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Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration

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ABSTRACT

International commercial arbitration has long been considered one of the paradigmatic forms of private international law and has achieved a degree of legitimacy that is virtually unparalleled in the international realm. However, significant questions have recently begun to arise about the device's public international attributes, stemming largely from a circuit split regarding the nature of the New York Convention, the leading treaty in the field, and Chapter 2 of the Federal Arbitration Act, which helps give effect to the Convention in the United States.

Efforts have been made to place the debate about the New York Convention within the context of post-*Medellin* jurisprudence concerning self-executing treaties. However, that framework does not adequately address the difficult constitutional question as to what course should be adopted when a particular issue is governed by both a treaty and a statute that is meant to incorporate that treaty into domestic law.

This Article addresses that question by considering the role of and relationship between the New York Convention and the Federal Arbitration Act, and by providing a robust analysis of the constitutional, statutory and public international issues that arise in cases involving international treaties and incorporative statues. Although the discussion is rooted in the context of international commercial arbitration, the Article provides important theoretical and practical insights that are equally applicable in other types of public international law.

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I. Introduction

According to the U.S. Constitution, treaties entered into by the United States constitute "the supreme Law of the Land" and are binding on all state and federal courts.[1] The U.S. Supreme Court has similarly recognized the supremacy of international treaties and the role of the courts

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[1] U.S. CONST., art. VI, cl. 2; *see also id.* art. III, §2, cl. 1.

in enforcing those instruments, stating that "[i]nternational law . . . is part of our law, and must be ascertained and administered by the courts of justice" of this country.[2]

As straightforward as these principles may seem, they have nevertheless generated a considerable amount of controversy over the years, both as a matter of international and constitutional law.[3] However, there is often little overlap between constitutional and international analyses,[4] and courts and commentators typically avoid the "difficult constitutional question" as to what course should be adopted when a particular issue is governed by both a treaty and a statute that is meant to incorporate that treaty into domestic law.[5] Although a number of interpretive devices exist to help courts deal with these issues,[6] these mechanisms only go so far and are often more popular in theory than in practice.[7]

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[2] Hilton v. Guyot, 159 U.S. 113, 163 (1895).

[3] *See* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 657-58 (2010) ("There have been spirited debates as to the precise domestic legal status of properly ratified treaties, the scope of the power of the federal courts to construe ambiguous statutes in a manner consistent with international law, the correctness of the Supreme Court's practice of relying on international sources when interpreting the Constitution, and the extent to which customary international law has the status of federal common law.").

[4] *See* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1764 (2009) (noting authorities have seldom considered "the force of international law as a matter of the constitutional law of the United States"). Furthermore, "[f]ew international law scholars are also serious U.S. constitutional scholars." *Id.*

[5] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732-33 (5th Cir. 2009) (Clement, C.J., concurring in the judgment) (footnote omitted), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541, 547-50 (2008) [hereinafter Bradley, Intent]; Coyle, *supra* note 3, at 657-58, 660-61.

[6] These mechanisms range from the Charming Betsy canon to the last-in-time rule. *See* Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 91 [hereinafter Bradley, Judicial Power]; *see also* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 161 [hereinafter Bradley, Duality]; William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1099-1105 (2001); William N. Eskridge, Jr., & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994) (listing various interpretive canons used in U.S. courts); Alex Glashausser, *What We Must Never Forget When it is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1307-23 (2005); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 76-105 (2012); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2270-78 (2010) [hereinafter Moore, Duality]; John T. Parry, *Congress, The Supremacy Clause, and the Implementation of*

Furthermore, some areas of law remain outside standard jurisprudential analyses. For example, international commercial arbitration has been largely overlooked by scholars in both constitutional and public international law,[8] although a recent circuit split regarding the relationship between the leading treaty on international commercial arbitration (the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention)[9] and Chapter 2 of the Federal Arbitration Act (FAA))[10] has generated a spate of commentary in the area of insurance disputes.[11]

The absence of any detailed analysis of the constitutional and public international attributes of international commercial arbitration is somewhat strange, given the ever-increasing amount of international trade in the world and arbitration's status as the preferred means of resolving cross-border commercial disputes.[12] However, this omission is perhaps reflective of

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Treaties, 32 FORDHAM INT'L L. J. 1209, 1209 (2009); Lauren Ann Ross, Note, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 479 (2012).

