NOTE

U.S. Sanctions Policy on Trial: The *Alleged Violations* Litigation and Opportunities for Other States to Follow This Strategy

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The Alleged Violations *litigation has haled an unwilling United States before the ICJ and has forced it to defend its economic sanctions policies before the international court. The stakes of this case are extremely high, as the United States could face an adverse judgment that undermines the international credibility of a favorite foreign policy tool and possibly a monetary judgment worth billions of dollars. This Note analyzes the claims made in the* Alleged Violations *litigation and identifies 15 States that have treaty relationships with the United States that would allow them to bring similar litigation. None of the identified States has as strong a cause of action as Iran does in* Alleged Violations*, but the presence of jurisdictional hooks that would allow for such litigation at the ICJ should be cause for concern for U.S. policymakers. This Note concludes that U.S. policymakers should consider seeking amendments to the compromissory clauses of several treaties currently in force to avoid similar litigation in the future.*

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I. INTRODUCTION: THE PENDING IRAN-U.S. ICJ CASES

On February 3, 2021, the International Court of Justice (ICJ) accepted jurisdiction over a case that alleges U.S. sanctions policy violates its treaty obligations and the case will now move to the merits phase.[1] This is a noteworthy development as it marks the first time U.S. sanctions have been challenged at the ICJ. This case, *Alleged Violations*, is the second of two cases that Iran has brought against the United States at the ICJ in recent years, both of which claim that U.S. actions violated the Treaty of Amity between the two countries.[2] Iran initiated proceedings for the other case, *Certain Assets*, on June 14, 2016, and the merits phase of that case remains pending.[3]

In *Certain Assets*, Iran challenges the U.S. state-sponsor of terrorism exception to foreign sovereign immunity.[4] Foreign states generally enjoy jurisdictional immunity as a matter of customary international law[5] and U.S. practice.[6] This principle was enacted into official U.S. law as the Foreign Sovereign Immunities Act (FSIA),[7] but several amendments to FSIA have narrowed the scope of sovereign immunity for states deemed to have provided support for terrorist acts.[8] This has allowed numerous U.S. plaintiffs to obtain judgments against Iran for damages caused by terrorist

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1 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Judgment, 2021 I.C.J. 175 (Feb. 3) ¶ 114, https://icj-cij.org/public/files/case-related/175/175-20210203-JUD-01-00-EN.pdf [hereinafter Alleged Violations].

2 Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899.

3 Certain Iranian Assets (Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. 164 (June 14), https://icj-cij.org/public/files/case-related/164/164-20160614-APP-01-00-EN.pdf [hereinafter Certain Assets]. The latest update on this case is the ICJ's order on November 15, 2019, authorizing the parties to submit written replies. Although both parties' replies were due to the court by May 17, 2021, it does not seem that either Iran's nor the United States' most recent submissions are publicly available. *See* Press Release, International Court of Justice, Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (Nov. 26, 2019), https://www.icj-cij.org/public/files/case-related/164/164-20191126-PRE-01-00-EN.pdf.

4 Certain Iranian Assets (Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. 164 (June 14), at ¶ 31 ("As a result of the USA's executive, legislative and judicial acts referred to above, Iran and Iranian entities are suffering ongoing harm, and face actual and imminent seizure of assets and interests and/or the enforcement of judgments against third parties . . .").

5 *See* Daniel Franchini, *State Immunity as a Tool of Foreign Policy: The Unanswered Questions of Certain Iranian Assets*, 60 VA. J. INT'L L. 433, 440 (2020) (". . . there can be little doubt that a rule of immunity is today the 'baseline' required by customary international law when proceedings are brought against a foreign state.").

6 *See, e.g.*, The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812) (holding that a private party could not sue a foreign government).

7 Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976).

8 *See, e.g.*, National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008) (allowing for a private cause of action against foreign states which are designated as state sponsors of terrorism by the Department of State); Justice Against State Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (allowing for federal courts to exercise subject matter jurisdiction for cases involving support of international terrorism, regardless of the State Department's designation).

acts it allegedly supported. In 2012, Congress passed legislation allowing plaintiffs to attach Iranian assets to satisfy their outstanding judgments[9] and, according to Iran, U.S. courts have issued judgments totaling at least $60 billion in these cases.[10] In *Bank Markazi v. Peterson*, the Supreme Court upheld Congress's ability to make these assets available as a valid exercise of legislative power to determine the scope of a foreign state's immunity.[11] Iran submitted the *Certain Assets* dispute to the ICJ as a response to the *Peterson* decision and the ICJ accepted jurisdiction to hear this case on February 13, 2019.[12]

The *Alleged Violations* litigation challenges U.S. sanctions programs on Iran, claiming that U.S. sanctions violate treaty provisions intended to protect trade and investment between the two countries.[13] The United States, along with China, France, Germany, Russia, the United Kingdom, and the European Union (EU), entered into the Joint Comprehensive Plan of Action (JCPOA) with Iran in August 2015.[14] This plan promised to lift all sanctions on Iran in exchange for Iranian concessions to limit its uranium enrichment and to allow increased international monitoring of its nuclear activities.[15] It is estimated that these sanctions cost Iran $160 billion in oil revenue between 2012 and 2016.[16] The United States lifted its nuclear-related sanctions on Iran in 2016 in accordance with the JCPOA,[17] but the Trump administration reversed course, withdrawing from the JCPOA and reimposing sanctions against Iran on May 8, 2018.[18] Iran initiated the *Alleged Violations* proceedings shortly thereafter, arguing that the sanctions violate the Treaty of Amity.[19]

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9 Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, § 502, 126 Stat. 1214, 1258 (2012). Congress specifically identified that the Act was meant to apply to the *Peterson* litigation.

10 *Certain Assets*, Memorial of Iran, 2017 I.C.J. 164 (Feb. 1) ¶ 1.15, https://icj-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

11 578 U.S. 948 (2016).

12 *Certain Assets*, Judgment on Preliminary Objections, 2019 I.C.J. (Feb. 13) ¶ 114, https://icj-cij.org/public/files/case-related/164/164-20190213-JUD-01-00-EN.pdf.

13 *Alleged Violations*, Application Instituting Proceedings, 2018 I.C.J. 175 (July 16), https://icj-cij.org/public/files/case-related/175/175-20180716-APP-01-00-EN.pdf.

14 Joint Comprehensive Plan of Action 2 (2015), July 14, 2014, https://2009-2017.state.gov/documents/organization/245317.pdf.

15 *Id.* at 6-9.

16 Bruce Zagaris & Maximilian Raileanu, *Iran Retaliates Against the United States*, 34 INT'L ENFORCEMENT L. REV. 449, 450 (2018).

17 Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day, 4 (2016), https://home.treasury.gov/system/files/126/implement_guide_jcpoa.pdf.

18 Reimposing Certain Sanctions with Respect to Iran, Exec. Order No. 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018).

19 *Alleged Violations*, Application Instituting Proceedings, 2018 I.C.J. 175 (July 16), ¶ 39, https://icj-cij.org/public/files/case-related/175/175-20180716-APP-01-00-EN.pdf.

Both Treaty of Amity cases present interesting issues about the ability of international institutions to constrain U.S. foreign policy.[20] This Note will focus on the implications of the *Alleged Violations* litigation and whether it could be a precursor to similar litigation challenging U.S. sanctions policy. The litigation itself already poses challenges for the United States, and if Iran succeeds at the merits phase, the potential costs are very high. If the United States wants to avoid a similar situation in the future, assessing the jurisdictional predicates that led to this situation is paramount.

Part II will analyze the modern sanctions landscape and the possibility that an adverse ruling in *Alleged Violations* could impose costs for U.S. sanctions policy. Part III will analyze current U.S. treaty obligations and U.S. sanctions programs to determine whether there are opportunities for other States to pursue similar litigation. Finally, the Conclusion will make recommendations for U.S. foreign policy going forward, in light of the risks presented by the *Alleged Violations* litigation.

II. ALLEGED VIOLATIONS AS A SANCTIONS RELIEF STRATEGY

A. The Modern Sanctions Landscape

There are a variety of definitions of economic sanctions, but they can generally be described as economic measures taken for political ends.[21] Economic sanctions have been used as a tool to compel state behavior at least since ancient Greece[22] and have traditionally been "comprehensive" or "sectoral", meaning that sanctions imposed a complete embargo of a target State or an industry of a target State.[23] While sanctions became a popular tool for policymakers to impose costs without resorting to military force, scholars began to criticize the traditional sanctions programs in the early 21st Century for imposing heavy costs on unintended targets[24] and for being ineffective in achieving foreign policy goals.[25]

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20 For an analysis of the foreign sovereign immunity questions in the *Certain Assets* litigation, see Franchini, *supra* note 5.

21 Andreas F. Loweneld, *Preface to the Second Edition of* INTERNATIONAL ECONOMIC LAW, at VIII (2d ed. 2008).

22 HOFBAUER ET AL, ECONOMIC SANCTIONS RECONSIDERED 9 (3d ed. 2007).

23 DAVID BALDWIN, ECONOMIC STATECRAFT 373 (1985).

24 *See* Susan Allen & David Lektzian, *Economic Sanctions: A Blunt Instrument?*, 50 J. OF PEACE RES. 121, 121 (2003) (concluding that comprehensive sanctions policy has a similar effect on the general population as a military conflict).

25 *See, e.g.*, HOFBAUER ET AL., *supra* note 22, at 157-62 (using a long-term study of sanctions in the 20th Century to conclude that sanctions are only partially effective at achieving their goals 34% of the time); DANIEL DREZNER, THE SANCTIONS PARADOX (1999) (describing the "paradox" that sanctions will provide the most incentives against allies and strong trade partners, who are the least likely targets of sanctions); Laura Kanji, *Moving Targets: The Evolution and Future of Smart Sanctions*, 37 HARV. INT'L REV. 39, 39 (2016) (suggesting that UN sanctions on Iraq meant to punish the Hussein regime actually improved its standing with the general public).

Dissatisfaction with traditional sanctions programs led to the development of targeted sanctions, which allow the U.S. government to target specific individuals for sanctions designation. For example, the Patriot Act of 2003 gave the U.S. government the authority to freeze an individual's assets used to finance terrorist organizations.[26] These sanctions essentially deny targets the ability to use the U.S. financial system, which is a major cost to them given the important role of U.S. finance in the global economy.[27] This has become a popular foreign policy tool on both sides of the aisle.[28] By the end of 2019, the number of new sanctions designations was the highest in history for the third year in a row and enforcement penalties brought by the Treasury Department's Office of Foreign Assets Control (OFAC) for sanctions violation exceeded $3.2 billion.[29]

Despite their popularity domestically, U.S. sanctions programs have proved controversial internationally. Sanctions targets have contested the legality of unilateral economic coercive measures in international law.[30] Third-party States, including U.S. allies, whose nationals must adhere to U.S. sanctions or risk losing access to the U.S. market, also oppose U.S. sanctions programs that unilaterally affect their nationals.[31] Foreign firms must choose between trading with sanctions targets or risking significant OFAC fines,[32] and the broad nexus of asserted U.S. sanctions enforcement jurisdiction

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26 ROBERT BLACKWILL & JENNIFER HARRIS, WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT 197 (2016).

27 Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of and European Responses to, US Secondary Sanctions*, 2020 BRIT. Y.B. INT'L L. 1, 3 (2020).

