11 filing by a person "that resides or has a domicile, a place of business, or property in the United States, or a municipality. . . ."

44. *In re Global Ocean Carriers Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000).

45. *Avianca*, 303 B.R. at 20–21.

46. *Eastman v. Eastman*, 188 B.R. 621, 624–25 (B.A.P. 9th Cir. 1995) (noting that the test under section 305(a)(1) is whether "both the 'creditors and the debtor' would be 'better served' by a dismissal").

47. *Avianca*, 303 B.R. at 21.

48. *Id.*

49. *Id.*

50. *Id.* at 22 (stating that Law 550 is relatively new and untested; it contains no provision whereby debtors may reject a burdensome lease, but Avianca's witnesses indicated that it was in default on most leases, that it could not assume payments nonetheless, and therefore needed to renegotiate or reject its leases).

under Chapter 11 appeared favorable to most of its creditors.⁵¹ Colombian creditors did not exploit the Chapter 11 process, while at the same time, Avianca already sought permission to pay both foreign creditors and small creditors whose claims were below \$7,000.⁵²

Avianca's claim also did not warrant dismissal or suspension under section 305(a)(2)(A), because no foreign proceeding was pending. The court also distinguished authorities⁵³ relied on by Movants on the basis that in those cases a dismissal or suspension was warranted under section 305(a)(2)(A), because a foreign proceeding had been commenced and the proceedings were entitled to recognition under section 305(a)(2)(B).⁵⁴ In contrast to Avianca's claim before the court, the cases warranting dismissal involved facts that called into question whether any proceeding in the United States would be appropriate.

Additionally, it would have been unwarranted to require Avianca to file a proceeding in Colombia or to presume that the proceeding would warrant suspension or dismissal due to the factors in section 304(c),⁵⁵ as referenced in section 305(a)(2)(A).⁵⁶ The court's analysis of these factors supported maintenance of Avianca's case in the United States. The court noted that Avianca maintained assets and property in the United States including contracts, aircrafts, and accounts receivables.⁵⁷ Furthermore, the power of the court to exercise jurisdiction over creditors and the willingness of Avianca's creditors to partake in the proceedings supported filing in the United States.⁵⁸ Moreover, Avianca was not trying to manipulate its place of filing or evade

51. *Id.* at 23.

52. *Id.* at 24.

53. *Id.* at 26 (noting Movants rely in particular on *In re Spanish Cay Co., Ltd.*, 161 B.R. 715 (Bankr. S.D. Fla. 1993)).

54. *Id.* at 27.

55. Bankr. Code § 304(c) provides that: "In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

just treatment of all holders of claims against or interests in such estate;

protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

prevention of preferential or fraudulent dispositions of property of such estate;

distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

comity; and

if appropriate, the provision of an opportunity for a fresh start for the individual that such proceeding concerns.

56. *Aerovías Nacionales De Colombia S.A. Avianca and Avianca, Inc.*, 303 B.R. 1, 29 (Bankr. S.D.N.Y. 2003).

57. *Id.* (listing Avianca's assets to include an aircraft that flies daily to the United States, significant U.S. credit card receivables, and most notably, contract rights, including aircraft leases, the rights to use airport facilities, and other types of airline agreements).

58. *Id.* at 31–32.

its creditors.⁵⁹ Lastly, the court found that Movant United Aerospace would not be unfairly prejudiced by the application of U.S. bankruptcy principles.⁶⁰

The court saw no reason to assume that the Debtors would be prevented from implementing a reorganization plan, and thus section 1112(b) of the Bankruptcy Code did not provide a basis for dismissal of Avianca's claim.⁶¹ Movants' argument that Avianca would be precluded from implementing a plan by Colombian creditors who could restrict its reorganization efforts to the detriment of U.S. creditors was not persuasive.⁶² The court reiterated that it would not adopt a rule requiring a foreign debtor to maintain a parallel proceeding in its home country, but that the court was also not preventing Avianca from filing Law 550, Colombia's Chapter 11 equivalent.⁶³

Lastly, the court dismissed Movants' argument that the Chapter 11 petition should be dismissed because Avianca's "center of main activities" is located in Colombia.⁶⁴ The court rejected the use of a principal place of business or "center of main interests" test to require filing in one jurisdiction.⁶⁵ Instead, it noted that while courts generally give deference to the "center of gravity" of multiple proceedings, a court may proceed jointly with a foreign court or authorize full jurisdiction itself where appropriate.⁶⁶

The court's ruling expands the instances where corporations may file under Chapter 11 in the United States without a parallel foreign proceeding, thereby taking advantage of U.S. law despite the negative implications to creditors. In this instance, Colombian law protects the sale of future receivables, such as Avianca's future ticket sales, whereas United States' law grants Avianca relief from its creditors, including bondholders.⁶⁷ As a result of applying U.S. law, Avianca's ticket receivables transaction defaulted, the first ever default from the future flow asset category.⁶⁸ The interests in the United States Bankruptcy Court for the Southern District of New York can be seen through the \$290,000,000 owed to aircraft lessors, located primarily in the United States. However, the ruling will likely open the door to further corporate reorganizations in the United States by foreign corporations, in order to utilize United States law.

Tim Lyster

59. *Avianca*, 303 B.R. at 33.

60. *Id.* at 35.

61. *Id.* at 45.

62. *Id.* at 42.

63. *Id.* at 43.

64. *Id.* at 45.

65. *In re Maxwell Communications Corp.*, 93 MICH. L. REV. 2276 (2000).

66. *Aerovias Nacionales De Colombia S.A. Avianca and Avianca, Inc.*, 303 B.R. 1, 46 (Bankr. S.D.N.Y. 2003).

67. Chris Moore, *Future Flows Under Threat from the U.S. Court: Avianca Airlines is challenging its future flow ABS in U.S. Bankruptcy Court*, STRUCTURED FINANCE INTERNATIONAL, p. 64 (May 1, 2003).

68. *Latin American Structured Fin 2003 Yr. in Review & Outlook*, FITCH RATINGS, (Feb. 9, 2004).