[7] *See* Roger P. Alford, *The Internationalization of Legal Relations,* 96 AM. SOC'Y INT'L L. PROC. 146, 147 (2002) [hereinafter Alford, Internationalization]; Paul B. Stephan, *Privatizing International Law,* 97 VA. L. REV. 1573, 1646-47 (2011).

[8] *See* Ronald G. Goss, *Can State Laws Prevent International Arbitration of Insurance Disputes Under the New York Convention?* 65 DISP. RESOL. J. 14, 93 (Nov. 2010-Jan. 2011) (noting "[t]here are . . . a host of treaty interpretations doctrines . . . that have never been addressed by a court" in the context of international commercial arbitration, including "the doctrine of *pacta sunt servanda*, the Charming Betsy Canon, and the Last-in-Time Rule").

[9] *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 92 (2009).

[10] *See* 9 U.S.C. §§201-08 (2012).

[11] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 390-91 (4th Cir. 2012); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); Suter v. Munich Reins. Co., 223 F.3d 150, 162 (3d Cir. 2000); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995); *see also infra* note 75 and accompanying text.

[12] *See* BORN, *supra* note 9, at 68; *see also* Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights From the U.S. Federal Courts,* 2 WORLD ARB. & MED. REV. 39, 43-52 (2008) [hereinafter Whytock, Relationship]; Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration,* 12 BUS. & POL. 1, 6-8 (2010) [hereinafter Whytock, Private-Public]. The number of cases filed in U.S. courts and relating to international commercial arbitration has risen exponentially in recent

several larger problems relating to the perception of international commercial arbitration in the legal community at large.

First, international commercial arbitration is often considered in the same light as consumer, employment and labor arbitration, even though international proceedings are much more sophisticated than domestic forms of arbitration and reflect little of the informality commonly associated with other types of arbitral proceedings.[13] This lack of understanding about the nature of international commercial arbitration could lead some non-specialists to conclude that the field is not worthy of serious scholarly scrutiny.[14]

Second, international commercial arbitration is often characterized primarily, if not exclusively, as a form of private international law.[15] While it is certainly true that the device is used to resolve disputes between private actors (including states behaving as private actors[16]), international commercial arbitration also constitutes a form of public international law,[17] as illustrated by the central role played by the New York Convention and other international treaties

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years, with commentators suggesting that as many as 1,800 matters are heard per year. *See* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 2-3 (2012) [hereinafter Strong, Borders]; *see also* Whytock, Relationship, *supra*, at 58-67, 75-79.

[13] *See* BORN, *supra* note 9, at 1746; S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 4-5 (2012) [hereinafter STRONG, GUIDE], *available at* http://www.fjc.gov.

[14] *See* S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 122-24 (2009) [hereinafter Strong, Sources].

[15] *See* Julian G. Ku, *The Crucial Role of States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1064 (2008).

[16] *See* 28 U.S.C. §1605 (2012); S.I. Strong, *Enforcement of Arbitral Awards Against Foreign States or State Agencies*, 26 NW. J. INT'L L. & BUS. 335, 336-38 (2006) [hereinafter Strong, FSIA].

[17] *See* EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶205, 247-300 (1999) [hereinafter FOUCHARD GAILLARD GOLDMAN]; W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 5-6 (2010); Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1, 26 (2006); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449, 465-75 (2008).

in the enforcement of arbitration agreements and awards.[18] In fact, with over 145 states parties, the New York Convention is one of the most successful commercial treaties in the world, which suggests it is both impossible as well as inappropriate to ignore the public international attributes of international commercial arbitration.[19] Indeed, there currently appears to be a resurgence of interest in international commercial arbitration *qua* public international law.[20]

Third, international commercial arbitration is often framed as a practical rather than a doctrinal discipline, a phenomenon that appears to be closely tied to the fact that arbitral awards do not create formal precedent.[21] However, courts can become involved in arbitral disputes in a

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[18] *See* New York Convention, *supra* note 9; David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 685, 704 (2012); *see also* Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), May 14, 1979, 1439 U.N.T.S. 87; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975) [hereinafter Panama Convention]; European Convention on International Commercial Arbitration, Apr 21, 1964, 484 U.N.T.S. 364; BORN, *supra* note 9, at 91-109. These other treaties are regional in nature, and the United States is a state party to one, the Panama Convention. *See* Panama Convention, *supra*. Chapter 3 of the FAA describes the relationship between the Panama Convention and domestic U.S. law. *See id.*; 9 U.S.C. §§301-07 (2012). Although there are a number of important differences between the Panama and New York Conventions, Congress has indicated that the two are to be construed in a similar manner. *See* House Report No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678; DRC, Inc. v. Republic of Honduras, 774 F.Supp.2d 66, 71 (D.D.C. 2011); Employers Ins. of Wasau v. Banco Seguros Del Estado, 34 F.Supp.2d 1115, 1120 (E.D. Wis.), *aff'd,* 199 F.3d 937 (7th Cir. 1999); BORN, *supra* note 9, at 104; John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 1-2, 19-20 (2000). Therefore, this Article will focus solely on the New York Convention. *See* New York Convention, *supra* note 9.

