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Reflections on Certain U.S. Law Specificities that Constitute Obstacles to the Free Trade Area of the Americas: A Brazilian Perspective

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REFLECTIONS ON CERTAIN U.S. LAW SPECIFICITIES THAT CONSTITUTE OBSTACLES TO THE FREE TRADE AREA OF THE AMERICAS: A BRAZILIAN PERSPECTIVE

DURVAL DE NORONHA GOYOS*

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I. INTRODUCTION

The fast-paced changes in the global economy and the consequent influence on the law of international trade, particularly after the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994, have made anachronisms of commerce-related national laws in several

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countries. Such laws were the results of predominant GATT-inconsistent attitudes of a largely protectionist character in a different era. As with old habits, old laws die hard. Thus, throughout the world, adjustments to the new international legal reality have become a necessary and painstaking process.

I would like to thank the *University of Miami Inter-American Law Review* for allowing me to choose this topic for today's presentation. I have done so with the sole purpose of highlighting the magnitude of the obstacles to be encountered in the legal framework of different relevant national laws before a Free Trade Area of the Americas (FTAA) may be founded, as it must, on the rule of law.

The disproportionate size of the U.S. economy in the projected FTAA, as well as its history of political isolation and economic unilateralism, warrant an indepth study of the internal structure of U.S. laws and their relation to international law. My presentation today will focus on the following: the kinds of international agreements under U.S. law, the formation and implementation of treaties under U.S. law, the Vienna Convention on the Law of Treaties (Convention)¹ and U.S. law, and the U.S. trade legislation and Section 301 of the Trade and Tariff Act.²

II. THE KINDS OF INTERNATIONAL AGREEMENTS UNDER U.S. LAW

Under U.S. law, a distinction is made between treaties and other international agreements. In contrast, both treaties and "executive agreements" are considered treaties as that term is used in international law. This distinction bears significant legal differences and makes relevant certain practical consequences deriving domestically in the United States.

The United States makes the following classifications of international agreements under U.S. law: 1) treaties; 2) congressional executive agreements; and 3) presidential executive

1. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (entered into force on Jan. 27, 1980) [hereinafter Vienna Convention].

2. Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975), *amended by* Omnibus Trade and Competitive Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164 (codified as amended at 19 U.S.C. §§ 2411-2419 (1988)) [hereinafter Trade and Tariff Act of 1974].

agreements. Pursuant to the U.S. Constitution, treaties must be procured through the advice and consent of the Senate. The second kind of international agreement is the congressional executive agreement. These fall into two subcategories: "previously" and "subsequently" authorized. In previously authorized executive agreements, Congress enacts legislation delegating to the President the authority to enter into such agreements.³ In subsequently authorized executive agreements, the President seeks authority from Congress to accept his previously made agreement as a binding international commitment of the United States.⁴ The final kind, the presidential executive agreement, requires that the President accept an agreement as binding on the United States by virtue of his inherent power under the Constitution without any congressional approval.⁵

Federal statutes and treaties are deemed to be of equal rank. Thus, if a treaty and federal statute conflict with each other, courts tend to construe as operative law the one made last in time. Both treaties and federal statutes prevail over executive agreements in cases of conflict. Additionally, treaties prevail over state law. The U.S. Supreme Court in *Missouri v. Holland*⁶ held that valid treaties prevail over state law, even if a U.S. federal statute on the same subject might be considered an unconstitutional interference with state power in the absence of the treaty.

The President has the "[p]ower, by and with the [a]dvice and [c]onsent of the Senate, to make [t]reaties, provided two-thirds of the Senators present concur"⁷ The treaty power is thus divided between the executive branch and the legislative branch of the U.S. government. The Senate's role is to advise and to consent to a treaty; the President's role is to make and to ratify or accede to a treaty. The Senate can condition its consent on the requirement that the President amend the treaty, or that the President enter certain "reservations." The President may ratify or accede to the treaty only with the Senate's changes.

3. See, e.g., *id.* § 101 (authorizing the United States to enter into trade agreements).

4. See, e.g., Bretton Woods Agreements Act, 22 U.S.C.A. § 286c (West 1990).

5. For example, agreements made under Article II, Section 2, Clause 1 of the U.S. Constitution are Presidential Executive agreements. U.S. CONST. art. II, § 2, cl. 1.

6. 252 U.S. 416 (1920).

7. U.S. CONST. art. II, § 2.

The Senate Committee on Foreign Relations (Committee) has exclusive jurisdiction over treaties and executive agreements. The Committee prepares the resolution that gives the Senate's consent to the ratification of the treaty. The Senate may base its approval on conditions set forth in the resolution. Conditions can be amendments, reservations, understandings, declarations, and statements (or provisos). They may be offered at any time during the Committee's deliberations or during consideration in the full Senate prior to the vote on the resolution.