Weiss v. La Suisse, Société D'Assurances Sur La Vie

293 F. Supp. 2d 397 (S.D.N.Y. Nov. 25, 2003)

The motions in this case¹ dealt with contract claims and matters of evidence.² The court held that Swiss substantive law governed the construction and effect of the insurance policies in dispute.³

I. Facts and Procedural Posture

The plaintiffs are members of the Orthodox and Chassidic communities of New York City and surrounding areas.⁴ In the late 1990s, plaintiffs purchased a multitude of life insurance policies from the defendant, La Suisse Life Insurance Company.⁵ Unlike generic policies, however, these insurance plans allowed for the face amount of the policy to be paid to the beneficiaries either (1) upon the insured's death or (2) if the beneficiary married before the contract term expired.⁶ The term of the contract continued for approximately 15 years after its purchase.⁷ The plaintiffs invested in these policies primarily to generate income for payment of wedding expenses.⁸ Defendant calculated the insurance premiums for these plans after analyzing the marriage statistics of Swiss and Israeli populations;⁹ however, whereas statistics demonstrated that those groups married in their mid-20s,¹⁰ the Orthodox and Chassidic custom is to marry at an earlier age, generally 18 or 19.¹¹ Thus, after La Suisse realized that these insurance plans were consistently being cashed out at a rate that effected a loss for the company,¹² it allegedly began to stall payments, require proof of marriage and avoid payment on claims.¹³

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1. 293 F. Supp. 2d 397, 400 (S.D.N.Y. 2003); 260 F. Supp. 2d 449 (S.D.N.Y. 2003); 161 F. Supp. 2d 305 (S.D.N.Y. 2001); 154 F. Supp. 2d 734 (S.D.N.Y. 2001); 131 F. Supp. 2d 44 (S.D.N.Y. 2001); 60 F. Supp. 2d 449 (S.D.N.Y. 1999).
 2. 293 F. Supp. 2d at 400.
 3. *Id.* at 400–01.
 4. 161 F. Supp. 2d 305, 306 (S.D.N.Y. 2001). *See also Court Dismisses Swiss Insurance Company's Counter Claim as Time-Barred by Swiss Law*, N.Y.L.J., 17 (Oct. 18, 2001) (detailing the facts which spawned this dispute).
 5. 161 F. Supp. 2d 305, 306 (S.D.N.Y. 2001).
 6. *Id.* at 307.
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. *Id.*; Emma D. Sapong, *Steeped in Tradition; Centuries of Symbolism Combine in The Orthodox Chassidic Jewish Wedding of Today*, BUFFALO NEWS, D1 (May 25, 2002) (detailing the customs and importance of marriage within the Chassidic community).
 11. 161 F. Supp. 2d 305, 306 (S.D.N.Y. 2001).
 12. *Id.* at 307.
 13. *Id.*

Plaintiffs brought suit against defendant in 1999 alleging breach of contract and religious discrimination under 42 U.S.C. § 1981.¹⁴ Defendant counterclaimed for fraud,¹⁵ alleging that the U.S. brokers committed fraud by marketing the policy, although aware of La Suisse's miscalculation.¹⁶ Further, La Suisse claimed this fraud should be imputed to the plaintiffs.¹⁷

After a series of judicial decisions,¹⁸ the only issues that remain for trial are "1) Plaintiffs' contract claims and 2) on their discrimination claim, their allegation that La Suisse's proffered non-discriminatory reason for its action—i.e., that the policies were not profitable—is a pretext."¹⁹ The latest installment of this action brings forward a multitude of motions *in limine*,²⁰ as the parties prepare for what many hope to be the concluding chapter of this dispute.

II. Preliminary Question of Proper Choice of Law

Confronted with a string of motions which required decision before this dispute could be finally tried and concluded,²¹ the court, once again, was faced with plaintiffs' contention that New York law should govern the analysis of these policies.²² The insurance policies, however, specifically provided that Swiss law would govern these contracts.²³ Plaintiffs' experts argued that Swiss law treats insurance policies as consumer contracts and therefore mandates that courts apply the law of the consumer's "habitual residence."²⁴ The court, however, rejected this argument and found that this provision was not one of Swiss substantive law.²⁵ As is the rule in diversity actions, while the substantive law may be foreign, domestic law governs procedure, including conflicts analysis.²⁶ Further, the Supreme Court has held that "choice of law provision . . . may reasonably be read as merely a substitute for the conflicts-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual rela-

14. See *Weiss v. La Suisse*, 69 F. Supp. 2d 449 (S.D.N.Y. 1999).

15. *Id.*

16. *Weiss v. La Suisse*, 161 F. Supp. 2d 305, 307 (S.D.N.Y. Sept. 14, 2001).

17. *Id.*

18. *Weiss v. La Suisse*, 293 F. Supp. 2d 397, 400 (S.D.N.Y. Nov. 25, 2003)

19. *Id.* at 408.

20. *Id.* at 400.

21. *Id.*

22. *Id.* at 401 (responding to defendant's motion *in limine*, plaintiffs renewed their prior claim that New York law should govern this action); see also *Weiss v. La Suisse*, 154 F. Supp. 2d 734 (S.D.N.Y. 2001) (holding that Swiss law, as provided for in the insurance policies, governed this action).

23. *Weiss v. La Suisse*, 293 F. Supp. 2d 397, 402 (S.D.N.Y. Nov. 25, 2003).

24. *Id.*

25. *Id.* ("However, according to Plaintiff's own experts, Art. 120 of the 1987 Act is a conflicts of law provision under Swiss law, not a rule of substantive law").

26. *Id.* (noting that New York courts are governed by New York conflicts law rather than foreign interpretations) (citing *Anderson v. SAM Airlines*, 939 F. Supp. 167, 175 (E.D.N.Y. 1996)).

tionship.”²⁷ The court found that the “policies, their construction and effect are governed by Swiss law.”²⁸

III. Defendant’s Motions

Defendant’s first motion sought summary judgment on the grounds that Swiss law warrants judgment in its favor.²⁹ The court denied this motion because it was not sought in a timely fashion.³⁰ Additionally, its motion to “exclude all evidence relating to the contract claims” had to be denied for the same reasons.³¹

La Suisse then moved *in limine* to exclude all evidence regarding alleged preferential treatment of non-minority policyholders.³² The court granted in part and denied in part this motion.³³ This court had previously noted that the plaintiffs failed to proffer any evidence that the defendants had discriminated against them.³⁴ Therefore, defendants sought to preclude any evidence that might be interpreted as discrimination against the Orthodox or Chassidic Jewish population.³⁵ The court noted that the exclusion of all evidence is a weighty decision and should be implemented only when “such evidence is clearly inadmissible on all possible grounds.”³⁶ Thus, the court compromised by noting that plaintiffs would not be allowed to introduce evidence that might make the inference of discrimination, nor “will they be allowed to make comparative statements in their opening or summation in an effort to demonstrate that La Suisse discriminated against them.”³⁷ The court explained that, since plaintiffs had failed to bring forward this evidence when defendants made the motion for summary judgment,³⁸ they forfeited their ability to prove this theory at trial.³⁹

Defendant next moved to establish that if the plaintiffs were awarded damages, they should be converted from Swiss francs to U.S. dollars at the rate of exchange on the date of

27. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (holding that a choice of law provision within a contract governs only substantive law).