[19] *See* United Nations Commission on International Trade Law (UNCITRAL), Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http:// www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_ status.html (last visited Jan. 3, 2012) [hereinafter New York Convention Status]; *see also* New York Convention, *supra* note 9; BORN, *supra* note 9, at 91-105; FOUCHARD GAILLARD GOLDMAN, *supra* note 17, ¶¶190-192, 247-300.

[20] *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L. J. 775, 778-81, 864-67 (2012) [hereinafter Born, Adjudication]; Alex Mills, *Rediscovering the Public Dimension of Private International Law*, 24 HAGUE Y.B. INT'L L. 2011, 13, 20-21; S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, *in* BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM & DUALISM __ (Marko Novaković ed., forthcoming 2013) [hereinafter Strong, Monism and Dualism]; Whytock, Private-Public, *supra* note 12, at 1-2.

[21] *See* Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 501-09 (2008) [hereinafter Young, Supranational]. However, some types of soft precedent do exist. *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 ARB. INT'L

variety of ways and, as a result, produce binding precedent relating to arbitration.[22] Furthermore, the international arbitral community encourages the publication of arbitral awards in denatured (redacted) form, thus allowing scholars and practitioners to engage in increasingly sophisticated studies of arbitral as well as judicial behavior.[23] Together, these sources support a diverse range of doctrinal analyses. Although the field remains somewhat under-theorized,[24] one area that has received an increasing amount of interest involves the intersection between arbitration and constitutional law.[25]

Much of the existing constitutional analysis relates to domestic arbitration, which creates an unfortunate lacuna in the international realm. While there have been several recent attempts to rationalize the U.S. approach to international commercial arbitration, including the American Law Institute's development of a Restatement of the U.S. Law of International Commercial

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357, 361-78 (2007); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration,* 51 WM. & MARY L. REV. 1895, 1909-10 (2010).

[22] *See* BORN, *supra* note 9, at 418; STRONG, GUIDE, *supra* note 13, at 37-87. *But see* Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, 180 (2006).

[23] These awards appear in various yearbooks and electronic databases. *See* S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 26-27, 83-85 (2009) [hereinafter STRONG, RESEARCH]; *see also infra* note 353 and accompanying text.

[24] *See* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 2-3 (2010); *see also* BORN, *supra* note 9, at 184-86; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶5-1 to 5-33 (2003).

[25] *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION (2013); *see also* Gary B. Born, *Arbitration and the Freedom to Associate*, 38 GA. J. INT'L & COMP. L. 7, 17-19, 21-23 (2009) [hereinafter Born, Freedom]; Carole J. Buckner, *Due Process in Class Arbitration,* 58 FLA. L. REV. 186, 210-14 (2006); Sarah Rudolph Cole, *Arbitration and State Action,* 2005 B.Y.U. L. REV. 1, 6-51; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice,* 47 UCLA L. REV. 949, 989-1104 (2000); Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Biding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns,* 72 TUL. L. REV. 1 (1997); S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective,* 22 DUKE J. COMP. & INT'L L. 47, 99-105 (2011); Maureen A. Weston, *Universes Colliding: The Constitutional Implications for Arbitral Class Actions,* 47 WM. & MARY L. REV. 1711, 1745-67 (2006).

Arbitration[26] and the Federal Judicial Center's publication of a judge's guide on international commercial arbitration,[27] more work remains to be done. This Article therefore attempts to fill this gap in the literature by considering international commercial arbitration from a constitutional and public international law perspective.