A majority vote is required in the Committee and in the Senate to incorporate a condition into the resolution. Adoption of the resolution then requires a two-thirds vote in the Senate. The Senate has several options. It can amend, make a reservation, issue a Senate "understanding" or "declaration" regarding the general issue, or make "statements regarding related issues of United States law."⁸

After the Senate consents to a treaty, the President is free to ratify it. Ratification is the formal process of declaring the willingness of the state to be bound by a treaty. Ratification is usually confirmed in a formal document called an "instrument of ratification." The President must give effect to all conditions imposed by the Senate for its consent. If the President decides that, under international law, the treaty cannot be interpreted as the Senate has required, he has no authority to ratify the treaty unless the instrument of ratification is accompanied by express language conforming to the Senate's understanding. The instrument of ratification includes the title of the treaty, the date of signature, the countries involved, and the languages used. The President can also attach a statement of understanding or a declaration regarding the Senate's understanding of a treaty, even if the Senate did not offer a formal reservation or understanding.

To be bound internationally, a country must exchange or deposit its instrument of ratification. This international act of exchange or deposit, specifically, allows the formal entry into force of a treaty which usually occurs at a later specified date. Gen-

8. Enactment of a Law-Executive Business and Executive Sessions (visited Sept. 22, 1997) (<http://thomas.loc.gov/home/enactment/executive.html#treaties>); 25.1 Adoption of Treaties, Treaties in Domestic Law-United States (last modified Oct. 1, 1995) (<http://cec.org/infobases/law/Data.cfm?format=1&Country=US&Language=english&unique=120>).

erally, bilateral treaties are exchanged, while multilateral treaties are deposited. If treaties are to be deposited, they usually state where and with whom.

When the necessary exchange or deposit has been completed and the treaty has entered into force, the President issues a presidential proclamation that the agreement is in force. The proclamation of a treaty is a national act by which the text of a ratified treaty is publicized. After signing, the President returns the proclamation with his signature to the Secretary of State, who will publish it with the treaty text in *United States Treaties and Other International Agreements* and register it with the United Nations Secretariat pursuant to the United Nations Charter Article 102. Under Article 102, no party can invoke a treaty agreement before any organ of the United Nations until it is registered with the United Nations.⁹

III. THE FORMATION AND IMPLEMENTATION OF TREATIES UNDER U.S. LAW

The U.S. Constitution, Article VI, Clause 2, also known as the Supremacy Clause, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰

Article III of the Constitution provides that cases arising under treaties are within the judicial power of the United States.¹¹ The framers of the U.S. Constitution adopted this language to minimize treaty violations attributable to the United States: a goal which they hoped to advance through empowering the courts to enforce treaties at the behest of affected individuals without awaiting authorization from state or federal legislatures.

9. U.N. CHARTER art. 102, para. 2.

10. U.S. CONST. art. VI, cl. 2.

11. *Id.* art. III, § 2.

While the Supremacy Clause appears to be dispositive of the effect that treaties are to have on domestic law, judicial decisions since the signing of the Constitution have given the clause a myriad of interpretations. Furthermore, although the Constitution mandates that treaties are to be regarded as "law," and therefore enforceable by the courts without prior domestic legislation, this does not mean that treaties may be enforced by anyone at any time. The principal controversy in interpreting the Supremacy Clause—and the extent to which a treaty or certain treaty provisions may be operative under domestic law—arises from the distinction made between "self-executing" and "non-self-executing" treaties,¹² despite the fact that the Clause itself makes no distinction between treaties as such.

Whether or not a treaty or executive agreement is self-executing—sometimes referred to as "directly applicable"—is a matter of constant interpretation in the American judicial system. In theory, the issue was decided in 1829 in the case of *Foster v. Neilson* where Chief Justice John Marshall, addressing the issue of a treaty's domestic law effect, stated:

Our Constitution declared a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the legislature must execute the contract before it can become a rule for the court.¹³

Foster was an ejectment action in which the plaintiffs claimed title to a tract of land in West Florida on the basis of a grant from Spain. The treaty, by which sovereignty over the territory that included the disputed land, was transferred to the United States, and provided in the English text that the Spanish grants "shall be ratified and confirmed to the persons in possession"¹⁴ The plaintiffs argued that the treaty confirmed their

12. A "self-executing" treaty is a treaty which may be enforced in the courts without prior legislation by Congress. A "non-self-executing" treaty may not be enforced in courts without prior legislative implementation.

13. 27 U.S. (2 Pet.) 253, 314 (1829).