28 *Donald Trump Has Shown a Surprising Enthusiasm for Sanctions*, THE ECONOMIST (Nov. 30, 2019), https://www.economist.com/united-states/2019/11/28/donald-trump-has-shown-a-surprising-enthusiasm-for-sanctions (noting that the Trump administration added over 3,100 names to the OFAC sanctions list in its first three years and the list contains approximately 7,500 names of sanctioned individuals); *see also* Johnpatrick Imperiale, *Sanctions by the Numbers*, CENTER FOR A NEW AMERICAN SECURITY (Feb. 27, 2020), https://www.cnas.org/publications/reports/sanctions-by-the-numbers (showing that sanctions designations have dramatically increased while sanctions delistings have decreased in recent years).

29 *2019 Year-End Sanctions Update*, GIBSON DUNN (Jan. 23, 2020), https://www.gibsondunn.com/2019-year-end-sanctions-update/.

30 *See* Kenneth Anderson, *Text of Russia-China Joint Declaration on Promotion and Principles of International Law*, LAWFARE (July 7, 2016, 7:18 AM), https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law (describing a joint statement of China and Russia stating that the unilateral imposition of economic measures is not a "good faith" application of international law). *See also Alleged Violations*,Memorial of Iran, 2019 I.C.J. 175 (May 24) ¶ 1.13, https://icj-cij.org/public/files/case-related/175/175-20190524-WRI-01-00-EN.pdf ("Iran maintains its long-standing position that the imposition and enforcement of all unilateral sanctions by the USA against Iran over the years has been, and continues to be, unlawful under international law."). *But see* Antonios Tzanakopolous, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L COMP. L. 616, 631 (2015) for a critique of the argument that there is a right of States to set their own economic or foreign policy in international law.

31 Ruys & Ryngaert, s*upra* note 27, at 5.

32 *Id.* at 3.

covers what might otherwise be considered completely foreign transactions.[33]

These "secondary sanctions" constrain third-party behavior and create significant compliance costs in addition to the missed trade opportunities for foreign firms. It has been argued that the U.S. jurisdictional triggers for sanctions enforcement are contrary to customary international law[34] and that secondary sanctions violate the non-intervention principle of international law.[35] In its *Nicaragua* decision, the ICJ held that the formulation of foreign policy is a principle of State sovereignty, and thus, inviolable.[36] According to the argument that the U.S. conception of territoriality is contrary to international law, U.S. secondary sanctions violate a foreign State's sovereignty because they coerce foreign firms to change their behavior, which will, in turn, lobby their governments for foreign policy changes.[37] Although the U.S. connection to the supposed sovereignty violation may be diffuse here, this thinking is perhaps reflective of the generally negative view of unilateral secondary sanctions in international law.[38]

B. The Alleged Violations *Litigation*

While the legitimacy of U.S. sanctions programs under international law is an interesting issue to consider, it is important to remember that the *Alleged Violations* litigation asserts treaty-based claims rather than general violations of international law. The United States initially accepted compulsory jurisdiction of the ICJ on questions of international law,[39] but it revoked this consent in 1985 following an adverse ruling in the *Nicaragua* case.[40] Thus, any claim against U.S. sanctions policy that is sought to be litigated at the ICJ must have a basis in a treaty, not just a general violation of international law.

The Iran sanctions at issue in *Alleged Violations* are the most extensive in the modern U.S. sanctions regime. Former Secretary of State Pompeo

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33 *Id.* at 8 (claiming that even specifying that a contract will be paid in U.S. dollars is enough to trigger U.S. sanctions enforcement).

34 *Id.* at III.b.

35 *See* Patrick C. R. Terry, *Enforcing U.S. Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L. J. 1, 22 (2020).

36 *Id.* (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 205 (June 27)).

37 *Id.*

38 See *infra* Section III.B.3. for additional discussion on extraterritorial and secondary sanctions.

39 International Court of Justice: United States Recognition of Compulsory Jurisdiction, Aug. 14, 1946, 361 Stat. 1218, https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0140.pdf.

40 *Text of U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), https://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html.

described the sanctions imposed following the U.S. withdrawal from the JCPOA as the "largest set of sanctions ever emplaced on an economy."[41] The Congressional Research Service estimates that U.S. sanctions caused the Iranian economy to contract by 20% between 2011 and 2015, and an additional 8% since the reimposition of sanctions in 2018.[42] The Iran sanctions have also led global banks to withdraw from the Iranian market due to the risk of exposure to U.S. sanctions enforcement.[43]

Iran claims that these sanctions violate nine provisions of the Treaty of Amity.[44] The Treaty of Amity was signed in 1955 and entered into force in 1957, when the United States maintained friendly relations with the prerevolutionary Iranian monarchy.[45] The Treaty remained in force following the Iranian Revolution in 1979, and it has been invoked three times in ICJ litigation prior to the pending *Certain Assets* and *Alleged Violations* cases.[46] In *Alleged Violations*, Iran claims the U.S. sanctions violate treaty provisions that provide protections for trade, investment, and mutual property rights. These include treaty provisions guaranteeing fair and equitable treatment (FET) standards, full protection and security of investments and property, treatment of property no less favorable than that given to other nations, freedom of commerce and navigation, and prohibitions on the restrictions of payments and shipment of goods.[47]

The United States made three major objections to ICJ jurisdiction over this case. First, the United States argued that Iran mischaracterized the measures as violations of the Treaty of Amity, when the dispute actually concerned the application of the JCPOA.[48] Second, the United States argued that even if the ICJ determined that the dispute fell within the scope of the

41 *Interview With Martha MacCallum of Fox News*, U.S. DEP'T OF STATE (Jan. 23, 2019), https://2017-2021.state.gov/interview-with-martha-maccallum-of-fox-news/index.html.

42 Kenneth Katzman, *Iran Sanctions*, CONG. RSCH. SERV., 52 (Apr. 6, 2021), https://fas.org/sgp/crs/mideast/RS20871.pdf.

43 *Id.*

44 Article IV(1), Article IV(2), Article V(1), Article VII(1), Article VIII(1), Article VIII(2), Article IX(2), Article IX(3), and Article X(1).

45 KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE AND NAVIGATION TREATIES 313 (2017); Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899.

46 United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Application, 1979 I.C.J. 7 (Nov. 29) (arguing that, among other violations of international law, Iran's actions in taking the U.S. Embassy staff hostage violated Articles II(4), XIII, XVIII and XIX of the Treaty of Amity); Aerial Incident of 3 July 1988 (Iran v. U.S.), Memorial of Iran, 1990 I.C.J. 292 (July 24) (arguing that the U.S. destruction of an Iranian civil airliner violated Articles IV(1), VIII(1), VIII(2), and X(1) of the Treaty of Amity); and Oil Platforms (Iran v. U.S.), Memorial of Iran, 1993 I.C.J. 69 (June 8) (arguing that the U.S. Navy's destruction of Iranian oil platforms violated Articles I, IV(1), and X(1) of the Treaty of Amity).

47 *See generally Alleged Violations*, Memorial of Iran, 2019 I.C.J. 175 (May 24) ¶¶ 4.1-8.15, https://icj-cij.org/public/files/case-related/175/175-20190524-WRI-01-00-EN.pdf.

48 *Alleged Violations*, Preliminary Objections of the United States, 2019 I.C.J. 175 (Aug. 23) ¶¶ 1.16-1.17, https://icj-cij.org/public/files/case-related/175/175-20190823-WRI-01-00-EN.pdf.

Treaty of Amity, the measures taken were excepted from the Treaty by Article XX, as they concerned "essential security interests" and "fissionable materials".[49] Finally, the United States argued that third-party measures (i.e. secondary sanctions) did not fall within the scope of the Treaty of Amity, as the Treaty was bilateral and did not cover relations with third parties.[50]

The ICJ rejected all of the U.S.' preliminary objections and found Iran's application admissible.[51] The Court held that, while the dispute may concern the JCPOA, this does not preclude that the dispute also falls within the scope of the Treaty of Amity.[52] It also found that the third-party measures were intended to weaken Iran's economy and thus, there is a question of whether these fall within the scope of the Treaty of Amity for the merits phase.[53] Finally the Court held that the U.S. contention that the measures fall within exceptions listed in Article XX were questions for the merits phase, and not preclusive to jurisdiction.[54] The *Alleged Violations* case will now move to the merits phase, where the United States will face a lengthy litigation process.

If successful in this case, Iran asks the ICJ to order the United States to cease its current Iranian sanctions and to forbid any future sanctions.[55] Iran also seeks reparations of an unspecified amount.[56] The request for reparations is extensive, and includes restitution for property actually seized or damaged as a result of U.S. actions, as well as compensation for non-quantifiable injuries and "satisfaction" for treaty violations.[57] Iran's request for relief lists such injuries as the "devaluation of the Rial", "interference with the payment of sovereign debt", and "non-material or moral damage" as injuries necessitating reparations.[58] Given the massive impact U.S. sanctions have had on the Iranian economy and the broad scope of relief sought, the ultimate amount in dispute seems likely to be in the tens to hundreds of billions of dollars.

The ICJ judgment on preliminary objections has put the United States in an unenviable position – facing the possibility of an eleven-figure reparations judgment and calling into question the legality of its strongest tool for deterring Iranian nuclear proliferation. The prospect of such an outcome is definitely a cause for concern, but there is still a question of

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49 *Id.* at ¶ 1.19.

50 *Id.* at ¶ 1.22.

51 *Alleged Violations*, Judgment on Preliminary Objections, 2021 I.C.J. 175 (Feb 3) ¶ 114, https://icj-cij.org/public/files/case-related/175/175-20210203-JUD-01-00-EN.pdf.

52 *Id.* at ¶ 56.

53 *Id.* at ¶ 81.

54 *Id.* at ¶ 112.

55 *Alleged Violations*, Memorial of Iran, 2019 I.C.J. 175 (May 24) ¶¶ 10.7-10.15, https://icj-cij.org/public/files/case-related/175/175-20190524-WRI-01-00-EN.pdf.).

56 *Id.* at ¶¶ 10.16-10.17.

57 *Id.* at ¶ 10.20.

58 *Id.* at ¶¶ 10.28-10.29.

whether an adverse judgment could be enforced.[59] Under Article 94 of the UN Charter, every UN member agrees to "undertake" to comply with any ICJ decision in any case to which it is a party.[60] However, history has shown that compliance with ICJ judgments is not a forgone conclusion. The traditional belief has been that ICJ monetary judgments are effectively unenforceable where the debtor party refuses to pay.[61] While the creditor could turn to the ICJ, the UN Security Council, or the UN General Assembly for aid in enforcement, this has historically provided little help.[62]

It may be easier to seek enforcement of an ICJ monetary judgment through domestic courts, which are "generally considered to be the primary enforcers of international law."[63] However, attempts to enforce an *Alleged Violations* monetary judgment in U.S. courts may be a difficult task. In *Medellin v. Texas*, the Supreme Court held that ICJ judgments are not directly enforceable federal law.[64] The Court reasoned that, absent implementing legislation from Congress or explicit language that the underlying treaty is "self-executing," an ICJ ruling creates an international law obligation for the United States but it is not binding domestic law.[65] The Treaty of Amity is not implemented in federal law nor is it a self-executing treaty, so under the reasoning of *Medellin*, lower courts would not be compelled to enforce an adverse *Alleged Violations* ruling.

However, *Medellin* does not prevent domestic courts from enforcing ICJ rulings. In *Medellin*, the respondent sought to benefit from an ICJ decision that would have allowed him to file additional habeas petitions contrary to state law.[66] In a potential *Alleged Violations* proceeding, there would presumably be no barrier to enforcement contrary to procedural law. Iran would likely have standing to seek enforcement in the United States, as foreign states generally have standing to sue in U.S. courts even absent diplomatic relations, so long as the states are not at war.[67] However, enforcement of an *Alleged Violations* monetary judgment in U.S. courts would also require Iran to make a showing of proper jurisdiction and that

59 *See* John K. Gamble & Christine M. Giuliano, *US Supreme Court, Medellin v. Texas: More Than an Assiduous Building Inspector?*, 22 LEIDEN J. INT'L L. 151, 164 (2009) (". . . legal obligations seem vacuous if their implementation is made impossibly difficult.").