Although the matters discussed herein are often of a highly theoretical nature, they also have significant practical value given the growing number of questions regarding the relationship between the New York Convention and the FAA.[28] For example, not only has a circuit split recently emerged regarding the application of the New York Convention to international insurance disputes,[29] but there has also been a longstanding controversy among U.S. courts regarding form requirements (i.e., the type of writing that is necessary to reflect an arbitration agreement) in disputes involving the Convention.[30] Form requirements are an especially critical issue in international arbitration, since they dictate whether a particular arbitral agreement or award is governed by the New York Convention.[31] Certiorari has been sought on these issues on

[26] *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (forthcoming) [hereinafter RESTATEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION]; George A. Bermann, *Restating the U.S. Law of International Commercial Arbitration,* 42 N.Y.U. J. INT'L L. & POL'Y 175, 175-99 (2009).
[27] *See* STRONG, GUIDE, *supra* note 13. The Federal Judicial Center is the research and education arm of the U.S. federal judiciary. *See* Federal Judicial Center, http://www.fjc.gov.
[28] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307 (2012).
[29] *See* New York Convention, *supra* note 9; *see also supra* notes 9-11 and accompanying text; *see also infra* notes 79-122 and accompanying text.
[30] New York Convention, *supra* note 9, arts. II, IV(1), V(1)(a); Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005); Sphere Drake Ins. plc v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994); *see also* Bautista v. Star Cruises, 396 F.3d 1289, 1295 (11th Cir. 2005); Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l Inc., 198 F.3d 88, 92 (2d Cir. 1999); BORN, *supra* note 9, at 580-81; S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 58-78 (2012) [hereinafter Strong, Writing].
[31] *See* New York Convention, *supra* note 9, arts. II, IV(1), V(1)(a); BORN, *supra* note 9, at 580-81; Strong, Writing, *supra* note 30, at 58-78.

numerous occasions,[32] and the U.S. Supreme Court's ongoing fascination with arbitration suggests that it is only a matter of time before the Court turns its attention to the intersection between constitutional and public international law.[33]

The specific issue addressed in this Article involves the "difficult constitutional question" regarding what courts should do when faced with both a treaty and a statute designed to provide some sort of support for the domestic application of that treaty.[34] Although this inquiry obviously triggers the debate about self-executing and non-self-executing treaties,[35] the issue, as it is presented in the arbitral context, is much more complex than mere self-execution. Furthermore, this precise question has seldom been addressed in any context, let alone international commercial arbitration.[36]

While this Article focuses on the specific language of the New York Convention and the FAA, the discussion nevertheless provides important insights to lawyers and jurists working in a wide variety of subject matter areas, since the analysis addresses certain theoretical concerns that

[32] *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010) (regarding an insurance dispute); Strong, Writing, *supra* note 30, at 49 & n. 5 (listing six recent petitions for certiorari in the area of form requirements).

[33] In the past five years, the Supreme Court has heard eight arbitration cases, with two additional cases set for argument this Term. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Granite Rock Co. v. Int'l Brotherhood of Teamsters, 130 S. Ct. 2847 (2010); Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009); 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009); Vaden v. Discover Bank, 129 S. Ct. 1262 (2009); Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); Sutter v. Oxford Health Plans LLC, 675 F.3d 215 (3d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3070 (2012); In re Am. Express Merchs. Litig., 667 F.3d 204 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 81 U.S.L.W. 3070 (2012).

[34] *Safety Nat'l*, 587 F.3d at 732-33 (Clement, C.J., concurring in the judgment) (footnote omitted); Coyle, *supra* note 3, at 657-58, 660-61.

[35] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-15 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833); Moore, Duality, *supra* note 6, at 2229; *see infra* notes 79-121 and accompanying text.

[36] *See* Coyle, *supra* note 3, at 657-58, 660-61.

have been largely ignored by both courts and commentators.[37] In fact, international commercial arbitration constitutes an ideal context in which to debate these kinds of larger issues, since the fifty-year history of the New York Convention provides researchers with a degree of empirical and comparative data unknown in other areas of law.[38] Furthermore, arbitration has achieved a level of legitimacy to which other types of international adjudication can only aspire, thus providing an additional reason why this field is particularly worthy of study.[39]

The discussion proceeds as follows. First, section II sets the stage by putting international commercial arbitration into a public international law context and applying standard analytical concepts to practices that have primarily been considered as a matter of private international law. Although this Article does not attempt to resolve the issue about whether and to what extent the New York Convention is self-executing under U.S. law, this section provides an overview of the current circuit split so as to provide the foundation for later discussions.[40]