14. *Id.* at 310.

title to the property and that the Court was, therefore, required to recognize their title to the land.¹⁵ The Supreme Court, however, held that it could not recognize their title to the land until Congress enacted legislation confirming the grants.¹⁶

The Court in *Foster* regarded the question of whether the treaty operated of itself as a matter of treaty construction. The Court focused on the treaty's language, stating that had the treaty provided that the grants were "hereby" confirmed, it would have confirmed the grants.¹⁷ However, the Court interpreted the English text of the treaty stating "shall be ratified and confirmed" as contemplating a future act of ratification by the United States.¹⁸ As "shall be ratified and confirmed" was executory in nature, the provision had to be executed before the Court would recognize the grants.¹⁹

Thus, *Foster* created the first of many distinctions concerning the enforcement and applicability of treaties domestically, even after the precepts of the Supremacy Clause were accepted. *Foster* stands for the proposition that the general rule established by the Supremacy Clause, under which treaties are enforceable in the courts without prior legislation, is narrower than previously thought in that there is a presumption that treaties are not necessarily self-executing if they may be altered by the parties to the treaty itself. Specifically, a treaty which otherwise might be self-executing pursuant to the Supremacy Clause, may not be self-executing where the parties to the treaty—or, perhaps, even the U.S. treaty negotiators alone—intended that the treaty's objective be accomplished through intervening acts of legislation.

Interestingly, *United States v. Percheman*,²⁰ a subsequent case stemming from the same treaty discussed in *Foster*, appeared at the time to have reversed the *Foster* decision by interpreting the Supremacy Clause to include a presumption that treaties are self-executing. In *Percheman*, the Supreme Court was given a Spanish text of the treaty which provided, in pertinent part, that grants "shall remain ratified and confirm-

15. *Id.* at 277.

16. *Id.* at 314.

17. *Id.*

18. *Id.* at 315.

19. *Id.*

20. 32 U.S. (7 Pet.) 51 (1833).

ed"²¹ The *Percheman* Court held that the language did not "stipulat[e] for some future legislative act,"²² and thus it could enforce the land grants without waiting for legislation to provide for such. However, some 150 years after the *Foster* and *Percheman* cases, Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic* cited *Foster* for the proposition that "[t]reaties of the United States ... do not generally create rights that are privately enforceable in courts."²³ Lower federal courts have subsequently held that *Foster* may be interpreted to create a presumption that U.S. treaties are not self-executing, notwithstanding the *Percheman* decision.²⁴

The Restatement (Third) of the Foreign Relations Law of the United States (Restatement)²⁵ summarizes very well the implications and repercussions of international law and international agreements as law of the United States:

1. International law and international agreements of the United States are law of the United States and supreme over the law of the several States.
2. Cases arising under international law or international agreements of the United States are within the judicial power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, and are within the jurisdiction of the federal courts.
3. Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

21. *Id.* at 88.

22. *Id.* at 88-89.

23. 726 F.2d 774, 808 (D.C. Cir. 1984).

24. See, e.g., *Robertson v. General Electric Co.*, 32 F.2d 495, 500 (4th Cir. 1929) (holding that, pursuant to *Foster*, "language of futurity" indicates that a treaty provision is not self-executing).

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT]. The Restatement, published by the American Law Institute (ALI), which was founded in 1923 in order to gather, synthesize, organize, and simplify the common law of the United States, is the primary tool the ALI uses to reach its goals. The Restatement attempts to gather and synthesize the case law on a topic, to organize it, and to present the "rules" distilled from the cases. These "rules" are the ALI's attempt of providing reference on the law.

4. An international agreement of the United States is "non-self-executing":

- a. if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation;
- b. if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation; or
- c. if implementing legislation is constitutionally required.²⁶

As will be discussed in Part IV, intent of the parties is one of the crucial factors considered by a U.S. court when determining whether a treaty may be deemed self-executing, such that it may be enforced in a U.S. court. Recent court decisions, however, have expanded upon the notion of "the parties' intent" to include one party's intent as a basis for analysis of the treaty. In an effort to obviate any doubt about a treaty's status of being self-executing, U.S. treaty negotiators have recently added clauses to treaties through "declarations" which have expressed their intent that the treaty is not self-executing,²⁷ and lower courts have even given conclusive weight to the aforementioned unilateral American declarations of non-self-execution.²⁸ Other sources of determination of "intent" accepted by American courts, in addition to the intent of both parties to the international agreement, have included the intent of the U.S. treaty negotiators, the President in transmitting it to the Senate for its advice and consent, and even the intent of the Senate in giving its advice and consent.²⁹

The Restatement apparently accepts the practice discussed above, stating:

In the absence of a special agreement, it is ordinarily for the United States to decide how it will carry out its international

26. *Id.* § 111.

27. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

28. *See, e.g., infra* note 31.

29. *See, e.g.*, *United States v. Postal*, 589 F.2d 862, 881-83 (5th Cir. 1979) (relying on preratification statements of State Department officials and U.S. negotiators); *Edwards v. Carter*, 580 F.2d 1055, 1057 n.4 (D.C. Cir. 1978) (relying on preratification statements by the Attorney General, State Department Legal Advisor, and Senate Foreign Relations Committee).

obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.³⁰

In addition to distorting the principle established in the Supremacy Clause to focus on the unilateral intent of the United States, some lower federal courts have construed the "intent" issue to ask not whose intent, but rather the intent about what. Accordingly, recent decisions have interpreted *Foster* and *Percheman* in a manner which establishes that, in the absence of evidence of an intent on the part of the drafters of the treaties to make them enforceable in courts of law, they are thus non-self-executing and will not be enforceable in the courts without prior legislative implementation.³¹

Regardless of the fact that it is entirely possible for some provisions of a treaty to be self-executing while others are not,³² many courts have taken an all or nothing approach in determining whether a treaty is self-executing and, thus, judicially enforceable in the United States without prior legislative implementation. For example, the U.S. Court of Appeals for the Third Circuit found the treaty language, "[e]very country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention," to reflect the parties' intent that the treaty was not to be considered as self-executing.³³

In addition to questioning the "intent" of the parties in determining whether or not a treaty is self-executing, many courts

30. RESTATEMENT, *supra* note 25, § 111, cmt. h.

31. *Postal*, 589 F.2d at 876-77; *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992).

32. "If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement." RESTATEMENT, *supra* note 25, § 111, cmt. h.

33. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

have examined other factors. These additional factors create a second hurdle that must be overcome to enforce a treaty provision in the United States, even once it is established that the treaty is self-executing or the necessary legislation has in fact been implemented to give it effect domestically. Other factors which courts will consider include whether the claim is "justiciable," whether the litigant has standing, and whether the litigant has a "right of action." In an attempt to simplify their analysis of these additional issues, many courts have converted the issues into a formula composed of factors which they will consider in determining whether a treaty is self-executing. These factors include the following: the language of the agreement;³⁴ the circumstances surrounding the execution of the agreement;³⁵ the class of the agreement (addressing the group in which constitutional treaties are classified);³⁶ the subject matter of the agreement;³⁷ the history of the agreement;³⁸ the historical purpose of the agreement;³⁹ and the parties' own "practical construction" of the treaty (i.e., their course of dealing).⁴⁰

An example of the kind of issue related to justiciability for which courts often will apply these factors is whether treaty provisions are meant to be obligatory on the parties or merely "precatory" in nature, more similar to recommended or wistful thoughts or wishes than direct commands. American jurisprudence has taken great pains to demonstrate that courts will not oversee actions for which there is no obligation to be imposed on the defendant. In the context of treaties, U.S. courts, by applying justiciability analyses,⁴¹ are further expanding the concepts of non-self-execution first brought forth in *Foster*. It should be noted that the determination of what is and is not considered precatory language⁴² and, thus, what constitutes a self-executing

34. *Sei Fuji v. State*, 38 Cal.2d 718, 721-22 (1952).

35. *Id.*

36. *See Santovincenzo v. Egan*, 284 U.S. 30, 37 (1931).

37. *See Clark v. Allen*, 331 U.S. 503, 513 (1947).

38. *See Arizona v. California*, 373 U.S. 546, 599 (1963).

39. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59 (1964).

40. *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).

41. Specifically, those which under U.S. constitutional law are regarded as analyses of whether an issue addresses a "political question," which, under the U.S. system of separation of powers, are left for the other branches of government (e.g., legislative or executive) to determine.

42. Language such as "use our best efforts," "cooperate" to achieve certain goals, "promote" or "encourage" certain principles is an example of precatory language.

and judicially enforceable treaty is generally considered to be a matter of U.S. municipal constitutional law.⁴³

A final issue which American courts will consider in determining what effect to give treaties under U.S. law is whether private parties may pursue an action in court to enforce a treaty provision. This issue is often linked to the issue of whether a party has standing to sue. Standing issues under U.S. law, as applicable to treaties, have yet to be fully enunciated by the courts. However, it is clear that there is no American doctrine which mandates that private parties may only enforce treaty provisions in court if the treaty itself provides for a private right of action. Currently, in bilateral as well as plurilateral international trade agreements, there is the robust tendency to allow private right of action.⁴⁴ Such a development is due to the lack of significant enforcement measures in international law and to the fact that it is often through national courts that international law is enforced. This is explicitly allowed by both the North American Free Trade Agreement (NAFTA) as well as by the Common Market of the South (MERCOSUL).⁴⁵

IV. THE VIENNA CONVENTION ON THE LAW OF TREATIES AND ITS EFFECTS VIS-À-VIS U.S. LAW

The Convention⁴⁶ attempts to codify international law regarding treaties as well as, on a minor scale, to promote progressive developments in the area, focusing on such issues as conclusion, entry into force, observance and application, reservations, interpretation as well as invalidity, termination, and suspension of the operation of treaties.

43. Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 712-13 (1995); see also *Aerovías Interamericanas de Panamá v. Board of County Comm'r of Dade County*, 197 F. Supp. 230, 245 (S.D. Fla. 1961). However, courts have rarely explored the question of whether they may also be bound by any international law on the subject.

44. The place of private parties within the system of international law has been a cause of controversy for some considerable time. Originally, international law was a system of rules governing the relations between sovereign states, and many of the rules of the system still reflect this. Presently, however, international law has extended its scope beyond its traditional areas, such as in trade and human rights. See generally MARTIN DIXON & ROBERT MCCORQUODALE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 106 (1991).

45. DURVAL DE NORONHA GOYOS, JR., *GATT, MERCOSUL & NAFTA* 220 (1996).

46. Vienna Convention, *supra* note 1.

The provisions of the Convention are binding only upon the parties to it.⁴⁷ Further, the provisions are applicable only to treaties entered into subsequent to the Convention's entry into force. However, as many of its covenants were customary international law,⁴⁸ or have become such, they are applicable to all treaties, even if the states concerned are not parties to the Convention. Indeed, those provisions of the Convention which are not declaratory of customary international law may constitute presumptive evidence of emerging rules of international law.

Even those areas that were inserted in the Convention for progressive development rather than codification have, to a great extent, passed into the general corpus of international law because of the sheer weight of their incorporation in the Convention. The most striking of these is the law on reservations, contained in Articles 19-23, which did not represent universal practice at the time of its adoption.⁴⁹ The articles on modification, Articles 40-41, some of the articles on invalidity and termination, and the rules on *jus cogens* are similar in this regard.⁵⁰ Article 26 of the Convention establishes the rule *pacta sunt servanda* in the law of treaties and the principle of good faith in international agreements.⁵¹ Article 27 determines that a sovereign state cannot invoke its internal law as an international legal justification for failing to perform its obligations under a treaty.⁵²

47. A distinction is drawn in international law between the international legal obligations of a state which is a party to a treaty and a state which is a signatory to a treaty. Under Article 11 of the Vienna Convention, states may consent to be bound by a treaty "through signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." *Id.* art. 11.

48. These are, for instance, the rule of interpretation, derived from the Beagle Channel Arbitration (Arg. v. Chile) 1 Int'l Arb. Proc. 307 (Perm. Ct. Arb. 1977), the rule of fundamental change of circumstances, derived from the Fisheries Jurisdiction (U.K. v. Iceland), 1974 I.C.J. 3 and the rule of material breach, derived from the Namibia Case, 1971 I.C.J. 16.

49. Indeed, the law on reservations is quite important, as Article 19 of the Vienna Convention allows the formulation of a reservation unless:

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty. Vienna Convention, *supra* note 1, art. 19.

In addition, Article 17 establishes that the consent of a state to be bound by part of a treaty will only be effective if the treaty so permits or the other contracting powers so agree. *Id.* art. 17.

50. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW (1990).

51. Vienna Convention, *supra* note 1, art. 26.

52. *Id.* art. 27.

This rule is to be interpreted in conjunction with Article 46, which disallows a state from claiming that its consent to be bound by a treaty has been expressed in violation of its internal law unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

The United States, though a participant in and signatory of the Convention, has not ratified the Convention. On November 21, 1971, the President of the United States transmitted the treaty to the Senate for its consent to ratification, but thus far the Senate has not acted upon it. In considering whether to give their consent to the Convention, the Senate Foreign Relations Committee sought to equate "treaties" as used in the Convention with "treaties" as used in the U.S. Constitution. The Senate declared that every agreement that is a "treaty" under the convention can be concluded as such by the United States only by the process prescribed for "treaties" under the Constitution.⁵³ The Senate's position was rejected by the executive branch. The Senate attempted to uphold and reserve current American law which conflicts with many Articles of the Convention.⁵⁴ Notably, the exception available under Article 46 would not be applicable to the United States, as it is restricted to the manifest violations objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