60 U.N. Charter art. 94, ¶ 1.

61 Mary E. O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891, 892 (1990).

62 *Id. See also* G.A. Res. 41/31, ¶ 1 (Nov. 3, 1986) (calling for the United States to comply with the *Nicaragua* judgement, which the United States subsequently ignored).

63 O'Connell, *supra* note 61, at 913.

64 Medellin v. Texas, 552 U.S. 491, 511 (2008).

65 *Id.*

66 *Id.* at 498.

67 Banco Nacional de Cuba v. Sabbatino, 379 U.S. 398, 410 (1963).

such enforcement is not a political question, which could create significant hurdles.[68]

Another possible strategy for Iran to collect on an *Alleged Violations* judgment would be to seek enforcement in a third country where the United States has assets. One consideration in this strategy is that other States may be limited by considerations similar to *Medellin*.[69] It is also unclear how foreign domestic courts would treat a monetary ICJ judgment. Following a monetary judgment from the Permanent Court of International Justice (PCIJ) in *Societe Commerciale de Belgique (Belgium v. Greece)*,[70] a Belgian court treated the judgment as a foreign domestic judgment and subjected it to scrutiny as such.[71] There is also a persuasive argument for treating ICJ judgments more like arbitral awards, in that domestic courts should not question the legitimacy of the award where the parties agreed to the arbitration.[72] However, it should also be noted that there are significant differences between international arbitration and ICJ litigation, not the least of which is that States have generally implemented agreements specifically to enforce foreign arbitral awards.[73] By contrast, Article 94 of the UN Charter only creates an obligation on the parties to the case, which could provide third-party domestic courts an avenue to refuse enforcement based on political concerns.[74]

While there seems to be a possible path for enforcement of a monetary judgment, enforcement of an ICJ order to cease U.S. sanctions programs seems highly unlikely. On October 3, 2018, the ICJ granted Iran's request for provisional measures in the *Alleged Violations* case, ordering the United States to lift certain sanctions on Iran that implicate humanitarian issues.[75] The United States has essentially ignored this order and seems unwilling to comply with any order infringing its ability to impose sanctions, which it views as part of its sovereign right.[76] Indeed, the dismal prospect of

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68 *See* Colton Brown, *Enforcement of ICJ Decisions in United States Courts*, 11 MD. J. INT'L L. 73 (1987), for a similar analysis of whether Nicaragua would have been able to seek enforcement of an ICJ judgment in U.S. court.

69 *See, e.g.*, Pierre H. Verdier, *Enforcement of International Judgments in Canada*, 103 PROC. OF THE ANN. MEETING (AM. SOC'Y INT'L L.) 48, 49 (2009) (suggesting that enforcement of ICJ judgments in Canada would implicate federalism concerns similar to *Medellin*).

70 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

71 O'Connell, *supra* note 61, at 916.

72 *See id.* at 917-20.

73 For example, 168 States (including the United States) are party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T., 330 U.N.T.S. 3, which specifically requires States to enforce foreign arbitral awards.

74 U.N. Charter art. 94, ¶ 1.

75 *Alleged Violations*, Order on Provisional Measures, 2018 I.C.J. 623, ¶ 102 (Oct. 3).

76 *See* Saeed K. Dehghan & Julian Borger, *International Court of Justice Orders US to Lift New Iran Sanctions*, THE GUARDIAN (Oct. 3, 2018), https://www.theguardian.com/world/2018/oct/03/international-court-of-justice-orders-us-to-lift-new-iran-sanctions (reporting that Secretary of State Mike Pompeo stated the United States would

implementation of a judgment ordering the United States to cease its sanctions programs may discourage the ICJ from this decision at all.[77]

If anything is certain, enforcing a potential adverse *Alleged Violations* judgment would involve complex questions of international law and major foreign policy considerations. I have touched on these issues here to illustrate the potential ramifications of this litigation, and a thorough analysis of the enforceability of an adverse judgement, or a likely litigation strategy to avoid this outcome, could be the subject of its own paper. The remaining goal of this Note is to examine whether the United States might find itself in this precarious situation again. The next section will address the question of whether there is an opportunity for similar litigation in the future and whether such litigation is feasible.

III. OPPORTUNITIES FOR OTHER STATES TO FOLLOW THE *ALLEGED VIOLATIONS* STRATEGY

A. Treaty Obligations

This section will analyze current U.S. treaties to determine whether any could provide a sufficient jurisdictional hook to allow another State to pursue *Alleged Violations*-type litigation. The ICJ only has jurisdiction over those cases which parties refer to it.[78] Parties can mutually agree to submit a case to the Court or specify the ICJ as the dispute resolution mechanism via mutual agreement. Under Article 36(2) of the ICJ Statute, states may recognize the Court as having compulsory jurisdiction over any legal dispute generally concerning international law.[79] If a State chooses to recognize the Court's compulsory jurisdiction under Article 36(2), it can bring litigation against another State that also recognizes Article 36(2) jurisdiction.

The United States submitted a declaration recognizing the ICJ's Article 36(2) compulsory jurisdiction in 1946,[80] but terminated its declaration accepting compulsory jurisdiction in 1985 after the Court rejected its

ignore the ICJ order and that its sanctions programs are a sovereign right of the United States to protect national security).

77 *See* Nienke Grossman, *Solomonic Judgments and the Legitimacy of the International Court of Justice*, *in* LEGITIMACY AND INTERNATIONAL COURTS 43-61 (Andreas Follesdal et al. eds., 2018) for a discussion of the ICJ's legitimacy concerns in making judgments.

78 Statute of the International Court of Justice art. 36.

79 *Id.* Article 36(2) specifically gives the Court jurisdiction over, "a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."

80 Stephen P. Mulligan, *The United States and the "World Court"*, CONG. RSCH. SERV. (Oct. 17, 2018), https://fas.org/sgp/crs/row/LSB10206.pdf.

preliminary objections in the *Nicaragua* case.[81] The termination became effective in 1986 and remains so today.[82] The United States is still exposed to ICJ compulsory jurisdiction via international agreements though.[83] Where the United States is a party to a treaty that specifies ICJ compulsory jurisdiction over disputes, the United States may be brought into ICJ litigation unwillingly by the other signatory party. So, for a State to follow the *Alleged Violations* strategy, it must have a treaty with the United States that provides ICJ compulsory jurisdiction.

U.S. exposure to ICJ jurisdiction via its treaty obligations has previously been recognized as a problem. In 2018, after the State of Palestine filed an application to institute ICJ proceedings against the United States[84] and the Court released its *Alleged Violations* judgment on preliminary measures, the Trump administration withdrew from the underlying treaties that provided compulsory ICJ jurisdiction in these cases.[85] The Administration vowed to review any treaties that still expose the United States to ICJ jurisdiction, but it is unclear what became of this effort.[86] The ICJ maintains jurisdiction over these cases despite the U.S. withdrawal from the underlying treaties, as ICJ jurisdiction is determined at the time of filing and remains throughout the life of the dispute.[87] There is concern about the ability of the President to unilaterally withdraw the United States from treaties that have been ratified by the Senate, but challenges to these actions in court have typically been deemed a "political question" and thus, non-justiciable.[88]

There are three types of treaties with compromissory clauses that provide for compulsory ICJ jurisdiction: modern treaties of Friendship, Commerce and Navigation (FCN), Economic Cooperation Agreements

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81 Sean D. Murphy, *The United States and the International Court of Justice*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 67 (Cesare P.R. Romano, ed. 2009).

82 *Id.*

83 Scott R. Anderson, *Walking Away from the World Court*, LAWFARE (Oct. 5, 2018), https://www.lawfareblog.com/walking-away-world-court (stating that following the withdrawal of consent for broad ICJ jurisdiction, "ICJ jurisdiction over the United States became contingent on specific treaty provisions—creating a limited exposure that the United States has generally sought to avoid, particularly in more recent years.").

84 Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, (Sept. 28, 2018), https://icj-cij.org/public/files/case-related/176/176-20180928-APP-01-00-EN.pdf.

85 *See* Anderson, *supra* note 83 (reporting that the United States withdrew from the Treaty of Amity and the Optional Protocol to the Vienna Convention on Diplomatic Relations).

86 Roberta Rampton et al., *U.S. Withdraws from International Accords, Says U.N. World Court 'Politicized'*, REUTERS (Oct. 3, 2018, 1:35 PM), https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-withdraws-from-international-accords-says-u-n-world-court-politicized-idUSKCN1MD2CP.

87 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 28-29, ¶ 36 (June 27).

88 *See* Goldwater v. Carter, 444 U.S. 996 (1979) (plurality op.) (dismissing a Congressional challenge to President Carter's unilateral withdrawal from a mutual defense treaty with Taiwan as a non-justiciable political question); *see also* Mulligan, *supra* note 80.

(ECA), and multilateral treaties. As of January 1, 2021, the United States has 79 treaties in force with these compromissory clauses.[89] The compromissory clauses vary in their exact language, but generally allow one party to seek ICJ submission without agreement from the other party.[90]

1. Modern Treaties of Friendship, Commerce and Navigation

The Treaty of Amity is an example of a modern FCN treaty. Early FCN treaties were traditionally used to establish bilateral relations in a single agreement that covered a wide variety of topics and the United States signed its first FCN treaty with France in 1778.[91] These treaties were important for gaining recognition of the new republic and establishing commercial and maritime relationships with the major European powers.[92] After World War I, these treaties evolved to include investment protections as more Americans began to invest abroad.[93] The "modern" FCN treaties continued the incorporation of investment protections and were a popular tool of post-World War II foreign policy, pursued from 1946-1966.[94] Most of these treaties contained compromissory clauses with compulsory ICJ jurisdiction, as the United States sought to solidify relationships through international institutions and to legitimize the ICJ as an institution for pacific dispute settlement.[95]

However, compulsory ICJ jurisdiction was not a satisfactory dispute resolution mechanism because it often left individual nationals without

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89 *See* Murphy, *supra* note 81, at 99-111; *see generally* DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 (2020); DEP'T OF STATE, TREATIES IN FORCE: SUPPLEMENTAL LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS (2021).

90 *Compare* the compromissory clause in the Treaty of Amity at Article XXI(2), which provided jurisdiction for *Certain Assets* and *Alleged Violations*:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

with the compromissory clause in the Optional Protocol to the Vienna Convention on Diplomatic Relations in Article I, which provided jurisdiction for *Relocation of U.S. Embassy*:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

91 VANDEVELDE, *supra* note 45, at 57 .

92 *Id.*

93 John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 308 (2013).

94 KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 19 (1992).

95 *Id.* at 10.

judicial recourse for investment disputes.[96] An individual investor who sought dispute resolution under a modern FCN would have to convince the government to take her case to the ICJ, which the government was often hesitant to do for political reasons.[97] In fact, only one investment dispute has been brought before the ICJ under an FCN on behalf of an individual investor.[98] The United States eventually transitioned to a policy of pursuing Bilateral Investment Treaties (BIT) instead of FCNs. The unsatisfactory remedy of compulsory ICJ jurisdiction for investors, as well as U.S. skepticism of the ICJ following the *Nicaragua* ruling, motivated a shift from compulsory ICJ jurisdiction to *ad hoc* arbitration as the dispute resolution remedy.[99]

The modern FCN program resulted in 22 U.S. treaties.[100] Of these, 16 treaties are currently recognized as in force and specify compulsory ICJ jurisdiction, with: Denmark,[101] Ethiopia,[102] Germany,[103] Greece,[104] Ireland,[105] Israel,[106] Italy,[107] Japan,[108] South Korea,[109] Luxembourg,[110] Nepal,[111] Netherlands,[112] Pakistan,[113] Suriname,[114] Taiwan,[115] and Togo.[116] There are three modern FCN treaties that are no longer in force with

96 *Id.*

97 *Id.*

98 *Id.* (discussing Elettronica Siluca S.p.A. (ELSI) (U.S. v. Italy), Application Instituting Proceedings, 1987 I.C.J. 3 (Feb. 6)).