Next, Section III considers the interpretation and implementation of the New York Convention as a matter of both theory and practice.[41] This inquiry, though arising in the context of arbitration, should be useful even to those working in other fields, since international commercial arbitration's long and active history constitutes what might be called a laboratory for statutory and treaty interpretation. This section discusses certain empirical data developed by the United Nations Commission on International Trade Law (UNCITRAL) and includes a detailed

[37] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307 (2012).
[38] *See* New York Convention, *supra* note 9; *see also infra* notes 141, 353 and accompanying text.
[39] *See* Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 448 (2008); Young, Supranational, *supra* note 21, at 477.
[40] *See* New York Convention, *supra* note 9.
[41] *See id.*

evaluation of the structural and conceptual challenges that can arise when a U.S. court is asked to interpret Chapter 2 of the FAA.[42]

The discussion then moves to section IV and considers the New York Convention and the FAA in light of a number of standard interpretive devices, including the Vienna Convention on the Law of Treaties (Vienna Convention) and the Charming Betsy canon.[43] This analysis also introduces several more recently developed interpretive methodologies, including the borrowed treaty rule and a subject-specific teleological approach, so as to determine which of the various interpretive techniques is most appropriate in the arbitral setting.

Section V concludes the Article by bringing together the diverse strands of argument and weighing up the various alternatives. This section also discusses how the lessons learned in the context of international commercial arbitration might assist analysts working in other areas of public international law.

II. Setting the Stage

A. International Commercial Arbitration as Public International Law

For decades, international commercial arbitration has been considered one of the world's most successful forms of private international law, a conclusion that appears to have led some people to overlook arbitration's public international attributes.[44] However, "[b]oth scholars of private international law and attorneys for the Department of State have uniformly concluded that there

[42] *See* 9 U.S.C. §§201-08.
[43] *See* New York Convention, *supra* note 9; Vienna Convention on the Law of Treaties, done May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]; 9 U.S.C. §§1-307; Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
[44] *See* Virginia A. Greiman, *The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships,* 32 WHITTIER L. REV. 395, 404 (2011).

is no constitutional obstacle to the regulation of private international law through treaty,"[45] which means that there is no principled reason to exclude international commercial arbitration from the kinds of analyses that are common in other areas of public international law simply because the New York Convention primarily addresses private rather than public law concerns.[46]

Indeed, to do so would be contrary to longstanding legal principles. For example, the U.S. Supreme Court recognized over a century ago that international law not only includes

> questions of right between nations, governed by what has been appropriately called the "law of nations," but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation.[47]

Commentators have taken a similar view. For example, Philip Jessup suggested that the term "transnational law" was preferable to "international law," since the latter did not adequately convey the dynamic interaction between public and private international law,[48] while Harold Koh has noted that the law of nations has long been known to "embrac[e] private as well as public . . . transactions."[49] Therefore, it is not only appropriate but necessary to apply the fundamental principles of public international law to international commercial arbitration.

[45] Ku, *supra* note 15, at 1068.
[46] *See* New York Convention, *supra* note 9.
[47] Hilton v. Guyot, 159 U.S. 113, 163 (1895).
[48] PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).
[49] Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351 (1991) [hereinafter Koh, Litigation]; *see also* Ku, *supra* note 15, at 1063; Zaring, *supra* note 18, at 704.

B. Monism, Dualism and International Commercial Arbitration

The relationship between international and domestic legal orders has been extensively discussed as a matter of international law, constitutional law and institutional design.[50] One of the most standard analytical paradigms involves the concepts of monism and dualism.[51]

The basic parameters of these two principles are well-known. Monist states typically do not distinguish between international and domestic law, and allow national courts to rely directly on international law.[52] Dualist states, on the other hand, view international and domestic law as inherently distinct and require certain actions (typically a legislative act of implementation) before international legal principles may be directly relied upon in national courts.[53] "[M]onism and dualism can vary with the type of obligation, meaning that a state can be monist with regard to treaty law but dualist with regard to customary international law."[54]

Monists often believe that international law is superior to domestic law, although the question of hierarchy is somewhat distinct from the issue of whether international law can achieve direct effect within a particular legal order.[55] Matters of hierarchy and status are decided by reference to the constitutional law of the relevant legal system.[56]

Although monism and dualism have traditionally played a central role in international and constitutional legal theory, some debate nevertheless exists as to the concepts' scope and