28. *Weiss v. La Suisse*, 293 F. Supp. 2d 397, 402.

29. *Id.* at 403.

30. *Id.* (finding that the proper time for such a motion expired in 2001).

31. *Id.* (holding that a motion to exclude all evidence regarding the contract claims would effectuate a dismissal of those claims and this was already found untimely in this instance). As this court noted in *TVT Records, et al. v. Island Def Jam Music Group, et al.*, 250 F. Supp. 2d 341, 344–345 (S.D.N.Y. 2003), *in limine* motions are not the “appropriate vehicle for effecting dismissal.” *Id.*

32. *Weiss v. La Suisse*, 293 F. Supp. 2d 397, 407 (S.D.N.Y. Nov. 25, 2003).

33. *Id.* (denying the motion since “Defendant’s [request] . . . lacks sufficient specificity.”).

34. *Weiss v. La Suisse*, 260 F. Supp. 2d 644, 654–56 (S.D.N.Y. 2003).

35. *Weiss v. La Suisse*, 293 F. Supp. 2d 397, 407 (S.D.N.Y. Nov. 25, 2003).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

judgment.⁴⁰ The court granted this motion.⁴¹ As this is a question of procedure, a court sitting in diversity should apply the conversion laws of its own domestic jurisdiction.⁴² Since New York has adopted the “judgment day” rule, conversion on the date of judgment was determined proper.⁴³

La Suisse then moved to preclude one of the plaintiffs’ witnesses from testifying on the grounds that he had failed to comply with a subpoena issued in one of the earlier proceedings.⁴⁴ The court granted this motion,⁴⁵ although it noted that this was a harsh sanction.⁴⁶ La Suisse also attempted to preclude a group of seven witnesses the plaintiff wished to call.⁴⁷ However, the court distinguished these witnesses since they were unknown and unidentified when previously deposed.⁴⁸ After considering several factors, the court found that judicial fairness “cut in favor of allowing the testimony.”⁴⁹

The court denied defendants motion to exclude introduction of “evidence about the administrative rule changes for brokers handling marriage policies.”⁵⁰ However, the court once again instructed the plaintiffs to refrain from attempting to admit such evidence as a means of showing any inferences of discrimination by the defendants.⁵¹

The next point of analysis was La Suisse’s motion to exclude parol evidence of the “availability of pro-rata premium refunds.”⁵² The motion was granted.⁵³ The court concluded that

40. *Id.*

41. *Id.*

42. *Id.* (citing *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 865 (2d Cir. 1981)).

43. *Id.* at 409. See N.Y. Judiciary Rule § 27(b) (McKinney 2001), which states:

In any case in which the cause of action is based upon an obligation denominated in a currency other than the currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree.

44. *Id.* at 410.

45. *Id.*

46. *Id.* See also F.R.C.P. 37(b)(2)(B) (authorizes courts to sanction parties who have failed to adhere to court orders).

47. 293 F. Supp. 2d 397, 413 (S.D.N.Y. Nov. 25, 2003).

48. *Id.*

49. *Id.* (listing the relevant factors in analyzing whether to preclude witnesses in the following manner: “(1) the party’s explanation for failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance”).

50. *Id.* at 411.

51. *Id.*

52. *Id.*

53. *Id.*

under Swiss law, such extrinsic evidence is never admitted,⁵⁴ and this comports with New York.⁵⁵

The court reserved judgment on defendant's motion to preclude evidence regarding their reinsurance policy.⁵⁶ Although Rule 411 of the Federal Rules of Evidence precludes evidence of insurance, this is generally prescribed in cases involving claims of negligence.⁵⁷ The rule does not act as a complete bar.⁵⁸ As the court mentioned, the reinsurance may later become relevant depending upon the different defense theories La Suisse offers.⁵⁹ Thus, it reserved judgment on the matter until trial.⁶⁰

Finally, the court granted La Suisse's motion to exclude evidence of "Operation Tell," on the grounds that the information is "irrelevant, misleading and highly prejudicial."⁶¹

IV. Plaintiffs' Motions

Plaintiffs' first motion sought to exclude any evidence regarding a previous counterclaim brought by La Suisse.⁶² In the prior proceeding, La Suisse's claim of fraud by the plaintiffs was dismissed by this court.⁶³ Recognizing the possible prejudice which may occur, the court precluded La Suisse from any attempts to "imply that Plaintiffs defrauded La Suisse."⁶⁴ The court, however, did note that if fraud was relevant and necessary to establish La Suisse's defense, such evidence may be admitted.⁶⁵ For example, La Suisse may need to establish that its actions were rooted in a belief that fraud had taken place.⁶⁶

Plaintiffs next moved to preclude La Suisse from offering any evidence "related to monetary loss on its marriage portfolio on the grounds that such evidence was not produced in discovery."⁶⁷ They argued that, since defendants had previously denied the existence of such materials, they were now barred from presenting any such documents.⁶⁸ Defendants countered

54. *Id.*

55. *Id.* (citing *Municipal Capital Appreciation Partners, I, L.P. v. Page*, 181 F. Supp. 2d 379, 392 (S.D.N.Y. 2002)).

56. *Id.* at 413.

57. *Id.* See generally Fed. R. Evid. 411.

58. Fed. R. Evid. 411.

59. 293 F. Supp. 2d 397, 413 (S.D.N.Y. Nov. 25, 2003).