99 *Id.* at 39, 195.

100 *Id.* at 19.

101 Treaty of Friendship, Commerce, and Navigation, Den.-U.S., Oct. 1, 1951, 12 U.S.T. 908.

102 Treaty of Amity and Economic Relations, Eth.-U.S., Sept. 7, 1951, 4 U.S.T. 2134.

103 Treaty of Friendship, Commerce, and Navigation, Ger.-U.S., Oct. 29, 1954, 7 U.S.T. 1839.

104 Treaty of Friendship, Commerce, and Navigation, Greece-U.S., Aug. 3, 1951, 5 U.S.T. 1829.

105 Treaty of Friendship, Commerce, and Navigation, Ir.-U.S., Jan. 21, 1950, 1 U.S.T. 785.

106 Treaty of Friendship, Commerce, and Navigation, Isr.-U.S., Aug. 23, 1951, 5 U.S.T. 550.

107 Treaty of Friendship, Commerce, and Navigation, It.-U.S., Sept. 26, 1951, 12 U.S.T. 131.

108 Treaty of Friendship, Commerce, and Navigation, Japan-U.S., Apr. 2, 1953, 4 U.S.T. 2063.

109 Treaty of Friendship, Commerce, and Navigation, S. Kor.-U.S., Nov. 28, 1956, 8 U.S.T. 2217.

110 Treaty of Friendship, Establishment, and Navigation, Lux.-U.S., Feb. 23, 1962, 14 U.S.T. 251.

111 Agreement Relating to Friendship and Commerce, Nepal-U.S., Apr. 25, 1947, 61 Stat. 2566.

112 Treaty of Friendship, Commerce, and Navigation, Neth.-U.S., Mar. 27, 1956, 8 U.S.T. 2043.

113 Treaty of Friendship and Commerce, Pak.-U.S., Nov. 12, 1959, 12 U.S.T. 110.

114 Treaty of Friendship, Commerce and Navigation, Neth.-U.S., Mar. 27, 1956, 8 U.S.T. 2043 (applicable to Suriname as of September 10, 1963).

115 Treaty of Friendship, Commerce, and Navigation, Taiwan-U.S., Nov. 4, 1946, 63 Stat. 1299. Note that this treaty was signed with the Republic of China, which the United States stopped recognizing as the official government of China on January 1, 1979 and does not maintain official relations. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 497 (2020). Moreover, the United Nations officially recognized the People's Republic of China as the only government of China on October 25, 1971. G.A. Res. 2758 (XXVI) (Oct. 25, 1971). Although this treaty continues in a non-official relationship capacity, this treaty has been effectively defeated for the purpose of exposing the United States to ICJ jurisdiction as the United States does not recognize the treaty as legally binding and the United Nations does not recognize the government in Taiwan.

116 Treaty of Amity and Economic Relations, Togo-U.S., Feb. 8, 1966, 19 U.S.T. 1

Nicaragua, Iran, and the Republic of Vietnam.[117] The United States withdrew from the Nicaragua FCN in 1986 following the application instituting proceedings in the *Nicaragua* case,[118] and, of course, withdrew from the Treaty of Amity with Iran in 2018.[119] The status of the Treaty with the Republic of Vietnam is currently "under review" as the United States established diplomatic relations with the Socialist Republic of Vietnam on July 12, 1995.[120]

Three modern FCN treaties are currently in force, but omit ICJ compulsory jurisdiction, with: Oman,[121] Thailand,[122] and Yemen.[123] In the case of Oman, the clause was omitted following negotiations because the sultan did not know much about the ICJ and did not want a third party to interfere on matters he considered his responsibility.[124] It is unclear why the Thailand FCN Treaty omits ICJ jurisdiction, but that Treaty substitutes arbitration for ICJ jurisdiction.[125] It is similarly unclear why the Yemen Treaty omits ICJ jurisdiction and that Treaty contains no compromissory clause. Thus, 15 treaties[126] in force contain the necessary condition for ICJ jurisdiction and the substantive provisions similar to those that provided the causes of action pursued by Iran in *Alleged Violations*.

2. Economic Cooperation Agreements

The United States pursued the "Economic Cooperation Act" (ECA) treaty program between 1948 and 1955, and these treaties also contained compromissory clauses with compulsory ICJ jurisdiction. These treaties provided postwar foreign assistance via the Economic Cooperation Act of 1948.[127] There are currently 19 of these treaties still recognized as in force, with: Austria,[128] Belgium,[129] Denmark,[130] France,[131] Greece,[132] Iceland,[133]

117 Treaty of Amity and Economic Relations, Republic of Viet.-U.S., Apr. 3, 1961, 12 U.S.T. 1703.

118 *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 28, ¶ 36 (June 27).

119 *See* Anderson, *supra* note 83.

120 DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 486 (2020).

121 Treaty of Amity, Economic Relations, and Consular Rights, Oman-U.S., Dec. 20, 1958, 11 U.S.T. 1835.

122 Treaty of Amity and Economic Relations, Thai.-U.S., May, 29, 1966, 19 U.S.T. 5843.

123 Agreement Relating to Friendship and Commerce, U.S.-Yemen, May 4, 1946, 60 Stat. 1782.

124 VANDEVELDE, *supra* note 45, at 337.

125 *Id.* at 375.

126 Excluding the Taiwan FCN, as it is effectively defeated for present purposes. *See* note 115.

127 VANDEVELDE, *supra* note 94, at 9.

128 Economic Cooperation Agreement, Austria-U.S., July 2, 1948, 62 Stat. 2137.

129 Economic Cooperation Agreement, Belg.-U.S., July 2, 1948, 62 Stat. 2173.

130 Economic Cooperation Agreement, Den.-U.S., June 29, 1948, 62 Stat. 2199.

131 Economic Cooperation Agreement, Fr.-U.S., June 28, 1948, 62 Stat. 2223.

132 Economic Cooperation Agreement, Greece-U.S., July 2, 1948, 62 Stat. 2293.

133 Economic Cooperation Agreement, Ice.-U.S., July 3, 1948, 62 Stat. 2363.

Israel,[134] Italy,[135] Luxembourg,[136] Netherlands,[137] Norway,[138] Portugal,[139] Singapore,[140] Solomon Islands,[141] Spain,[142] Sweden,[143] Trinidad,[144] Turkey[145] and the United Kingdom.[146]

The ECAs were the result of the Convention for European Economic Cooperation signed in Paris in 1948, an agreement that was enacted into U.S. law later that year.[147] The treaties are mostly identical. The substantive provisions of these treaties govern the appropriate use of foreign aid from the U.S. government and are dissimilar to the substantive FCN provisions under which Iran brought *Alleged Violations*. However, the ICJ compulsory jurisdiction provision is very broad and arguably independent from the other provisions. For example, Article IX of the U.S.-Turkey Economic Cooperation Treaty reads:

> 1. The Governments of the United States of America and the Republic of Turkey agree to submit to the decision of the International Court of Justice **any claim espoused by either Government on behalf of one of its nationals against the other Government** for compensation for damage arising as a consequence of governmental measures . . . by the other Government and affecting property or interest of such national . . .[148]

Unlike other articles of the Treaty, Article IX is not predicated with the goals of the Treaty or other references that this Article should only apply to foreign assistance. Article IX does not require that the claim be related to a violation of another provision of the Treaty. As such, theoretically, it would seem that Article IX provides compulsory ICJ jurisdiction for any claim, regardless of whether it is related to foreign assistance.

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134 Agreement Relating to Emergency Economic Assistance, Isr.-U.S., May 1, 1952, 3 U.S.T. 4266.

135 Economic Cooperation Agreement, It.-U.S., June 28, 1948, 62 Stat. 2421.

136 Economic Cooperation Agreement, Lux.-U.S., July 3, 1948, 62 Stat. 2451.

137 Economic Cooperation Agreement, Neth.-U.S., July 2, 1948, 62 Stat. 2477.

138 Economic Cooperation Agreement, Nor.-U.S., July 3, 1948, 62 Stat. 2514.

139 Economic Cooperation Agreement, Port.-U.S., Sept. 28, 1948, 62 Stat. 2856.

140 Economic Cooperation Agreement, U.K.-U.S., June 6, 1951, 3 U.S.T. 3426.

141 *Id.*

142 Economic Aid Agreement, Spain-U.S., Sept. 26, 1953, 4 U.S.T. 1903.

143 Economic Cooperation Agreement, Swed.-U.S., July 3, 1948, 62 Stat. 2541.

144 Economic Cooperation Agreement, U.K.-U.S., June 6, 1951, 3 U.S.T. 3426.

145 Economic Cooperation Agreement, Turk-U.S., July 12, 1947, 61 Stat. 2953.

146 Economic Cooperation Agreement, U.K.-U.S., June 6, 1951, 3 U.S.T. 3426.

147 Foreign Assistance Act of 1948, Pub. L. No. 80-472, 62 Stat. 137 (repealed 1954). The clause noting that disputes may be submitted to the ICJ is located in § 115(b)(10), 62 Stat. 152, however, the act states that disputes may only be submitted by the U.S. government. This language differs from the treaty language that was ultimately adopted, which allows either party to submit a case to the ICJ.

148 Economic Cooperation Agreement, Turk-U.S., art. IX, July 12, 1947, 61 Stat. 2953 (emphasis added).

However, the jurisdiction clause conditions the ability of parties to submit disputes on their acceptance of the ICJ's broad compulsory jurisdiction under Article 36(2) of the Court's statute. Article IX of the U.S.-Turkey Economic Cooperation Treaty continues:

> . . . It is understood that the undertaking of each Government in respect of claims espoused by the other Government pursuant to this paragraph is made in the case of each Government under the authority of and is limited by the terms and conditions of such effective recognition as it has heretofore given to the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court.[149]

So, in order for either party to exercise the ICJ jurisdiction under an ECA treaty, both the United States and the other signatory party must have recognized ICJ compulsory jurisdiction under Article 36(2).

This seems like an odd requirement because if both parties recognized Article 36(2) compulsory jurisdiction, then either could bring a dispute to the ICJ over an interpretation of the treaty anyways. A possible explanation for this is that the ECA compromissory clause was intended encourage States to recognize Article 36(2) jurisdiction to increase participation in the ICJ. Encouraging States to recognize Article 36(2) jurisdiction was a contemporary U.S. goal[150] and also served to provide a dispute resolution mechanism for U.S. investors. This may explain why the ECA compromissory clauses required recognition of Article 36(2) jurisdiction, but it does not explain why they differed from the modern FCN compromissory clauses even though early modern FCN treaties were drafted around the same time. Unfortunately, the legislative history is unclear on this and it remains uncertain why the ECA clauses differ here.[151]

In any case, no State would be able to submit a dispute to the ICJ under an ECA compromissory clause now because the United States no longer

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149 *Id. See also* Murphy, *supra* note 81 (supporting the notion that acceptance of ICJ compulsory jurisdiction under Article 36(2) is a necessary condition for exercising the jurisdiction clauses of the ECA treaties).