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[50] *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 710 (2006).
[51] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31-34 (7th ed. 2008); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception,* 51 STAN. L. REV. 529, 530-31 (1999) [hereinafter Bradley, Breard]; Coyle, *supra* note 3, at 656 & n.1; John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis,* 86 AM. J. INT'L L. 310, 311, 314-15 (1992).
[52] *See* BROWNLIE, *supra* note 51, at 31-34; Bradley, Breard, *supra* note 51, at 530; Coyle, *supra* note 3, at 656 & n.1; Jackson, *supra* note 51, at 314-15.
[53] *See* BROWNLIE, *supra* note 51, at 31-34; Bradley, Breard, *supra* note 51, at 530; Coyle, *supra* note 3, at 656 & n.1; Jackson, *supra* note 51, at 314-15.
[54] Ginsburg, *supra* note 50, at 714.
[55] *See* Bradley, Breard, *supra* note 51, at 539; Jackson, *supra* note 51, at 312, 318.
[56] *See* Ginsburg, *supra* note 50, at 713.

continuing vitality. For example, some commentators claim that "[m]onism is dead,"[57] while other observers believe that the basic principles of monism live on, either by virtue of a practice known as "creeping monism," wherein common law courts rely on various international treaties despite the absence of implementing legislation,[58] or through the creation of a less extreme version of monism.[59] Other scholars take the view that it is dualism that is outdated and that the proper analytical paradigm now involves the distinction between monism and pluralism.[60]

The United States stands in a somewhat peculiar position with respect to these concepts. Because the U.S. Constitution does not indicate whether the country is monist or dualist in nature,[61] U.S. courts must rely on the judicially created concept of "self-executing treaties"[62] and "non-self-executing treaties" when deciding whether a treaty is directly applicable in the United States.[63] In many ways, the situation is not optimal, since the test relating to self-execution is

[57] Alexander Somek, *Monism: A Tale of the Undead, in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 343, 344 (Matej Avbelj & Jan Komárek eds., 2012).
[58] *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties,* 107 COLUM. L. REV. 628, 633 (2007).
[59] *See* Bradley, Breard, *supra* note 51, at 531; *see also* Armand de Mestral & Evan Fox-Decent, *Rethinking the Relationship Between International and Domestic Law,* 53 MCGILL L. J. 573, 582 (2008); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence,* 44 HASTINGS L.J. 185, 188 (1993) (noting increased interest in monistic approaches).
[60] *See* Neil Walker, *Constitutionalism and Pluralism in Global Context, in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND, *supra* note 57, at 17, 17-21; *see also* Jackson, *supra* note 51, at 314.
[61] *See* Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 458 (2010).
[62] *See* Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008); BROWNLIE, *supra* note 51, at 48; *see also* David L. Sloss, *Executing* Foster v. Neilson: *The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 138-39 (2012) [hereinafter Sloss, Two-Step]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 112 HARV. L. REV. 599, 667 n.308 (2008) [hereinafter Vázquez, Treaties].
[63] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-15 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833); Jackson, *supra* note 51, at 320; de Mestral & Fox-Decent, *supra* note 59, at 583, 605-06; Moore, Duality, *supra* note 6, at 2229; Tim Wu, *Treaties' Domains,* 93 VA. L. REV. 571, 578 (2007).

somewhat convoluted[64] and is made even more confusing by virtue of the fact that a treaty may be self-executing as to some issues or for some purposes but not as to others.[65] Furthermore, the concept of self-execution does not apply to customary international law, thereby creating significant questions about custom's place in the United States' constitutional order.[66]

Other problems also exist. For example, although international and constitutional law scholars have considered monism and dualism for decades, virtually no one appears to have applied these concepts to international commercial arbitration, despite the central role played by the New York Convention in the international arbitral regime.[67] Instead, most references to monism and dualism in international commercial arbitration are made only in passing.[68]

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[64] *See* Medellin v. Texas, 552 U.S. 491, 504-32 (2008); ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 388 (4th Cir. 2012); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Bradley, Intent, *supra* note 5, at 540; Sloss, Two-Step, *supra* note 62, at 135; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) [hereinafter Vázquez, Four Doctrines]; Wu, *supra* note 63, at 578-79.

[65] *See* Dubinsky, *supra* note 61, at 469; *see also* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732 (5th Cir. 2009) (Clement, C.J., concurring in the judgment), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010).