60. *Id.*

61. *Id.* See generally Fed. R. Evid. 401–3. Operation Tell was the code name used by La Suisse's parent company for a highly confidential plan to demutualize the company on offer shares on Swiss stock exchanges.

62. *Weiss v. La Suisse* 161 F. Supp. 2d 305 (S.D.N.Y. 2001).

63. *Weiss v. La Suisse* 293 F. Supp. 2d 397, 409 (S.D.N.Y. Nov. 25, 2003).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

this statement by arguing that the information was available to both sides in various exhibits and could be calculated easily.⁶⁹ Additionally, the plaintiffs chose not to depose defendant's witness, although his upcoming testimony, offering projections of the policies' losses, was readily identified in the discovery materials.⁷⁰ The court agreed with La Suisse's interpretation in this regard, and denied plaintiffs' motion to exclude.⁷¹

V. Conclusion

The court has correctly interpreted the plethora of case law and statutes which govern this diversity action. Applying Swiss substantive and New York procedural law, the federal court in the Southern District of New York has prepared this action for a much-needed and overdue conclusion.

Jessica Giambrone

69. *Id.* at 410.

70. *Id.* ("Evidence regarding La Suisse's projected losses had been readily available to Plaintiffs and the fact that Defendant did not have a profit and loss statement specifically for marriage policies, . . . does not preclude them from offering evidence regarding projections").

71. *Id.*

In re United Pan-Europe Communications N.V.

2004 U.S. Dist. LEXIS 223 (S.D.N.Y. Jan. 9, 2004)

The United States District Court affirmed with costs a final order of the United States Bankruptcy Court authorizing a foreign communications network as debtor in a Chapter 11 action to reject a contract agreement that it had entered into with a British broadcasting company. The court declined the application of the doctrine of international comity on the grounds that no “true conflict” existed between American and Dutch law.

In *In re United Pan Europe Communications N.V.*,¹ Southern District Judge Denny Chin, writing the opinion for the court, affirmed a final order of the United States Bankruptcy Court permitting the rejection of a contract by one of the two European parties, United Pan-Europe Communication, N.V. (UPC), that entered into the agreement.² Judge Chin dismissed Europe Movieco Partners Limited’s (“Movieco”) argument that the rejection should have been denied because of the principle of international comity.³ The court determined that the doctrine of international comity is not applicable since the differences in the ways courts reach the same practical conclusions are not considered “true conflicts” for the purposes of comity.⁴ The case further presents an interesting holding by finding that a court-authorized rejection of a contract is merely a breach.⁵

I. Parties

a. Appellant

Movieco, the appellant in this case, is an English limited liability company that operates and broadcasts two movie channels in Europe.⁶ The company’s sole office is located in London, and that city is also the principal place of business for the company.⁷ The two channels, Cinenova and Cinenova 2, are broadcast via satellite from England to European subscribers.⁸ In addition, the company lacks any connection to the United States with regard to any aspect of its business.

1. 2004 U.S. Dist. LEXIS 223.

2. *Id.* at *13.

3. *Id.* at *9–10.

4. *Id.* at *9.

5. *Id.* at *4–5.

6. *Id.* at *2.

7. *Id.*

8. *Id.*

b. Appellee

UPC, the appellee-debtor in this case, is a Netherlands-based cable company that is one of Europe's largest cable TV groups.⁹ The company's principal place of business is in Amsterdam but its principal assets are located in the United States.¹⁰ UPC also provides services for residential and commercial customers in 11 European countries.¹¹

II. Facts and Procedural Posture

In December 1999, Movieco entered into a seven-year licensing agreement with UPC in which Movieco agreed to provide UPC with the Cinenova movie channel in exchange for UPC's paying a monthly fee to distribute the channel to its cable subscribers in the Netherlands and Belgium.¹² The written agreement stipulated that the contract would be controlled by the laws of England and that any disagreement that arose would be subject to arbitration in Amsterdam under the laws of the International Chamber of Commerce.¹³

By 2002, UPC was faced with significant financial difficulties and sought to restructure the corporation as a solution to counter these operating losses.¹⁴ The capital restructuring was accomplished through an informal committee meeting of the corporation's noteholders and counsel, who are all based in New York, and the major shareholder and largest noteholder, UnitedGlobalCom, also located in the United States in Denver, Colorado.¹⁵ A final restructuring plan was created and executed.¹⁶ The restructuring plan proposed the filing of bankruptcy in the United States and the Netherlands and both proceedings were initiated.¹⁷ This appeal addresses the voluntary Chapter 11 bankruptcy petition that UPC filed in the United States.¹⁸

In conjunction with the Chapter 11 petition, UPC made a motion based on 11 U.S.C.S. § 365(a) of the U.S. Bankruptcy Code for an order to reject the 1999 agreement with Movieco.¹⁹ Section 365 provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."²⁰ Movieco opposed the section

9. *Well Soaped Observer Column*, FIN. TIMES, Sept. 4, 2003, at 12 (noting that UPC is Europe's largest cable company).

10. *In re United Pan-Europe Communications N.V.*, 2004 U.S. Dist. LEXIS 223 at *1-2.

11. *Europe Movieco Partners Ltd. v. United Pan-Europe Communications N.V.*, 2003 U.S. Dist. LEXIS 1297 at *2.

12. *In re United Pan Europe Communications N.V.*, 2004 U.S. Dist. LEXIS 223, at *2-3.

13. *Id.* at *3. See www.iccwbo.org (explaining that activities of the International Chamber of Commerce include arbitration and dispute resolution).

14. 2004 U.S. Dist. LEXIS 223, at *2-3.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at *4.

19. *Id.*

20. 11 U.S.C.S. § 365 (2004). See Peter A. Alces & David Frisch, *Commercial Codification as Negotiation*, 32 U.C. DAVIS L. REV. 17, 41 (1998) (discussing how to apply section 365 of the United States Bankruptcy Code).