150 *See Testimony of Abraham D. Sofaer, U.S. Dep't of State Legal Adviser, to the Senate Foreign Relations Committee (Dec. 4, 1985)*, reprinted in 86 DEP'T OF STATE BULL. 67 (Jan. 1986) (stating that the United States expected other States to recognize Article 36(2) jurisdiction so that the ICJ would be an effective international institution); *see also European Recovery Program Hearings before the S. Comm. on Foreign Relations*, 80th Cong. 1411-12 (Jan. 1948) (Report of Committee on International Law to be Presented at the Seventy-First Annual Meeting Jan. 23, 24, 1948, N.Y. State Bar Association) (recommending that, "as a general rule States should submit their legal disputes to the International Court of Justice," and stating that it is desirable for as many States as possible to recognize ICJ compulsory jurisdiction).

151 From the Congressional Record, it appears that the decision to add the ICJ jurisdiction clause was an amendment of the House Committee on Foreign Relations, but there is no record as to why the Committee made this amendment. The Senate agreed to this amendment, with the reservation that a party was expected to exhaust local resources before submitting a claim to the ICJ. *See* 94 CONG. REC. 4062 (1948).

recognizes Article 36(2) jurisdiction.[152] So, while there is in an interesting question as to whether the ECA jurisdiction clause could support an ICJ cause of action separate from the substantive provisions of the treaty, it is essentially moot. If the United States decides to reconsider recognition of Article 36(2) jurisdiction, the possibility of expanded jurisdiction for the 19 ECA signatory parties is something that should be considered, but, given the souring U.S. attitude toward the ICJ, this seems like an unlikely scenario.

3. Multilateral Treaties

The United States is a signatory to 44 multilateral treaties that have compulsory ICJ jurisdiction compromissory clauses,[153] but not all of these treaties expose the United States to compulsory jurisdiction. For many of these treaties, the United States filed jurisdictional reservations when signing, or the treaties require that signatories opt in to compulsory ICJ jurisdiction and the United States has not done so.[154] It has become common practice for the United States to include reservations when signing a treaty if the treaty would pose risks to the federal government.[155] Such reservations to treaties are permissible under the Vienna Convention on the Law of Treaties, so long as the treaty does not explicitly prohibit them.[156] However, prohibitions on reservations are becoming more common in multilateral treaties that are the result of extensive negotiations, and such prohibitions have been impediments to the United States signing multilateral treaties such as the UN Convention on Law of the Seas and the Rome Statute of the International Criminal Court.[157]

The United States is party to 28 multilateral treaties that expose it to compulsory ICJ jurisdiction[158] and these types of treaties have previously led

152 *See* Mulligan, *supra* note 80.

153 *See* Murphy, *supra* note 81; *see generally* DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 (2020).

154 Murphy, *supra* note 81, at 98.

155 Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, ASIL INSIGHTS (May 4, 2003), https://www.asil.org/insights/volume/8/issue/11/reservations-treaties-and-united-states-practice.

156 *Id.*

157 *Id.*

158 Murphy, *supra* note 81 (Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Apr. 25, 1997); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Dec. 6, 1994); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Feb. 20, 1990); International Convention against the Taking of Hostages (Dec. 7, 1984); Convention on Psychotropic Substances (Apr. 16, 1980); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Oct. 26, 1976); Patent Cooperation Treaty (Nov. 26, 1975); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Jan. 26, 1973); Universal Copyright Convention (Sept. 18, 1972); Convention on the Suppression of the Unlawful Seizure of Aircraft (Oct. 14, 1971); International Health Regulations (Jan. 1, 1971); Convention Placing the International Poplar Commission within the

to ICJ cases against the United States.[159] However, while these multilateral treaties may provide jurisdiction, none of them contains a compromissory clause detached from the substantive provisions of the treaty like the ECA treaties do. Recall that the ECA compromissory clauses provide jurisdiction over any claim submitted by a signatory party on behalf of a national, arguably operating independently of the substantive provisions governing foreign assistance.[160] The compromissory clauses in all of the multilateral treaties state that the dispute must be related to the substantive provisions of the treaty, typically that the dispute relates to an "interpretation or application" of a treaty.[161]

Since none of the multilateral treaties provide independent ICJ jurisdiction, if a State wants to compel the United States into the ICJ, it would need to have a claim that the U.S. sanctions violate a substantive treaty provision. If a State wants to bring a case similar to *Alleged Violations* challenging U.S. sanctions, then the multilateral treaty would have to contain provisions similar to the Treaty of Amity. That is, the multilateral treaty would need to contain provisions guaranteeing protections for trade, investment, and mutual property rights.[162] None of the multilateral treaties

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framework of Rood and Agriculture Organization (Aug. 13, 1970); Paris Convention for the Protection of Industrial Property (May 25, 1970); Convention on Privileges and Immunities of the United Nations (Apr. 29, 1970); Protocol relating to the Status of Refugees (Nov. 1, 1968); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Dec. 6, 1967); Single Convention on Narcotic Drugs (May 25, 1967); Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (Oct. 14, 1966); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (May 11, 1966); Amended Constitution of the International Rice Commission (Nov. 23, 1961); Amended Agreement for the Establishment of the Indo-Pacific Fisheries Commission (Nov. 23, 1961); International Convention for the Prevention of Pollution of the Sea by Oil (May 4, 1961); Convention on Offences and Certain Other Acts Committed on Board Aircraft (Sept. 5, 1960); Protocol Amending Slavery Convention (Mar. 7, 1956); Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, and the Production of, International and Wholesale Trade in, and Use of Opium (Feb. 18, 1955); Treaty of Peace with Japan (Feb. 14, 1952); Convention on Road Traffic (Aug. 30, 1950); Protocol Amending the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (Aug. 12, 1947)). Note that most of these treaties also have a requirement of some "cooling off" period, and many require that parties exhaust other remedies before submitting the dispute to the ICJ.

159 *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, ¶ 153 (Mar. 31); Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, (Sept. 28, 2018), https://icj-cij.org/public/files/case-related/176/176-20180928-APP-01-00-EN.pdf. Both cases were initiated under the Optional Protocol to the Vienna Convention on Diplomatic Relations.

160 *See supra* Section III.A.2.

161 *See, e.g.*, Convention on the Privileges and Immunities of the United Nations art. 8 § 30, Dec. 14, 1946, 1 U.N.T.S. 15:

> "All differences **arising out of the interpretation or application of the present convention** shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement." (emphasis added).

162 *See supra* Section II.B.

with compulsory ICJ jurisdiction contain these types of substantive provisions. Three treaties contain substantive provisions that are somewhat similar, in that they govern trade or economic rights, but each differs substantially from the protections provided by the Treaty of Amity and would fail to sustain a claim against U.S. sanctions similar to *Alleged Violations*.

First, Article 12(b) of the Treaty of Peace with Japan requires Japan to give national or most-favored-nation (MFN) treatment to foreign nationals and ships.[163] However, this provision only places a requirement on Japan, so Japan could not bring suit against the United States and, in any case, the provision only applied for the first four years following the Treaty's implementation, so the requirement expired in 1956. Second, the ICSID Convention deals extensively with adjudication of investment disputes, but this agreement concerns the establishment of the dispute resolution mechanism rather than providing standards of investment treatment.[164] Finally, Article 10 of the Paris Convention for the Protection of Industrial Property provides that signatories must assure other nationals of effective protection against unfair trade competition.[165] It may seem that there is an argument that sanctions imposition could be unfair competition, but the Treaty is clearly not intended to provide these types of protections. The Treaty deals with honest trade practices, including respect for patents and trademarks, and the examples listed in Article 10(3) make it clear that the provision is meant to refer to dishonest commercial trade practices rather than economic sanctions.

In sum, although ECA and many multilateral treaties contain compulsory ICJ jurisdiction clauses, the ECA compromissory clauses do not currently expose the United States to compulsory ICJ jurisdiction and the multilateral treaties do not contain the right substantive provisions to challenge U.S. sanctions. Only the modern FCN treaties provide the necessary compromissory clause and substantive provisions to pursue litigation similar to *Alleged Violations*. As such, only 15 States have the opportunity to follow Iran's strategy of challenging U.S. sanctions at the ICJ.[166]

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163 Treaty of Peace with Japan art. 12 § b, Apr. 28, 1952, 136 U.N.T.S. 45.

164 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159.

165 Paris Convention for the Protection of Industrial Property art. 10, Apr. 26, 1970, 828 U.N.T.S. 305.

166 *See* Section III.A.1. (Denmark, Ethiopia, Germany, Greece, Ireland, Israel, Italy, Japan, South Korea, Luxembourg, Nepal, Netherlands, Pakistan, Suriname, and Togo).

B. Sanctions on Countries with ICJ Jurisdiction Treaty Provisions

Where a State has an applicable modern FCN treaty relationship with the United States, the next step is to determine whether U.S. sanctions affecting that State violate the treaty provisions. The following subsections will consider three plausible situations where States could bring sanctions-related cases to the ICJ: targeted sanctions on Pakistani individuals, potential sanctions on Ethiopian government and military officials, and Iran-related secondary sanctions on the countries of the European Union. These scenarios have been chosen because they present situations where the United States has a modern FCN treaty relationship and sanctions designations on individuals in the country, there is a real dispute about the legitimacy of U.S. sanctions, and there is a unique claim of harm.

1. Pakistan

The Treaty of Friendship and Commerce (Pakistan FCN) is a modern FCN treaty between the United States and Pakistan that came into force on February 12, 1961.[167] The compromissory clause is contained in Article XXIII(2) and is nearly identical to the clause contained in the Treaty of Amity.[168] Pakistan would seem to have the most motivation to pursue dispute over individual sanctions on its nationals at the ICJ since it has more individual nationals subject to sanctions than any other State with a modern FCN treaty relationship by a large margin. Pakistan's Foreign Ministry has also condemned U.S. sanctions programs, which it views as "unilateral coercive measures."[169]

In *Alleged Violations*, Iran has argued that U.S. sanctions on its nationals and companies, specifically those listed on the Specially Designated Nationals (SDN) registry, violate a number of provisions in the Treaty of Amity. These include the requirement to provide FET to nationals,[170] prohibitions on expropriation,[171] and the prohibition on restricting payments.[172] The Pakistan FCN provides some similar protections that could seemingly support similar claims, but there are some differences. The

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167 Treaty of Friendship and Commerce, Pak.-U.S., Nov. 12, 1959, 12 U.S.T. 110.

168 The text of Article XXIII(2) reads: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

169 Ayaz Gul, *Pakistan Voices Opposition to US Sanctions on Turkey*, VOICE OF AMERICA (Dec. 16, 2020, 2:39 PM), https://www.voanews.com/south-central-asia/pakistan-voices-opposition-us-sanctions-turkey.

170 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Memorial of Iran (May 24, 2019), https://icj-cij.org/public/files/case-related/175/175-20190524-WRI-01-00-EN.pdf (Article IV(1) (Iran makes several claims regarding violations of Article IV of the Treaty of Amity, which covers the FET standard).

171 *Id.* at ¶¶ 4.31-4.35, 4.113 (Article IV(2)).

172 *Id.* at ¶¶ 5.23-5.27 (Article VII(1)).