Consequently, U.S. municipal law displays numerous areas of inconsistency with international law concerning the domestic enforcement of international agreements, an area which is of great relevance in today's world, particularly in connection with bilateral or plurilateral trade and investment agreements. As a result of such inconsistencies, "the possibility arises that a U.S. court could come to a conclusion contrary to that of international law, and that such court decision would cause a breach of United

53. RESTATEMENT, *supra* note 25, pt. III, n.4.

54. The conflicting Vienna Convention Articles include, but are not limited to the following: Article 12 (consent to be bound by a treaty expressed by signature); Article 13 (consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty); Article 14 (consent to be bound by a treaty expressed by ratification, acceptance, or approval); Article 19 (formulation of reservations); Article 24 (entry into force); Article 26 (*pacta sunt servanda*); Article 27 (internal law and observance of treaties); Article 31 (general rule of interpretation); Article 32 (supplementary means of interpretation); Article 42 (validity and continuance in force of treaties); and Article 46 (provisions of internal law regarding competence to conclude treaties). Vienna Convention, *supra* note 1, arts. 12-14, 19, 24, 27, 31, 32, 42, 46.

States international obligations.”⁵⁵ This situation of obstinate refusal to limitations on its sovereignty by international law puts the United States in a singularly unique position in the international community. In contrast, the United Kingdom, for example, is a party to the Convention and, by the European Communities Act 1972, has incorporated the European Communities treaties into its national law, both of which represent an infringement of Parliament’s sovereignty.⁵⁶

V. THE U.S. TRADE LEGISLATION AND SECTION 301 OF THE TRADE AND TARIFF ACT OF 1974

A. *General Legal Background*

Section 301 of the Trade and Tariff Act of 1974⁵⁷ authorizes the U.S. Trade Representative (USTR) to investigate and sanction countries whose trade practices are deemed “unfair” to U.S. interests.⁵⁸ It contains both mandatory and discretionary provisions and specific timetables for USTR action. This Section originated as a revision to Section 252 of the Trade Expansion Act of 1962,⁵⁹ which allowed the President to restrict imports from countries that “unjustifiably” or “unreasonably” restricted U.S. exports. Section 301 also expanded the President’s authority to impose tariff and nontariff import restrictions.⁶⁰

A series of amendments to Section 301 have been concluded with the intention of expanding its scope as well as creating an arsenal of retaliatory actions with a view to ensuring the respective removal of offending foreign trade practices. Thus, the Trade Agreements Act of 1979⁶¹ amendments to Section 301 set forth specific time frames for investigations and their final resolution. The Trade Act of 1984⁶² provided further amend-

55. John H. Jackson, *United States of America*, in *THE EFFECT OF TREATIES IN DOMESTIC LAW*, 141, 154 (Francis G. Jacobs & Shelley Roberts eds., 1987).

56. DIXON & MCCORQUODALE, *supra* note 44, at 100.

57. Trade and Tariff Act of 1974 §§ 2411-2419.

58. *Id.* § 301(d)(1).

59. Trade Expansion Act of 1962, Pub. L. No. 87-794, & 252, 76 Stat. 872 (1992).

60. Trade and Tariff Act of 1974 § 301(a).

61. Trade Agreements Act of 1979, § 901, Pub. L. No. 96-39, 93 Stat. 144, 295 (1979) (implementing legislation for the Tokyo Round of Multilateral Trade Negotiations Agreement) [hereinafter Tokyo Round].

62. Trade And Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984).

ments, such as requiring the preparation of an annual national trade estimate as well as providing for self-initiation of Section 301 investigations by the USTR.

The most recent amendments, contained in the Omnibus Trade and Competitiveness Act of 1988,⁶³ transfer final decisionmaking authority in Section 301 cases from the President to the USTR. Most significantly, the 1988 amendments require mandatory action when a foreign government's policy is deemed "inconsistent" with its obligations under a trade agreement with the United States or is otherwise "unjustifiable." "Unreasonable" and "discriminatory" practices on the part of a foreign government warrant retaliatory action on the part of the USTR.⁶⁴ The arsenal for action in the Trade Act of 1988 came with the expansion of Section 301 to comprise three new categories: "Super 301," "Special 301," and "Telecommunications 301," all of which allowed the executive office to make sanctions in respect of the provisions therein.

"Super 301" was intended to be a temporary measure in 1989 and 1990, but since became integrated into the pre-existing U.S. law, under which the USTR was required to prepare, on schedule, a list of foreign trade barriers, a priority list of countries and their alleged "unreasonable" practices, a timetable for their removal, and in case of failure, a schedule for sanctions on the part of the United States. "Special 301" is very much similar to "Super 301" in its methodology, but addresses specifically the field of intellectual property. "Telecommunications 301," similar to the other categories, is designed to combat the "closed" nature of foreign telecommunications markets.