365 motion on the grounds that it violated the principle of international comity and conflicted with Dutch law.²¹ Bankruptcy Court Judge Lifland addressed these concerns in his holding by noting that the decision was not terminating the contract, but merely referring to it as a breach under Chapter 11.²² The court further acknowledged that since the agreement specified the manner in which disputes would be resolved, all issues should be dealt with according to the terms explicitly stated in the agreement.²³ Movieco's objection to the motion was rejected.²⁴ The Bankruptcy Order deemed the rejection effective as of March 1, 2003, and stated that as of that date UPC is no longer responsible under the agreement in accordance with section 365(a).²⁵ Under section 365 a rejected contract is to be considered breached as of the day before the reorganization petition is filed.²⁶ The rejection operated as a benefit for the debtor, because it is relieved from the burden of performing a contract, while it also operated as a detriment to the creditor, who is diminished to the position of an unsecured inferior claim holder.²⁷

In response to the unfavorable result that Movieco faced in the United States court, it turned to the Dutch court and filed suit against UPC.²⁸ The suit sought specific performance of the original agreement to thwart UPC from abandoning its obligation to distribute the Cineova movie channel and to order them to continue the channel's broadcasts.²⁹ The Dutch court denied the claim, because it deemed Dutch law inapplicable for the enforcement of an agreement containing a choice of law provision designating that disputes would be resolved with English law.³⁰ The Dutch bankruptcy court saw the relief requested by Movieco as outside its jurisdiction, because Dutch law did not govern the contract.³¹ The Dutch court was consistent with the U.S. court's determination. The U.S. court had found that consequences of the United States Bankruptcy Court Order would be determined during arbitration as agreed to in the contract.³²

21. 2004 U.S. Dist. LEXIS 223, at *4.

22. *Id.* at *4–5.

23. *Id.* at *4.

24. *Id.*

25. *Id.* at *5.

26. See Charles B. Craver, *The Impact of Financial Crisis Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 490 (1988) (explaining rejection of a contract under section 365 of the Bankruptcy Code).

27. *Europe Movieco Partners Ltd. v. United Pan-Europe Communications N.V.*, 2003 U.S. Dist. LEXIS 1297 at *4; see Michael Curti, *Recent Decision, Europe Movieco Partners Limited v. United Pan-Europe Communications N.V.*, 16 ST. N.Y. INT'L L. REV. 191, 193 (2000).

28. *In re United Pan-Europe Communications, N.V.*, 2004 U.S. Dist. LEXIS 223 at *5.

29. *Id.*

30. *Id.* at *6 (quoting the Dutch bankruptcy court which said, "In the case at hand, the parties chose to have the Agreement governed by English law and agreed that any disputes arising from the Agreement were to be resolved through arbitration. This is why Article 225 of the [Dutch] Bankruptcy Act cannot be grounds to award the application.").

31. *Id.* (incorporating into the opinion the decision of the Dutch bankruptcy court).

32. *Id.* at *6–7 (acknowledging the Dutch and American courts agreed that the arbitrators were designated to decide the impact of laws of the specific contract).

Movieco was still determined to prevent UPC from ceasing distribution of the channel and instituted another proceeding in the Dutch court, but this time sought to prevent UPC from ceasing to distribute the channel until the arbitrator decided the issue of specific performance.³³ The Dutch court granted this application to maintain the status quo between the companies until an arbitral award was made.³⁴ The present appeal, which the court addressed, is regarding the order of the Bankruptcy Court that authorized UPC to reject the licensing agreement.

III. Discussion

Movieco's arguments centered on the fact that the 2003 Bankruptcy Court Order violated the principle of international comity. Its position was that, since the United States Bankruptcy Order violated Dutch insolvency law, the order was a violation of international comity and therefore the motion for rejection was incorrectly awarded.³⁵ International comity is the principle which maintains that each nation should afford the laws and institutions of another nation courteous respect within its territory or courts in order to promote cooperation, and reciprocity.³⁶ Congress explicitly recognized the importance of the principle of international comity when it revised the Bankruptcy Code.³⁷ Movieco asserted that the United States should have respected the fact that section 365 of the U.S. Bankruptcy Code, which permits rejection of a contract, has no counterpart in Dutch insolvency law.³⁸

In assessing the appellant's argument, the court found that an essential element for applying the principle of international comity is that a conflict in law must exist between the laws of the nations involved.³⁹ Comity doctrine was inappropriate since no "true conflict" existed between the United States Bankruptcy Code and Dutch law.⁴⁰ Comity only applies when dealing with a "true conflict" between American law and a foreign jurisdiction.⁴¹ The court articulated that this necessary element of a "true conflict" was missing in applying international

33. *Id.* at *7.

34. *Id.* at *7.

35. *Id.* at *8–9.

36. See Aylet Ben Exer & Ariel L. Bendor, *The Constitution and Conflict-of-Laws Treaties: Upgrading International Comity*, 29 N.C. J. INT'L L. & COM. REG. 1, 9–10 (2003) (explaining the concept of international comity; see also Owen Peter Martikan, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the Aerospatiale Decision* 68 TEX. L. REV. 1003, 1015–1016 (1990) (stating the principle of international comity and different tests that have been employed to see if it is satisfied).

37. See *In re Maxwell Communication Corp. PLC*, 93 F.3d 1036, 1038 (1996) (announcing the importance of the concept of international comity in bankruptcy law).

38. *In re United Pan-Europe Communications, N.V.*, 2004 U.S. Dist. LEXIS 223 at *8–9.

39. *Id.* at *9 (citing *In re Maxwell Communication Corp. PLC*, 93 F.3d 1036, 1050 (2d Cir. 1996), which said that application of international comity is only warranted when a "true conflict" exists between American and foreign law).

40. See *Maxwell*, 93 F.3d at 1041–42 (noting that comity is improper when there is no "true conflict" present).

41. See *Maxwell*, 93 F.3d at 1049 (detailing that in order for comity to apply there must be a "true conflict" between the American law and foreign law of a case).

comity to the present scenario for the three ensuing reasons.⁴² The general principle of international comity is limited to cases where “there is in fact a true conflict between domestic and foreign law.”⁴³ Only in cases where the preferential law of the foreign or domestic law would produce a different result depending on the law applied is there a “true conflict.”⁴⁴ A “true conflict,” as proposed by one of the earliest champions of the idea, Brainerd Currie, is a situation where both states had an interest in having their laws applied.⁴⁵