FET provision of the Pakistan FCN is located in Article XVII(2), but unlike the Treaty of Amity, it only provides for FET in relation to government purchases or contracts. As such, it seems unlikely that the Pakistan FCN could support similar FET claims. The provision prohibiting expropriation is located in Article VI of the Pakistan FCN and is similar to the Treaty of Amity provision in that it forbids "unreasonable or discriminatory measures" against the property of nationals.[173] Iran has argued that the blocked assets of its nationals in the United States qualified as a violation of the prohibition on expropriation.[174] Thus, it would seem that Pakistan would be able to sustain a similar claim if its nationals have blocked property in the United States. The United States has blocked some assets of Pakistani nationals, but the total amount of blocked assets is unclear. In 2019, the Treasury Department announced that it had blocked approximately $91,000 of Pakistan-based terror groups.[175] The Department also recently announced that Pakistani organizations were subject to asset blocking under sanctions programs targeting human trafficking organizations[176] and election interference,[177] however it is unclear if any additional assets have actually been frozen.

Finally, Iran has argued that listing its nationals on the SDN and freezing their assets restricted payments between the United States and Iran.[178] The prohibition on payment restrictions in the Pakistan FCN is contained in Article XII and is narrower than the similar provision in the Treaty of Amity. The Treaty of Amity broadly prohibits restrictions on payments to or from the territories of the signatory parties. The Pakistan FCN provides a prohibition on general "exchange restrictions" similar to the Treaty of Amity, but differs in that it specifically provides a different standard for nationals, who are only subject to MFN treatment with regard to restrictions on payments between the territories of the parties.[179] Given the narrower scope of the Pakistan FCN, it seems like Pakistan would have a more difficult time making a similar argument, as it would have to prove not only

173 Treaty of Friendship and Commerce, Pak.-U.S. *supra* note 167, at Article VI(3).

174 *Id.* at ¶¶ 4.115-4.116 (Article IV(2)).

175 OFF. OF FOREIGN ASSETS CONTROL, TERRORIST ASSETS REPORTS: CALENDAR YEAR 2019 9-11 (2020) (announcing blocked assets on Pakistan terror groups of Lakshar-e Tayyiba, Jaish-e-Mohammed, Harkat ul-Mujahideen, Hizbul Mujahideen, and Tehrik-e Taliban Pakistan).

176 Press Release, Dep't of the Treasury, Treasury Sanctions Pakistan-based Transnational Human Smuggling Organization Involved in Smuggling Migrants to the United States(Apr. 7, 2021), https://home.treasury.gov/news/press-releases/jy0112.

177 *Recent Actions, Issuance of Executive Order Blocking Property With Respect To Specified Harmful Foreign Activities Of The Government Of The Russian Federation and related Frequently Asked Questions; Russia-related Designations*, DEP'T OF THE TREASURY (Apr. 15, 2021), https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210415.

178 *Alleged Violations*, Memorial of Iran, ¶¶ 5.14, (May 24, 2019), https://icj-cij.org/public/files/case-related/175/175-20190524-WRI-01-00-EN.pdf.

179 Treaty of Friendship and Commerce, Pak.-U.S. *supra* note 167, at Article XII(1).

that SDN listing is a restriction on payments, but also that it is a treatment less favorable than that the United States would give to nationals of a third country. This would seem to be a difficult argument to prove, as U.S. sanctions target nationals of all countries.

In sum, Pakistan would probably not bring an ICJ case on the basis of SDN listing of its nationals alone. Claims that U.S. sanctions violate FET and the prohibition on the restriction of payments would be more difficult for Pakistan than they were for Iran, because of differences in the treaty language. The Pakistan FCN may support an expropriation claim, but it should be noted that the amounts in question are probably not worth the costs of pursuing ICJ litigation. While the total amount of blocked assets of Pakistani individuals is unknown, it is likely nowhere near the billions of dollars of blocked Iranian assets. Pakistan may have more motivation to bring a case based on the effects of U.S. secondary sanctions on Iranian energy projects, as these have likely contributed to Pakistan's energy instability.[180]

2. Ethiopia

The Treaty of Amity and Economic Relations (Ethiopia FCN) is a modern FCN treaty between Ethiopia and the United States that came into force on October 8, 1953.[181] The compromissory clause is located in Article XVII and is similar to the compromissory clauses in the Treaty of Amity and the Pakistan FCN. In November 2020, a military conflict broke out between the Ethiopian government and the leadership of the Tigray region of the country.[182] The conflict is largely the result of longstanding tensions between rival political groups, and has led to mass displacement of populations and credible reports of war crimes.[183] In December 2020, U.S. Senators introduced a proposal considering "targeted sanctions on any political or military officials found responsible for violations of human rights carried out in the course of the conflict."[184] This analysis will seek to determine whether Ethiopia would have a cause of action to challenge such sanctions if they are implemented.

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180 *See* RICHARD NEPHEW, COLLATERAL DAMAGE: THE IMPACT ON PAKISTAN FROM U.S. SANCTIONS AGAINST IRAN 12-13 (2017) (observing that evidence suggests U.S. sanctions on Iran were one of several factors which contributed to Pakistan's energy instability, which in turn, contributed to macroeconomic weakness, and potentially political and social instability).

181 Treaty of Amity and Economic Relations, Eth.-U.S., Sept. 7, 1951, 4 U.S.T. 2134.

182 Michelle Gavin, *The Conflict in Ethiopia's Tigray Region: What to Know*, COUNCIL ON FOREIGN RELATIONS (Feb. 10, 2021, 2:06 PM), https://www.cfr.org/in-brief/conflict-ethiopias-tigray-region-what-know.

183 *Id.*

184 S. Res. 798, 116th Cong. (2021), *as reprinted in* 2021 U.S.S.C.A.N. 20876; *see also US Senators Seek Possible Sanctions over Ethiopia Conflict Abuses*, REUTERS (Dec. 10, 2020, 5:28 AM), https://www.reuters.com/article/us-ethiopia-conflict/u-s-senators-seek-possible-sanctions-over-ethiopia-conflict-abuses-idUSKBN28K139.

For purposes of this analysis, it is assumed that the targeted sanctions envisioned would include asset freezing and travel restrictions of select Ethiopian government and military officials. A major barrier to pursuing litigation under the Ethiopia FCN here is that most of the protections guaranteed by the Treaty apply only to nationals or companies, not to government entities.[185] There is a significant question of whether individuals sanctioned for actions taken in their official government capacity would be considered "nationals" for the purposes of the Treaty.

The ICJ dealt with a similar issue in *Certain Assets*, where the United States argued that Bank Markazi, Iran's central bank, could not benefit from the protections of the Treaty of Amity because it is a sovereign government entity and not a "company" for the purpose of the Treaty.[186] In its judgment on preliminary objections, the Court held that the nature of the activities carried out by the bank were important factors for determining whether it was a company for the purposes of the Treaty.[187] The Court opined that the object and purpose of the Treaty were important factors that pointed to the conclusion that it was "aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature . . ."[188] The Court concluded that an entity carrying out exclusively sovereign activities linked to the sovereign functions of a State could not benefit from the protections of the Treaty, but it reserved judgment on whether Bank Markazi carried out exclusively sovereign activities for the merits phase.[189]

The Ethiopia FCN contains the same object and purpose as the Treaty of Amity, so it seems likely that the Court would conclude that the Treaty is also intended to grant protections to natural persons engaging in activities of a commercial nature. If the Court were to apply the same "sovereign function" test here, it would seem clear that the acts for which the government and military officials were sanctioned (i.e. military actions) are sovereign functions and not commercial activities. However, the analysis here might be more complicated as a legal entity may perform exclusively

185 The only provisions that deal specifically with government entities are Articles III and IV, which outline terms of consular relations. The provisions detailing investment protections, such as Article VIII, which sets forth the FET standard, specifies its application to "nationals and companies." Treaty of Amity and Economic Relations, Eth.-U.S., *supra* note 181, at Article VIII(1).

186 *Certain Assets*, Preliminary Objections, ¶¶ 9.1-9.20, (May 1, 2017), https://www.icj-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf.

187 *Certain Assets*, Judgement on Preliminary Objections, 2019 I.C.J. (Feb. 13) ¶ 90, https://icj-cij.org/public/files/case-related/164/164-20190213-JUD-01-00-EN.pdf ("In this regard, the Court cannot accept the interpretation put forward by Iran in its main argument, whereby the nature of the activities carried out by a particular entity is immaterial for the purpose of characterizing that entity as a 'company'").

188 *Id.* at ¶ 91.

189 *Id.* at ¶¶ 91, 97.

sovereign functions, but a natural person will always perform personal functions, as well as duties in their official capacity.

It is unclear whether the Court would still apply the *exclusive* sovereign function standard given this fundamental difference. If it did, perhaps it would make sense to distinguish between sanctions that affect the results of official acts and personal acts. For example, imagine that an Ethiopian military official stole money from civilians while raiding a town in the Tigray region and deposited it in an American bank account or that he attempted to travel to the United States for military training. He would not be protected under the provisions of the Ethiopian FCN if the United States froze those assets or blocked his entry to the country in this case. However, if he had money, which was not obtained through his official duties, that was invested in the New York Stock Exchange or if he wanted to travel to the United States to pursue personal business opportunities, he may benefit from the treaty protections.[190]

From the standpoint of avoiding ICJ litigation, it would seem that the United States would be in a better position if it decided to sanction the government of Ethiopia, rather than the targeted individual sanctions proposed. But in any case, such litigation would still seem highly unlikely. ICJ litigation of these sanctions would present similar considerations as the potential Pakistan litigation over individual targeted sanctions, in that the amount of damages would likely be extremely low in comparison to the cost of litigation.

3. European Union

Seven states with which the United States maintains modern FCN treaty relationships are members of the EU.[191] Although the EU often aligns with the United States on foreign policy issues, EU states oppose U.S. unilateral sanctions programs as they unilaterally restrict their nationals and companies from engaging in beneficial commercial activity.[192] EU states have also

190 Note that this analysis examines the ability of a government and military officials to benefit from treaty protections, not whether the United States would sanction personal assets and activities. It is clear from practice that the United States would subject the individual's assets to sanctions regardless of the nature of the underlying activity. In *Paradissiotis v. United States*, the Federal Circuit Court of Appeals upheld this practice, holding that it would be inconsistent with the purpose of economic sanctions to allow a sanctioned Libyan government agent to engage in profitable U.S. securities transactions. 304 F.3d 1271, 1275 (Fed. Cir. 2002).

191 Denmark, Germany, Greece, Ireland, Italy, Luxembourg, and the Netherlands.

192 *See* Steven Erlanger, *Europe Struggles to Defend Itself Against a Weaponized Dollar*, N.Y. TIMES (Mar. 12, 2021), https://www.nytimes.com/2021/03/12/world/europe/europe-us-sanctions.html; *see also* Jonathan Hackenbroich, *How Europe Can Defend Itself from US Sanctions*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Aug. 25, 2020), https://ecfr.eu/article/commentary_how_europe_can_defend_itself_against_us_economic_sanctions/; Adam Payne, *24 EU Countries Complained to the Trump Administration about Its Use of Sanctions, Taking US Officials by Surprise, According to a Report*, INSIDER (Aug. 14, 2020, 6:53 AM),

shown willingness to challenge U.S. sanctions. In 1996, U.S. extraterritorial sanctions on business with Cuba led the EU to initiate a World Trade Organization (WTO) dispute and also motivated the EU to pass a "blocking statute" prohibiting member-state nationals and companies from complying with these sanctions.[193] The dispute ultimately led to an agreement that the neither party would seek to pass new economic sanctions "designed to make economic operators of the other behave in a manner similar to that required of [the partner's] own economic operators."[194]

As a result, the United States switched from a policy of extraterritorial sanctions, which impose sanctions directly on foreign entities outside U.S. territory that do not comply with the sanctions policy,[195] to pursuit of secondary sanctions, which prohibit U.S. nationals and companies from having commercial relationships with foreign entities that do not follow U.S. sanctions policy.[196] Secondary sanctions essentially prohibit access to the U.S. market rather than sanctioning non-complying foreign firms directly.