[66] Some commentators believe customary international law is subordinate to federal legislation (since customary international law cannot be self-executing), while other experts believe customary international law should enjoy the same status as treaties. *See* Bradley, Breard, *supra* note 51, at 549-50; J.H. Dalhuisen, *Custom and Its Revival in Transnational Private Law*, 18 DUKE J. COMP. & INT'L L. 339, 369-70 (2008); Paulsen, *supra* note 4, at 1800-04. Hierarchically speaking, treaties (at least to the extent they are self-executing) are considered analogous to federal law and thus superior to inconsistent state law. *See* U.S. CONST., art. VI, cl. 2; Bradley, Breard, *supra* note 51, at 548; Paulsen, *supra* note 4, at 1774. Because treaties hold the same status as federal law, the latter of the two instruments will prevail in cases of unavoidable conflict. *See* Bradley, Breard, *supra* note 51, at 549 (describing the "last-in-time" rule); Paulsen, *supra* note 4, at 1776. However, a treaty that the subject of enabling legislation can also (or perhaps can only) rely on the domestic law to establish its primacy over the laws of the individual states. *See infra* notes 79-121 and accompanying text.

[67] *See* New York Convention, *supra* note 9.

[68] *See* LEW ET AL., *supra* note 24, ¶4-45; Amazu A. Asouzu, *African States and the Enforcement of Arbitral Awards: Some Key Issues*, 15 ARB. INT'L 1, 15 (1999); Radu Bogdan Badhu, *Current Status of International Arbitration in Romania*, 10 Y.B. PRIV. INT'L L. 473, 479 (2008); Mauricio Gomm Ferreira Dos Santos, *Arbitration in Brazil*, 21 J. INT'L ARB. 453, 460 (2004); Pemmaraju Sreenivasa Rao, *Enforcement of Foreign Arbitral Awards in India: Condition of Reciprocity in* INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY, X ICCA CONG. SER. 177, 181-82 & n.16 (Albert Jan van den Berg ed., 2001).

This is not to say that there has not been extensive discussion about the extent to which various countries comply with the principles espoused in the New York Convention, since the commentary on that subject is both broad and deep.[69] However, those analyses typically focus on the effect that various domestic statutes, including those based on the UNCITRAL Model Law on International Commercial Arbitration (Model Arbitration Law), have on international commercial arbitration.[70] These statutes are vitally important to the proper operation of the international arbitral regime because the New York Convention was not meant to provide a comprehensive regulatory framework for international commercial arbitration but was instead limited to issues relating to the enforcement of arbitral awards and arbitral agreements.[71] Therefore, even those states that are monist in nature need to adopt some sort of statute to fill in the various procedural gaps left by the New York Convention.[72]

Commentary in the United States tends to follow a similar path, focusing on individual issues arising under the Convention and the FAA rather than on larger constitutional concerns.[73] However, questions about the self-executing nature of the New York Convention have become

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[69] *See* New York Convention, *supra* note 9; BORN, *supra* note 9, at 1004-57, 2701-2878; FOUCHARD GAILLARD GOLDMAN, *supra* note 17, ¶¶629-34, 1666-1716; LEW ET AL., *supra* note 24, ¶¶15-1 to 15-57; STRONG, RESEARCH, *supra* note 23, at 88-137.

[70] See UNCITRAL Model Law on International Commercial Arbitration, U.N. Comm'n on Int'l Trade Law, 18th Sess., Annex I, U.N. Doc. A/40/17 (June 21, 1985), revised by Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 17-July 7, 2006, Annex I, art. 34, U.N. Doc. A/61/17, U.N. GAOR, 61st Sess., Supp. No. 17 (2006) [hereinafter Model Arbitration Law]; BORN, *supra* note 9, at 115-21; FOUCHARD GAILLARD GOLDMAN, *supra* note 17, ¶¶153-205; LEW ET AL., *supra* note 24, ¶¶2-38 to 2-41. The Model Arbitration Law was specifically designed to operate in harmony with the New York Convention. *See* New York Convention, *supra* note 9; Model Arbitration Law, *supra*, Explanatory Note to 1985 version, ¶47; BORN, *supra* note 9, at 115-21; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1243 (2003).

[71] *See* BORN, *supra* note 9, at 95-96; ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 9-10 (1981).

[72] *See* New York Convention, *supra* note 9; Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 89-90.