The court established that no conflict of law existed between Dutch and American law, because the relevant law for this case is in neither of the two jurisdictions.⁴⁶ The binding agreement explicitly stated that English law would govern interpretation of the agreement when conflicts arose.⁴⁷ The choice-of-law clause for the agreement explicitly stated that English law would govern all disputes and the choice-of-law clause must be strictly obeyed.⁴⁸ The court articulated that there could be no “true conflict” between American and Dutch law.⁴⁹ However, this is invalid because there can be a true conflict between what a Dutch court can order and what an American court can order, but there is not one in this specific case. In addition, both the American and Dutch courts recognized that a clause of the agreement further stated that all disputes would be solved through an arbitration governed by English law.⁵⁰ The court interpreted that the U.S. Bankruptcy Court Order merely permitted a breach of the agreement by UPC but could neither terminate the contract nor enforce the rejection of the contract.⁵¹ Those aspects of the dispute were left to the arbitrators’ application under English law.⁵²

The court also highlighted that the greatest evidence that no “true conflict” existed between Dutch and American law was the first decision of the Dutch court.⁵³ The Dutch court

42. See Varun Gupta, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2296 (1996) (acknowledging that many courts have articulated the “true conflict” approach as to whether to apply international comity); see also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 892–93 (2002) (stating that Brainerd Currie provided some of the most prominent analysis of the “true conflict” concept which he advocated); see also Robert C. Reuland, *Reply to Professor Weintraub*, 29 TEX. INT’L L.J. 431, 431 (1994) (noting that a “true conflict” must be present to apply international comity).

43. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (mentioning that international comity cases are limited to situations where there is “in fact a true conflict between domestic and foreign law”).

44. See *In re Simon*, 153 F.3d 991, 999 (1998) (discussing the *Maxwell* decision, which discussed “true conflict” between American and English law for purposes of comity).

45. See H. Thomas Byron III, *A Conflict of Laws Model for Foreign Branch Deposit Cases*, 58 U. CHI. L. REV. 671, 694 (1991) (clarifying Currie’s recommendations regarding “true conflicts” and “false conflicts”); see also William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 117 (1998) (noting Currie’s role in determining “true conflicts”).

46. *In re United Pan-Europe Communications N.V.*, 2004 U.S. Dist. LEXIS 223, at *9.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at *10.

51. *Id.*

52. *Id.*

53. *Id.*

had concluded, after reviewing the American court order, that the U.S. courts recognized that arbitration was necessary to determine the consequences of the order.⁵⁴ The Dutch court stated that this policy was analogous under Dutch law.⁵⁵ In summation, the Dutch court's denial of Movieco's first application to the Dutch court to prohibit the breach by UPC illustrated that the court saw no "true conflict."⁵⁶ For all the aforementioned reasons, the District Court found there was no "true conflict" to warrant a violation of the principle of international comity by allowing the order.⁵⁷

IV. Additional Appellant Arguments

Movieco asserted two additional arguments to support its position. The first argument was that the second Dutch court ruling, which prevented UPC from stopping distribution, demonstrated a "conflict."⁵⁸ This argument had no merit, because the Dutch court decision precisely stated that the court was not accepting Movieco's legal arguments, but merely attempting to maintain a status quo until arbitration occurred.⁵⁹ The all-encompassing theme again reiterated by the Dutch court was that the real dispute needed to be settled with English law by an arbitrator and not under Dutch law.⁶⁰ The other argument attempted by Movieco was that section 365 of the U.S. Bankruptcy Code was not intended to apply "extra-territorially" and that this type of situation would not apply since there were not enough causes to connect the United States to this dispute.⁶¹ The Bankruptcy Code was not intended to apply extraterritorially because of the lack of congressional intent or potential policy conflicts.⁶² "Extraterritorially" refers to the application of laws beyond the limits of the enacting state, that is, "it is essentially a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties, to establish the norms of conduct applicable to events or persons outside its borders, or to exercise power to compel conduct."⁶³ The U.S. Bankruptcy Code is not being applied to other territories since UPC had assets in the United States, including New York, where the Chapter 11 case was filed. Additionally UPC owned numerous American subsidiaries and had a large portion of its debts and equity in United States interests.⁶⁴ This argument was rejected, because of the close connection that UPC maintained to the United States.⁶⁵ The

54. *Id.*

55. *Id.* at *11.

56. *Id.*

57. *Id.*

58. *Id.* at *12.

59. *Id.*

60. *Id.*

61. *Id.* at *13.

62. See Silvia M. Reichel, Note, *Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 123 (1994) (acknowledging that some United States laws are not meant to apply extraterritorially because of congressional intent or potential policy conflicts).

63. See BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

64. In re United Pan-Europe Communications N.V., 2004 U.S. Dist. LEXIS 223, at *1-2.

65. *Id.*

presumption against extraterritoriality as it presently exists operates whenever a showing of congressional intent to regulate abroad is absent.⁶⁶

V. Conclusion

The District Court decided what appeared to be a clear-cut case based on the evidence presented and arguments made by Movieco. The opinion places significant emphasis on “true conflict” being an essential element of the doctrine of international comity. The absence of this element made it simple for the court to strike down Movieco’s argument. It is important for nations to recognize that while comity is an important concept that should be followed in national courts, in order to apply this doctrine there must be an actual conflict present. The present case clearly had no conflict present, so comity had no place being implemented. The case demonstrates that despite the surface differences in the United States and Dutch bankruptcy laws, there are no comity problems where the practical result is identical. The case illustrates how two different nations can reach the same result even though there may be apparent differences in their laws. The court also contributed to analysis of the Bankruptcy Code by clarifying that section 365 of the code meant that a rejection of a contract is merely a breach and not termination of the contract. The court in this case provided important insight into court-authorized contractual rejection and “true conflict” under international comity.

Erica Dziedzic

66. See Reichel, *supra* note 62, at 123 (stating that there is a presumption against extraterritoriality).

United States v. Savin

349 F.3d 27 (2d Cir. 2003)

This criminal case was remanded to the district court for resentencing consistent with its interpretation of “foreign investment company” under United States federal law, not the law of the victim corporation’s principal place of business or incorporation.