This analysis will specifically focus on Germany's ability to bring an *Alleged Violations*-type claim based on secondary sanctions, although any of the seven EU members with an FCN treaty relationship could theoretically bring a similar case. The Treaty of Friendship, Commerce and Navigation between the United States and Germany (Germany FCN) came into force on July 14, 1956.[197] The ICJ jurisdiction clause is located in Article XVII but looks different than other FCN jurisdiction clauses in that it provides that disputes shall be submitted to arbitration or the ICJ "upon agreement of the Parties" (essentially an *ad hoc* ICJ jurisdiction clause). However, the provisions in the Additional Protocols to the Treaty, which are to be considered "integral parts" of the Treaty,[198] state that disputes under Article XVII shall be submitted to the ICJ once Germany becomes a member of the United Nations or a party to the ICJ Statute.[199] A history of the Treaty negotiation shows that the discrepancy in the jurisdiction clause here is a result of contemporary German hesitance to refer disputes to the ICJ, at least so long as the Soviet Union blocked German accession to the United

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https://www.businessinsider.com/report-twenty-four-eu-states-complain-to-trump-administration-about-us-sanctions-2020-8.

193 JOHN J. FORRER, SECONDARY ECONOMIC SANCTIONS: EFFECTIVE POLICY OR RISKY BUSINESS 3, 5 (2018); Nicholas Davidson, *U.S. Secondary Sanctions: The U.K. and EU Response*, 27 STETSON L. REV. 1425, 1434-35 (1998) (describing the EU response to U.S. extraterritorial sanctions).

194 FORRER, *supra* note 193, at 3, 5.

195 *Id.*; *see also* Davidson, *supra* note 193, at 1425 (stating the extraterritorial scope of U.S. claims to sanctions jurisdiction).

196 FORRER, *supra* note 193, at 3; *But see* Ruys, *supra* note 27, at 8 (arguing that the terms "extraterritorial" and "secondary" sanctions are essentially interchangeable, as the focus should be on the attempt to regulate foreign conduct rather than the territoriality connection).

197 Treaty of Friendship, Commerce and Navigation, Ger.-U.S., Oct. 29, 1954, 7 U.S.T. 1839.

198 *Id.* at 1904.

199 *Id.* at 1909.

Nations.[200] Since Germany attained UN membership on September 18, 1973,[201] Article XVII now functions as a compulsory ICJ jurisdiction clause.

U.S. secondary sanctions have had significant effects on the German economy. It is estimated that CAATSA secondary sanctions on a single Russian aluminum firm[202] caused the German aluminum industry to reduce its production by up to 20%, leading to the loss of over 1,000 jobs and "pos[ing] a threat to the entire aluminum and processing industry. . ."[203] Secondary sanctions have also had substantial discrete impacts on individual companies. For example, in 2010, the Department of Treasury accused German bank Commerzbank AG of facilitating payments to a number of sanctioned entities.[204] Commerzbank reached a settlement with the Department, ultimately agreeing to cease operations with these entities and paying over $258 million,[205] which is essentially the cost of maintaining access to the U.S. market.

While the showing of harm may be an easy task, showing that these types of actions violate a provision of the Germany FCN may be more difficult. Unlike the Treaty of Amity, the Germany FCN is extremely detailed and every trade protection is qualified by the language that nationals or companies shall be afforded MFN treatment. For example, Article XII(1) states:

> Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the assumption of undertakings for, and the making of, payments, remittances, and transfers of moneys and financial instruments.

The German government may be unhappy if OFAC decides to freeze assets of a German company for violating U.S. sanctions policies, but it would have a difficult time arguing that the German company was not given national treatment as OFAC applies the same standards to U.S. companies.

Germany may have a stronger argument here alleging a violation of Article XVIII(1), which requires that each government consult with the other to take such measures that would limit access to markets.[206] The

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200 VANDEVELDE, *supra* note 45, at 301.

201 *See* GERMANY, https://www.un.org/en/about-us/member-states/germany#. (last visited Apr. 30, 2021).

202 22 U.S.C. § 9525 (2017).

203 Rohan Sinha & Stefan Talmon, *Germany Considers U.S. Extraterritorial Sanctions Illegal*, GERMAN PRACTICE IN INTERNATIONAL LAW (Jan. 8, 2020), https://gpil.jura.uni-bonn.de/2020/01/germany-considers-u-s-extraterritorial-sanctions-illegal/.

204 DEP'T OF THE TREASURY, SETTLEMENT AGREEMENT WITH COMMERZBANK AG, 1 (Mar. 11, 2015) https://home.treasury.gov/system/files/126/20150312_commerzbank_settlement.pdf.

205 *Id.* at 10.

206 "The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more

German government could argue that U.S. sanctions violate Article XVIII(1), as they restrict which markets German companies may operate in and the German government was not consulted prior to the imposition of sanctions. Of course, the United States would likely have objections to this interpretation, but there should be cause for concern, given that the ICJ has shown willingness to entertain sanctions-related claims at the merits phase.

That is, in *Alleged Violations*, Iran claimed that U.S. sanctions violated the Treaty of Amity because they imposed restrictions on Iran's relationships with third parties.[207] The United States responded by arguing that the Treaty of Amity governs the bilateral relationship, with no impact on relations with third parties.[208] The Court seems inclined to consider factual evidence of sanctions' impact to answer questions about the scope of the Treaty protections, holding that such allegations are enough to survive preliminary objections:

> Only through a detailed examination of each of the measures in question, of their reach and actual effects, can the Court determine whether they affect the performance of the United States' obligations arising out of the provisions of the Treaty of Amity invoked by Iran, taking account of the meaning and scope of those various provisions.[209]

The Court's judgment on preliminary objections would seem to set a low bar for accepting jurisdiction where there is an arguable question of the scope of treaty protections and some credible showing of significant harm. Even if Article XVIII(1) was not intended to govern sanctions implementation, the Treaty text would seem to support an arguable case and Germany can probably make an initial showing of significant harm. In sum, it would seem that the Germany FCN may provide some basis for a cause of action to challenge U.S. sanctions at the ICJ.

The above scenarios explore theoretical causes of action against the United States and are only intended to determine whether such cases are possible. None of the above scenarios are as strong of a case as Iran presents in *Alleged Violations*, or even necessarily a strong case at all, but the fact

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private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect." Treaty of Friendship, Commerce and Navigation, Ger.-U.S., *supra* note 197.

207 *See Alleged Violations*, , Preliminary Objections of the United States, 2019 I.C.J. 175 (Aug. 23) ¶¶ 3.6-3.7), https://www.icj-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf.

208 *Id.*

209 *Alleged Violations*, Judgment on Preliminary Objections, 2021 I.C.J 175 (Feb. 3) ¶ 81), https://icj-cij.org/public/files/case-related/175/175-20210203-JUD-01-00-EN.pdf.

remains – the United States faces exposure to ICJ jurisdiction through its modern FCN treaty relationships and there are some possible causes of action to challenge U.S. sanctions policy. Whether a State will pursue ICJ jurisdiction will likely depend on the costs of litigation compared to expected relief.

C. Practical Considerations in Pursuing ICJ Litigation

The feasibility of ICJ litigation is likely to be weighed against the pros and cons of other means of seeking sanctions relief. ICJ litigation, or any international litigation before an international institution, can present daunting challenges for parties. Three major challenges for participation in international litigation are a lack of human resources, a lack of financial resources, and a lack of institutional arrangements.[210] Developing states may have special difficulties in obtaining the necessary in-house expertise,[211] but even developed states may lack necessary human resources to participate in international litigation.[212]

The lack of expertise can increase the financial burden of litigation, which can be a major disincentive to initiate ICJ proceedings.[213] There is little data available on the actual costs of participation in ICJ litigation, but it may be useful to get an estimate by looking at the costs of international arbitration. According to a 2017 study, the average cost of international investment arbitration for claimants was approximately $6 million.[214] ICJ litigation is likely not quite as costly as international arbitration, as the costs of ICJ judges and court costs are covered by the ICJ budget, unlike international arbitration where the parties must pay court costs and arbitrator fees. [215] But, even absent court costs and arbitrator fees, it is still not a small undertaking for many States. Parties must still meet the costs of counsel, experts, legal research, and translation (if required).[216]

In 1989, the United Nations set up a legal aid fund to address this issue, where indigent states can request money to fund ICJ litigation.[217] In this

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210 Phillippe Sands, *Enhancing Participation in International Litigation*, 24 COMMONWEALTH. L. BULL. 540, 551 (1998).

211 *Id.* at 552.

212 For example, Australia has had to hire outside counsel for a WTO dispute because it lacked necessary in-house expertise. *Id.*

213 Sands, *supra* note 210, at 552.

214 Mathew Hodgson, *Investment Treaty Arbitration: Cost, Duration, and Size of Claims All Show Steady Increase*, ALLEN & OVERY (Dec. 14, 2017), https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.

215 Sands, *supra* note 210, at 552.

216 *Id.*

217 Gbenga Oduntan, *Access to Justice in International Courts for Indigent States, Persons and People*, 58 INDIAN J. INT'L L. 265, 274 (2018).

scheme, the indigent state submits cost estimates to a panel of experts, the experts then release funds along with a budget, and the state submits receipts to UN auditors.[218] However, the balance of the fund has remained at around $3 million throughout its existence, rarely being used.[219] One problem with the fund is that the United Nations seems reluctant to release funds in cases without compulsory jurisdiction, as the opposing party may withdraw from the litigation.[220] This affects the viability of the legal aid scheme as a funding opportunity for states who wish to pursue contentious ICJ litigation.

Internal political considerations are also a major motivating factor in the choice to pursue ICJ litigation. Sometimes, internal political forces may be "more inclined to accept losing if the decision has been imposed from elsewhere than if the state concerned had simply conceded from the start."[221] Moreover, in some instances, negotiated settlements could signal weakness to domestic audiences and research has shown that taking a case to the ICJ can help governments save face.[222] One could imagine a scenario where the German political party in power brings an ICJ case concerning U.S. sanctions policy to appease local interests that resent U.S. influence over their trade relationships. However, this may not be true where the nature of the issue is already highly publicized and emotional within domestic politics. For example, Australia and New Zealand chose to pursue ICJ litigation to challenge Japanese whaling activity in the South Pacific, rather than pursuing diplomatic negotiations.[223] Concessions from the Japanese Foreign Ministry had seemed likely initially, but the ICJ litigation mobilized Japanese public opinion behind the Japanese Fisheries Agency.[224] Not only did Japan refuse to recognize the judgment, it changed its stance toward ICJ compulsory jurisdiction and refused to submit to further ICJ jurisdiction on this issue in the future.[225]

It might seem likely that a State is more willing to bring a case to the ICJ where it has a contentious relationship with the other State. However, empirical research on ICJ cases shows that States have a higher tendency to bring disputes to the ICJ where there is an established trade relationship, and the moving State is more dependent on the trade relationship.[226] The

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218 *Id.* at 274-75.

219 *Id.* at 275.

220 *Id.* at 308.

221 Malcom N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 INT'L & COMP. L. Q. 831, 832 (1997).

222 Christina L. Davis & Julia C. Morse, *Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice*, 62 INT'L STUD. Q. 7091, 711 (2018).

223 Whaling in the Antarctic (Aus. v. Japan), Declaration of New Zealand Intervening, 2012 I.C.J. 148 (Nov. 20).

224 Bill Mansfield, *Peaceful Settlement of International Disputes: Litigation or Negotiation - Some Practical Considerations*, 14 OTAGO L. REV. 329, 334 (2016).