Among the sanctions available under Section 301 are the abilities to "suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions"⁶⁵ and to impose duties or other import restrictions on the goods or impose "fees or restrictions on the services of such foreign country" for such time as the USTR shall deem appropriate.⁶⁶ Broad discretionary powers are conferred upon the USTR not only for imposing sanctions, but also to enter into "binding"

63. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

64. 19 U.S.C. § 2411(b).

65. *Id.* § 2411(c)(1)(A).

66. *Id.* § 2411(c)(1)(B).

agreements that commit such foreign countries to: "a) eliminate, or phase out, the act, policy, or practice; b) eliminate any burden or restriction; or c) provide the United States with compensatory trade benefits."⁶⁷

B. The Legality of Section 301 Under International Law

There are few doubts that the development of aggressive unilateralism in the United States in the early sixties, evident in the enactment of the Trade Expansion Act of 1962, is intimately linked to the declining competitiveness of the U.S. economy on a global scale. The share of U.S. products in world exports fell from seventeen percent in 1950 to eleven percent in 1980.⁶⁸ According to Jagdish Bhagwati, "the concerns with fairness of trade and with opening foreign markets arose in the early 1980s and must be traced, in subtle ways ... , to the acceleration of import protectionism during the first term of the Reagan Administration."⁶⁹ Helen Milner noted that, in 1985:

as a result of concerns over the huge U.S. trade deficits and mounting protectionist pressures, Congress began action on a new trade bill... . Many in Congress felt that strong action needed to be taken to reduce the trade deficit... . Responding to domestic pressures, the administration announced its support for "fair trade," not just free trade.⁷⁰

Subsequently, the U.S. administration compromised and cooperated with Congress in writing a new bill that would become the Trade Act of 1988.

Similarly, there is almost universal consensus that unilateral action taken based on "Super 301" violates, in at least three different ways, basic norms of the GATT. In the first place, any retaliation based on the imposition of ad valorem tariffs applied

67. *Id.* § 2411(c)(1)(D).

68. See GOYOS, *supra* note 45, at 193.

69. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE AND POLICY AND THE WORLD TRADING SYSTEM 1 (Jagdish Bhagwati & Hugh T. Patrick eds., 1991).

70. Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 163, 166-67 (Jagdish Bhagwati & Hugh T. Patrick eds., 1991).

selectively will violate the principle of the Most Favored Nation (MFN) clause enshrined in Article 1 of the GATT. Second, as a result, such tariffs would be established at a level higher than that set in the Uruguay Round of the GATT, and thus, there would also be a violation of Article 2. Third, the fact that the United States would at the same time be the self-appointed prosecutor and jury of a foreign state in a tribunal not sanctioned by international law would represent a violation of a vast array of different norms.

During the Uruguay Round, actions under the "Super 301" were often justified with the argument that the multilateral system of the GATT did not allow for an efficient system of dispute resolution.⁷¹ This view also substantiated U.S. initiatives during the Uruguay Round to modify dispute resolution within the GATT, which were endorsed by the international community, in the hope that the increasingly juridical nature of the system would enhance the rule of law in international trade.⁷² As a matter of fact, the increased respect for the rule of law in the Uruguay Round treaties was hailed by the then Director-General of the GATT as one of the respective three major achievements.⁷³

Even with the upgraded dispute resolution system resulting from the Uruguay Round in place under the World Trade Organization (WTO) modeled very much along U.S. suggestions, the United States has not ceased to resort to unilateral practices illegal under international law. According to a study prepared by the U.S. National Association of Manufacturers, in just a four year period (1993-1996), sixty-one U.S. laws and executive actions, targeting thirty-five countries, were enacted authorizing unilateral economic sanctions for foreign policy purposes.⁷⁴ In addition, the United States continues to have a poor record in

71. This argument was extensively utilized even though up to 1989 the United States was the undisputed leader of noncompliance with adverse legal rulings from GATT dispute settlement proceedings. See Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 113 (Jagdish Bhagwati & Hugh T. Patrick eds., 1991).

72. See generally DURVAL DE NORONHA GOYOS, JR., A OMC E OS TRATADOS DA RODADA URUGUAI [MERCOSUL AND THE URUGUAY ROUND] (1995).

73. Peter Sutherland, *The Rule of Law in International Trade Relations*, Speech in São Paulo, Brazil, at the invitation of the GATT Commission of the Brazilian Bar (July 6, 1994).

74. NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-1996 (1997).

implementing adverse GATT-WTO dispute resolution decisions.⁷⁵

VI. CONCLUSION

In the United States, there are two thresholds to consider when analyzing the legal status of international agreements and the respective enforcement thereof under domestic law. The first threshold is whether the international agreement is considered a "treaty" or a "presidential executive agreement." Treaties are deemed to have the same hierarchy of federal laws, overruling the previous ones and being overruled by subsequent ones. Presidential executive agreements are subordinated to federal law. Both treaties and presidential executive agreements are deemed to be of higher rank than state laws. The second threshold is whether the international agreement is "self-executing" or "non-self-executing." U.S. courts will not recognize "non-self-executing" international agreements as local law and will deny the respective enforceability thereof. In the absence of very specific language as to the self-executing nature of an international agreement, any reference to "words of futurity" may be construed to signify that the treaty in question is not to be considered self-executing.

U.S. legislators, diplomats, and trade negotiators always have present in mind the basic thresholds referred to above during the negotiation, execution, and ratification of any international agreement. This attitude derives from an ingrained reluctance to place international law over municipal law and may be found even in the case of treaties that, under domestic law, would revoke previous conflicting federal laws. This same reluctance has consistently been shared by members of the American judiciary. An example of this situation pertains to the U.S. internal legislation with respect to the implementation of the treaties of the Uruguay Round, which establishes in Section 102(a) that "no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."⁷⁶ In addition, nothing in the legislation

75. See, e.g., *Brazil, Venezuela Claim U.S. Slow to Implement Gasoline Ruling*, 14 Int'l Trade Rep. (BNA) 161 (Jan. 29, 1997).

76. 19 U.S.C. § 3512(a).

is to be constructed as limiting any authority conferred under any law of the United States including Section 301 of the Trade Act of 1974. Similarly, in connection with NAFTA, the apposite United States implementing legislation in Section 102(a)(1) reads that "no provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect."⁷⁷ These examples partly explain why the U.S. Senate never ratified the Convention, as it establishes in Article 27 that a sovereign state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Such covenants inserted in the United States, NAFTA, and Uruguay Round implementing legislation are flagrantly contrary to international law in general and specifically to numerous provisions of the Convention, including Article 26 which establishes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁷⁸ This situation compromises the position of the United States as a bona fide party to any international agreement and is further aggravated by the attempts of the United States to enforce its domestic laws⁷⁹ abroad while eschewing acceptance of international law. Accordingly, recent reports by the WTO Secretariat on the United States, for purpose of the trade policy review mechanism, indicated that the U.S. multi-track approach—multilateral, bilateral, and unilateral—to international trade policy can be a source of tension within the multilateral system.⁸⁰

In today's world, there is a trenchant tendency in international law to allow private rights of action in bilateral as well as in plurilateral trade and investment agreements. In such cases, domestic implementation of international law is essential for the enforcement of basic rights and assurance of fair competition. In a free trade area, business cannot operate efficiently in an environment that does not permit such enforcement. Therefore, the discussed expedient, albeit illegal, attitude of the United States allows nationals of that country to enforce such international

77. *Id.* § 3312.

78. Vienna Convention, *supra* note 1, art. 26.

79. See, e.g., The Cuban Liberty and Democratic Solidarity (Libertad) Act, Pub. L. No. 104-144, 110 Stat. 785 (1996).

80. Trade Policy Review Body, Reports by WTO's Secretariat, Summary Observations, Geneva, Oct. 31, 1996; (<http://www.wto.org/wto/reviews/tprb46.htm>) (visited July 28, 1997).

agreements abroad while preventing nationals of other countries from enforcing the same in U.S. courts against U.S. nationals.

The current legislative and judicial profile of the United States domestic legal implementation of international law and international agreements substantially compromises not only the country's credibility as a responsible member of the international community, but also the prospects of having it as a bona fide trade partner. For business in general, as outlined by the National Association of Manufacturers,⁸¹ "foreign companies and governments are understandably reluctant to enter into any long-term commercial relationship with U.S. companies if the threat of sanctions looms." From 1993 to 1996, all countries representing the major economies of the Americas, including Brazil, Canada, and Mexico among others, have been subject to U.S. unilateral economic sanctions inconsistent with the GATT, in spite of the new dispute resolution mechanism of the WTO and a similar credible system within NAFTA. Historically, Brazil, in particular, has been, together with Japan and India, a favorite target of such unilateral measures, even with respect to the notorious balance of payment crisis of the 1980s, as well as a victim of United States noncompliance with adverse panel decisions. Thus, it should be hardly surprising that public opinion in Brazil as well as the government itself are wary of a continued unilateral regime of the United States which is inconsistent with international law within the proposed FTAA.

81. NATIONAL ASSOCIATION OF MANUFACTURERS, *supra* note 74.