In *United States v. Savin*,¹ defendant-appellee Patrick Savin pleaded guilty to one count of wire fraud² and one count of perjury³ pursuant to a plea agreement. These convictions arose out of Savin’s relationship with Mezzonen, S.A., a tax-exempt private corporation registered, and with its principal place of business, in Luxembourg.⁴ Mezzonen was formed to deal in securities investments, and primarily in high-yield bonds.⁵ Savin was hired by Mezzonen to manage and advise the company on its high-yield securities investments.⁶ Savin manipulated this position and his ownership of Savin Carlson Investment Corp., to defraud Mezzonen out of millions of dollars.⁷

Savin was indicted on conspiracy to commit wire fraud,⁸ wire fraud,⁹ and perjury,¹⁰ but according to the plea agreement (“agreement”) pled guilty only to counts two and three of the indictment.¹¹ Under the agreement, the lesser perjury offense would be disregarded, and the offense level would be calculated accordingly.¹² Overall, the parties were in substantial agreement regarding the offense level but came to a standstill over the applicability of U.S.S.G. § 2F1.1(b)(6)(B).¹³ This provision elevates the offense level by four levels when the offense “affected a financial institution . . . [and] the defendant derived more than \$1,000,000 in gross receipts from the offense.”¹⁴ When applicable, the four-level enhancement results in a substantially more severe sentence. Unable to reach an agreement, the parties agreed “to litigate this issue at sentencing.”¹⁵ At sentencing, the government requested that the four-level U.S.S.G.

1. *United States v. Savin*, 2003 U.S. App. LEXIS 22639 (2d Cir. Nov. 4, 2003) (hereinafter “*Savin*”).

2. 18 U.S.C. § 1343 (2000); 18 U.S.C. § 1346 (2000)

3. 18 U.S.C. § 1623 (2000).

4. *Savin*, 2003 U.S. App. LEXIS 22639, at **4–5.

5. *Id.*

6. *Id.*

7. *Id.*

8. 18 U.S.C. § 1343; 18 U.S.C. § 1346.

9. *Id.*

10. 18 U.S.C. § 1623 (2000).

11. *Savin*, 2003 U.S. App. LEXIS 22639, at **5–7 (2d Cir. Nov. 4, 2003).

12. *Id.* at **5.

13. U.S. Sentencing Guidelines § 2F1.1(b)(6)(B) (1995) (hereinafter “U.S.S.G.”).

14. *Id.*

15. *Savin*, 2003 U.S. App. LEXIS 22639, at **5–7 (citing Letter Agreement between the United States Attorney’s Office for the Southern District of New York and Savin at 3 (Mar. 13, 2002)).

§ 2F1.1(b)(6)(B) enhancement be applied because it contended that Savin's wire fraud offense "affected a financial institution" from which "[Savin] derived more than \$1,000,000 in gross receipts from the offense."¹⁶ An application note¹⁷ to the Guidelines indicated that a financial institution included "any state or foreign . . . investment company" or "any similar entity."¹⁸ The district court did not consider whether the affected entity was "similar"¹⁹ to any of the financial institutions listed in the application note, but based its decision solely on its interpretation of the term "foreign investment company."²⁰ In so doing, the district court found that Mezzonen was not a financial institution as defined under Luxembourg law, the law of Mezzonen's country of registration and principal place of business.²¹ As a result, the district court did not apply the four-level enhancement and sentenced Savin to the bottom end of the sentencing range.²²

On appeal, the government argued that the district court erred in applying Luxembourg law and instead should have interpreted "foreign investment company"²³ under United States federal law.²⁴ In the alternative, the government asserted that enhancement was proper because Savin's offense affected an entity "similar"²⁵ to a foreign investment company. Appellee responded that the district court correctly interpreted the term investment company as defined under Luxembourg law.²⁶ Moreover, Savin contended that the guideline was invalid as applied to investment companies in general, and that the "similar entity"²⁷ language, if applicable here, was unconstitutionally vague as applied.²⁸

In the instant case, the court reviewed the district court's interpretation of the language of Sentencing Guidelines *de novo*.²⁹ The court began its analysis by determining the validity of the Application Note³⁰ defining financial institution.³¹ Application Note 14³² defined a financial institution as:

16. *Savin*, 2003 U.S. App. LEXIS 22639, at **6–7.

17. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14 (1995).

18. *Id.*

19. *Id.*

20. *Savin*, 2003 U.S. App. LEXIS 22639, at **9–10.

21. *Id.*

22. *Id.*

23. U.S.S.G. § 2F1.1(b)(6)(B).

24. *Savin*, 2003 U.S. App. LEXIS 22639, at **3.

25. U.S.S.G. § 2F1.1(b)(6)(B).

26. *Savin*, 2003 U.S. App. LEXIS 22639, at **3–4.

27. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

28. *Savin*, 2003 U.S. App. LEXIS 22639, at **3.

29. *Id.* at **10.

30. *Supra* note 17.

31. *Savin*, 2003 U.S. App. LEXIS 22639, at **13.

32. *Supra* note 17.

any institution described in 18 U.S.C. § 20 . . . any *state or foreign* bank, trust company, credit union, insurance company, *investment company*, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered with the Securities and Exchange Commission; futures commodity Merchants and commodity pool operators registered or required to be registered, with the Commodity Futures Trading Commission; and *any similar entity*, whether or not insured by the federal Government.³³

The court found that none of the financial institutions enumerated in 18 U.S.C. § 20³⁴ explicitly included investment companies.³⁵ This notwithstanding, the court relied upon its recent decision in *United States v. Lauersen*³⁶ in support of its finding that the guideline is nonetheless valid as to investment companies.³⁷ In *Lauersen*,³⁸ this court held that the guideline is valid as applied to affected entities not expressly listed in 18 U.S.C. § 20.³⁹ Because the guideline was valid as applied to investment companies generally, the guideline was also valid to Savin in the case at bar.⁴⁰ As a result of finding the Application Note valid as applied to Savin, the court then turned to the meaning of “foreign investment company”⁴¹ and “any similar entity.”⁴²

In determining the appropriate definition of “foreign investment company”⁴³ the court was first faced with the question of whether to apply United States federal law or the law of Luxembourg.⁴⁴ In so doing, the court considered the overarching policy of the Sentencing Guidelines.⁴⁵ The objective of the Sentencing Guidelines is to achieve “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”⁴⁶ The court opined that sentencing Savin to a level different than that of other similarly situated defendants based only upon the fact that Mez-

33. *Id.* (emphasis added). The Application Note references several other United States Code provisions but the court only addressed the applicability of 18 U.S.C. § 20 in the case at bar.

34. 18 U.S.C. § 20.