225 *Id.*

226 Davis & Morse, *supra* note 222, at 710.

dependency on the trade relationship may suggest that the moving party is often the economically weaker party. Another aspect States, and especially economically weaker States, must consider is the precedential impact of the arguments that they make at the ICJ. For example, Iran has argued for broad interpretation of FET, full protection and security, and other common treaty-based investment protection provisions in its *Alleged Violations* memorial. If Iran were a respondent in a future investment dispute, the applicant could use Iran's applicant-friendly interpretations of these provisions against Iran. Iran may not be too concerned about this possibility, as it has only been the respondent State in two reported investor-state arbitrations.[227] This consideration might be different for a State like Pakistan, for instance, which has been the respondent State in 12 reported investor-state arbitrations.[228]

States may also consider alternative strategies to negate the effect of sanctions rather than pursue ICJ litigation. Retaliatory sanctions may be an option, but are not likely to have comparable effects given that they are not underpinned by the dominance of the U.S. financial system that makes U.S. sanctions so effective. States have also tried other means of imposing costs for sanctions, such as banning the importation of agricultural resources,[229] targeting American multinationals for negative treatment,[230] and establishing an alternative interbank transfer system.[231] It is also believed that States launder money to avoid sanctions enforcement through the use of cryptocurrency[232] or by hiding the source of raw materials.[233] However, it is unclear whether any of these are effective strategies for countering sanctions and States may prefer to pursue ICJ litigation for the possibility of complete relief.[234]

So, while the costs of ICJ litigation may be high, the possibility of obtaining complete relief may make it an attractive option for sanctions

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227 These two cases are: East Asian Consortium B.V. v. Iran Electronic Development Company, ICC Case No. 15597/JEM/GZ (2008); Turkcell v. Iran, UNCITRAL (2008).

228 *See* INVESTMENT ARBITRATION REPORTER, ARBITRATION CASES, https://www.iareporter.com/arbitration-cases/ (last visited Apr. 30, 2021).

229 Mergen Doraev, Note, *The "Memory Effect" of Economic Sanctions Against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 U. PA. J. INT'L L. 355, 412 (2015).

230 Katzman, *supra* note 42, at 44-45.

231 Michael Lipin, *More European Nations Join Effort to Bypass US Sanctions on Iran*, VOICE OF AMERICA (Nov. 29, 2019), https://www.voanews.com/middle-east/voa-news-iran/more-european-nations-join-effort-bypass-us-sanctions-iran.

232 Emma K. Macfarlane, *Strengthening Sanctions: Solutions to Curtail the Evasion of International Economic Sanctions through the Use of Cryptocurrency*, 42 MICH. J. INT'L L. 199, 199 (2020) (alleging that Iran, Russia, Venezuela, and North Korea use cryptocurrency to avoid U.S. sanctions).

233 *See* Ted Regencia, *How Can Iran Bypass US Sanctions?*, AL JAZEERA (Nov. 5, 2018), https://www.aljazeera.com/economy/2018/11/5/how-can-iran-bypass-us-sanctions (alleging that Russia surreptitiously exports refined Iranian oil products to Europe).

234 *See, e.g.*, Katzman, *supra* note 42, at 44 (noting that, as of April 2021, the European alternative interbank transfer system had only been used once to process a single payment of $540,000).

relief, especially since other methods of sanctions avoidance have seemed to prove largely ineffective. Internal and international political considerations are also relevant factors that would have to be weighed on a case-by-case basis. Despite the desirability of a potential favorable ICJ outcome, it does not seem that the expected relief would be so great as to outweigh the costs in any of the analyzed cases. Iran's losses caused by U.S. sanctions far exceed the costs imposed on any other country, and, as such, it is unlikely that any other country has a similar incentive to pursue ICJ litigation as a resolution.

IV. CONCLUSION

The *Alleged Violations* litigation is the result of a set of unique circumstances. The Treaty of Amity was negotiated with Iran to ensure protections on mutual investment and the compromissory clause providing compulsory ICJ jurisdiction was intended to provide U.S. oil companies with a viable dispute resolution mechanism to challenge possible expropriations.[235] The Treaty somehow persisted even after the two countries severed diplomatic relations and established a separate dispute resolution mechanism where nationals could bring expropriation claims.[236] Thus, the Treaty provided a dispute resolution mechanism intended for investment disputes long after mutual investment activity had ceased and another tribunal had been established for this specific purpose. Moreover, the Iran sanctions at issue are unique in their size and scope. The sanctions on Iran are more comprehensive than those on any other country and have been described as a form of "financial warfare".[237] The intensive sanctions programs provided an arguable case for violations of the Treaty of Amity investment protection provisions and the claimed damages are high enough to justify the costs of ICJ litigation.

It is unlikely that any other State would follow Iran's strategy in *Alleged Violations*. Fifteen States have the ability to bring a similar case given U.S. exposure to compulsory ICJ jurisdiction in the active modern FCN treaties. However, none of these States has as strong a cause of action to bring a case as Iran did, because of differences in treaty protections and because U.S. sanctions have different impacts on these States. Also, the damages U.S. sanctions would cause on these States would probably not justify the costs

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235 VANDEVELDE, *supra* note 45, at 310-11.

236 *See* MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 49-50 (2010) (discussing the establishment of the Iran-U.S. Claims Tribunal following the Iranian Hostage Crisis).

237 ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 115 (2016); *see also id.* at 117 (distinguishing Iran sanctions from other U.S. sanctions programs as "particularly sustained, systematic, creative, and intensive. . .").

of ICJ litigation. While new ICJ litigation similar to *Alleged Violations* may currently seem unlikely, U.S. exposure to ICJ compulsory jurisdiction through the modern FCN treaties should be considered a constraint to future comprehensive sanctions programs. If the United States imposes comprehensive sanctions programs on a modern FCN treaty party in the future, this may provide stronger causes of action and change the cost calculations for that State to seek ICJ litigation.

While the risk of litigation is difficult to quantify, it is clear that this risk exists and it is a potential cost that could mitigate the effectiveness sanctions policy. Given this risk, perhaps it is time for U.S. policymakers to reconsider whether the compromissory clauses of the modern FCN treaties are worth maintaining. These clauses were negotiated to strengthen bilateral investment protections,[238] but as previously discussed, compulsory ICJ jurisdiction is a poor dispute resolution mechanism for investors.[239] The desire for an effective dispute resolution mechanism was a major motivation for the transition to investor-state arbitration in modern practice.[240]

The success of U.S. investment in modern FCN party States where there is a lack of a viable investment dispute resolution might call into question the need for formal dispute resolution clauses at all.[241] For example, it is estimated that U.S. foreign direct investment in Germany exceeded $140 billion in 2018,[242] despite the fact that U.S. investors cannot bring an investor-state claim against that State.[243] It is possible that vigilant monitoring allows market forces to provide enough incentives to ensure fair treatment of U.S. investors.[244] Moreover, local courts may be becoming increasingly sophisticated and could be able to fairly adjudicate international

238 Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

239 *See supra* Section III.A.1.

240 *See* VANDEVELDE, *supra* note 45, at 544-45 (discussing the growth of investment protections in BITs and Free Trade Agreements (FTA) in the modern era, which have led to hundreds of investment arbitration claims and hundreds of millions of dollars in arbitral awards); the United States does not have BIT relationships with any of the modern FCN parties, and it is possible that the United States did not pursue BITs where an FCN relationship already existed. The United States does have Free Trade Agreements (FTA) with Israel and South Korea. While the South Korea FTA does provide for investment arbitration for the settlement of investment disputes, the Israel FTA does not provide investment protections. DEP'T OF STATE, UNITED STATES BILATERAL INVESTMENT TREATIES, https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/ (last visited Apr. 30, 2021).

241 Excepting the case of South Korea, and assuming that the ICJ is not a viable means of dispute resolution for investment claims.

242 DEP'T OF STATE, 2020 INVESTMENT CLIMATE STATEMENTS: GERMANY, https://www.state.gov/reports/2020-investment-climate-statements/germany/ (last visited on Apr. 30, 2021).

243 *See id.* at "Legal Regime" (noting that a U.S. investor has never brought an investor-state claim against Germany).

244 Indeed, the State Department's annual "Investment Climate Statements" provide detailed information for investors on target markets and the legal regimes governing foreign investments.

disputes.[245] Exhaustion of local remedies is a customary rule of international law and, although investment arbitration tribunals have sometimes found this requirement futile, an investor would likely have to seek a remedy in local court prior to initiating arbitration anyways.[246] If the United States wants to foster greater respect for international investment rules, perhaps channeling these cases to foreign domestic courts will help accelerate their development in handling international disputes and help States to internalize these principles through continued practice.

Moreover, simply substituting investor-state arbitration for compulsory ICJ jurisdiction may not eliminate sanctions-related litigation exposure, as this may be another method for foreign individuals to challenge U.S. sanctions.[247] For example, Chinese nationals recently initiated investor-state arbitration against Ukraine under the China-Ukraine BIT after the Ukrainian government blocked the assets of potential Chinese investors.[248] The Ukrainian government later sanctioned these individuals, who claim that the sanctions amount to further violation of the BIT.[249] Australian companies impacted by Chinese sanctions on Australian exports have also recently considered initiating investor-state arbitration under the China-Australia FTA to challenge these sanctions.[250] If policymakers seek amendments to the modern FCN treaties and want to maintain a formal dispute resolution mechanism, they might consider seeking specific carve-outs for sanctions disputes, as has been done in some BITs.[251]

Until then, while there is a low risk of another case similar to *Alleged Violations* right now, the compromissory clauses and broad substantive

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245 *See, e.g.*, DEP'T OF STATE, *supra* note 242 (stating that investors can expect local German courts to protect their rights and noting the development of the German International Commercial Dispute Court, which allows parties to litigate in English).

246 *See generally* Zachary Mollengarden, Note, *The Utility of Futility: Local Remedies Rules in International Investment Law*, 58 VA. J. INT'L L. 403, 405 (2019).

247 *See* Jessica Beess & Jessica Chrostin, *Unilateral and Multilateral Sanctions in Investment Arbitration*, 110 PROC. OF THE ANN. MEETING (AM. SOC'Y INT'L L.), 207, 209 (2016) ("Unilateral (or regional) sanctions . . . may give rise to successful claims in investment arbitration, depending, of course, on the wording of the BIT and the specific facts of the case.").

248 Vladislav Djanic, *Chinese Investors Follow Through on Earlier BIT Threat Against Ukraine*, IAREPORTER (Dec. 7, 2020), https://www.iareporter.com/articles/chinese-investors-follow-through-on-earlier-bit-threat-against-ukraine/.

249 Vladislav Djanic, *Ukraine is Looking for Counsel in 3.5 Billion USD Treaty-based Dispute, as Sanctions are Imposed on Chinese Investors*, IAREPORTER (Feb. 1, 2021) https://www.iareporter.com/articles/ukraine-is-looking-for-counsel-in-3-5-billion-usd-treaty-based-dispute-as-sanctions-are-imposed-on-chinese-investors/.

250 Vladislav Djanic, *Australian Exporters Contemplate Treaty-based Claim Against China*, IAREPORTER (Dec. 17, 2020), https://www.iareporter.com/articles/australian-exporters-contemplate-treaty-based-claims-against-china/.

251 *See* Beess & Chrostin, *supra* note 247, at note 11 (stating that some U.S. BITs contain carve-outs for sanctions disputes); *see, e.g.*, Investment Treaty with Bahrain, Bahr.-U.S., art. 12(a), Sept. 29, 1999 , 106 U.S.T. 25.

provisions of the modern FCNs expose the United States to the possibility of facing unexpected litigation at the ICJ in the future.