35. *Savin*, 2003 U.S. App. LEXIS 22639, at **15.

36. *Id.* (citing *United States v. Lauersen*, 343 F.3d 604 (2d Cir. 2003)).

37. *United States v. Lauersen*, 343 F.3d 604 (2d Cir. 2003) (finding that certain business entities not specifically enumerated within the section may, however, fall within the confines of the Sentencing Guideline provisions).

38. *Id.*

39. 343 F.3d 604 (holding that the guidelines apply both to those entities enumerated and not expressly enumerated in the supplanting statute).

40. *Savin*, 2003 U.S. App. LEXIS 22639, at **15.

41. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

42. *Id.*

43. *Id.*

44. *Savin*, 2003 U.S. App. LEXIS 22639, at **16.

45. U.S. SENTENCING GUIDELINES MANUAL (1995).

46. *Id.* at ch. 1, pt. A, § 3 (1995).

zonen was a foreign corporation, goes against the underlying policy of the Sentencing Guidelines.⁴⁷ Moreover, the *Jerome* presumption⁴⁸ manifests a preference in favor of the “uniform application of federal law irrespective of where within the United States an issue regarding the law arises.”⁴⁹ Although there was no issue of interstate uniformity here, the court extended the presumption to the federal-foreign law context in order to preserve United States federal law’s independence from foreign law.⁵⁰ As such, the court agreed with the government that it should look to United States law in interpreting the term “foreign investment company.”^{51 52}

Under United States federal law, the interpretation of “foreign investment company”⁵³ is determined by looking to the plain meaning of the words as they appear in the Guidelines.⁵⁴ The court determined that the word “foreign”⁵⁵ simply indicated a “geographic connotation.”⁵⁶ Guided by two common use definitions, the court defined “investment company”⁵⁷ as a company engaged in the business of investing in and trading securities of other companies.⁵⁸ The court also addressed the district court’s reasoning that it would be inequitable for Mezzonen to be considered an investment company for the purposes of sentencing when it could not reap the benefits of that status under Luxembourg domestic regulation.⁵⁹ This argument failed because the Guidelines were not designed to ensure an equitable result for the victim but to account for the severity of the perpetrator’s offense.⁶⁰ Here, the severity of Savin’s offense remained constant regardless of the victim’s taxation status under foreign law.⁶¹ Accordingly, the court accepted the plain meaning of “foreign investment company” and interpreted the Guidelines under this definition.⁶²

47. *Savin*, 2003 U.S. App. LEXIS 22639, at **17.

48. *Jerome v. United States*, 318 U.S. 101, 104, 87 L. Ed. 640, 63 S. Ct. 483 (1943) (holding that in enacting and applying a federal statute Congress does not depend on state law).

49. *Id.*

50. *Savin*, 2003 U.S. App. LEXIS 22639, at **20.

51. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

52. *Savin*, 2003 U.S. App. LEXIS 22639, at **20–21.

53. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

54. *Savin*, 2003 U.S. App. LEXIS 22639, at **22–23.

55. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

56. *Savin*, 2003 U.S. App. LEXIS 22639, at **22–23.

57. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

58. Series 7: General Securities NYSE/NASD Registered Representative Study Manual (defining investment company as a “company or trust engaged in the business of investing in (and trading) securities”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged (1993).

59. *Savin*, 2003 U.S. App. LEXIS 22639, at **27.

60. *Id.*

61. *Id.* Note however, that there are sentencing provisions under which victim identity plays a role in sentence calculation. The victim here, Mezzonen, is not the type of victim normally considered vulnerable enough to warrant enhanced sentencing.

62. *Id.*

In the sentencing proceedings below, the district court did not consider whether Mezzonen fell within the guideline provision of “any similar entity.”⁶³ On appeal, Savin argued that enhancement was not proper on the “similar entity”⁶⁴ basis because that clause, if ultimately applicable on remand, was unconstitutionally vague as applied.⁶⁵ In addressing this, the court posited that if on remand the district court finds Mezzonen to be a foreign investment company, then the vagueness claim will be irrelevant.⁶⁶ However, in the interest of preventing further appeal, the court instructed that a statute is not unconstitutionally vague if a reasonable person of ordinary intelligence could understand what is prohibited.⁶⁷ Here, the court concluded that such a person could comprehend which entities were “similar”⁶⁸ to a “foreign investment company”⁶⁹ and that if that entity was “affected”⁷⁰ by a criminal offense that yielded more than one million dollars in gross proceeds, then a four-level enhancement would apply.⁷¹ As a result, the court found that the “similar entity” provision was not unconstitutionally vague as applied to Savin.⁷²

The Court of Appeals incorrectly remanded this case to the district court for resentencing with instructions to decide whether Mezzonen was a “foreign investment company” or “similar entity” under United States federal law. In so doing, the court attempted to promote uniformity by defining “investment company” under United States law instead of the law of the victim’s principal place of business and incorporation. Although uniformity is a justifiable and admirable goal, the court’s rationale lapsed in supporting its objective. In support of its finding, the court pointed to the judicial preference for uniformly applying federal law notwithstanding the location of the issue. In essence, the court was attempting to justify the desired end result of uniformity by pointing to a preexisting judicial preference for uniformity. Surely, the court could have better advocated its position by pointing to a rationale other than the goal it sought to ultimately achieve. In a footnote, the court acknowledged other situations in which courts have, and should look to foreign or state legal definitions. In citing these contexts, the court attempted to highlight the difference between situations to rightly apply foreign law and the situation at bar. One of these concepts involved defining the word “widow” under local law because “the validity of [a] marriage necessarily depends on the law of the place where the marriage was contracted.” Following this reasoning, whether or not Mezzonen was an investment company similarly should depend on the place where the corporation was incorporated and its principal place of business. The court overextended the preference for uniform application of federal law, and in so doing further confused the issue of whether to apply federal rather than foreign law definitions.

Christina Tsesselis

63. *Id.* at **31.

64. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

65. *Savin*, 2003 U.S. App. LEXIS 22639, at **31.

66. *Id.*

67. *Id.* at **33.

68. U.S.S.G. § 2F1.1(b)(6)(B), Application Note 14.

69. *Id.*

70. *Id.*

71. *Savin*, 2003 U.S. App. LEXIS 22639, at **33.

72. *Id.*

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