[73] *See, e.g.*, New York Convention, *supra* note 9; 9 U.S.C. §§1-307 (2012); Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 107-14; Strong, Writing, *supra* note 30, at 52-70.

increasingly urgent in light of a growing circuit split regarding the arbitrability of international insurance disputes.[74] Although the U.S. Supreme Court denied certiorari on this issue in 2010, experts believe that the matter will have to be addressed at some point in the near future, given the importance of the international insurance and reinsurance industries to the U.S. economy.[75]

Questions about the self-executing nature of the New York Convention also arise in other contexts, including debates about form requirements[76] and the FAA's ability to preempt state law.[77] Although this Article does not turn on matters relating to self-execution, it is nevertheless helpful to outline the parameters of the current debate so as to identify the problems U.S. courts face and demonstrate how the proposals contained in this Article overcome those concerns.[78]

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[74] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 390-91 (4th Cir. 2012); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London. 131 S. Ct. 65 (2010); Suter v. Munich Reins. Co., 223 F.3d 150, 162 (3d Cir. 2000); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995); *see also* Murphy Oil USA, Inc. v. SR Int'l Bus. Inc. Co., No. 07-CV-1071, 2007 WL 2752366, at *3 (W.D. Ark. Sept. 20, 2007); Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I., 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006); Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, No. 96-4173-CV-C-2, 1996 WL 938126, at *2 (W.D. Mo. June 10, 1996), *appeal dismissed by* 119 F.3d 619 (8th Cir. 1997); In re Arbitration Between England Ship Owners Mut. Ins. Ass'n (Luxembourg) & Am. Marine Corp., No. 91-3645, 1992 WL 37700, at *4-5 (E.D. La. Feb. 18, 1992), *appeal dismissed*, 981 F.2d 749 (5th Cir. 1993). A flurry of commentary has arisen with respect to this issue. *See* Cindy Galway Buys & Grant Gorman, *Movsesian v. Victoria Versicherung and the Scope of the President's Foreign Affairs Power to Preempt Words,* 32 N. ILL. U. L. REV. 205, 219 (2012); Goss, *supra* note 8, at 93; Joshua J. Newcomer, *International Decision*, 105 AM. J. INT'L L. 326, 326-32 (2011); David A. Rich, *Deference to the "Law of Nations:" The Intersection Between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes*, 33 T. JEFFERSON L. REV. 81, 84-86 (2010); Michael J. Ritter, *Disputing Arbitration Clauses in International Insurance Agreements: Problems With the Self-Execution Framework*, 3 PACE INT'L L. REV. 40, 41 (2012).

[75] A recent study places the United States at the top of the international insurance market. *See* National Association of Insurance Commissioners, 2011 Premium Volume – Worldwide, http://www.naic.org/documents/cipr_stats_top_50_worldwide_insurance_markets.pdf (last visited Jan. 4, 2013). One of the world's preeminent international insurers/reinsurers, Lloyd's of London, conducts forty-three percent of its business in the United States and Canada. *See* Lloyd's of London, Global Reach, http://www.lloyds.com/flash/global-reach/index.html (last visited Jan. 4, 2013).

[76] *See* Strong, Writing, *supra* note 30, at 52-70; *see also supra* notes 30-32 and accompanying text.

[77] *See* RUTLEDGE, *supra* note 25, at 79-124; Drahozal, *supra* note 73, at 107-15.

[78] *See* New York Convention, *supra* note 9.

C. The Debate About Whether the New York Convention is Self-Executing Under U.S. Law

At this point, judicial analyses of the self-executing nature of the New York Convention are limited and in conflict.[79] For example, while the U.S. Supreme Court recently suggested, *obiter dicta*, that the Convention is self-executing,[80] those statements were quite brief and have not been relied upon by the lower courts.[81]

Lower federal courts have typically avoided the issue of self-execution.[82] However, the matter has become increasingly difficult to ignore, given the need to consider reverse preemption in the context of international insurance disputes.

The term "reverse preemption" describes situations in which Congress defers to state authority, thereby allowing state law to trump (i.e., reverse preempt) federal law.[83] The phrase is used most often in the context of the McCarran-Ferguson Act, which is said to authorize reverse

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[79] *See* New York Convention, *supra* note 9.

[80] The Court noted in the seminal case of *Medellin v. Texas* that

> Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. *See, e.g.*, . . . 9 U.S.C. §§201-208 ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter," §201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

Medellin v. Texas, 552 U.S. 491, 521-22 (2009); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

[81] *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 722 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010).

[82] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 388 (4th Cir. 2012); Lobo v. Celebrity Cruises, Inc. 426 F. Supp. 2d 1296, 1301 (S.D. Fla. 2006), *aff'd*, 488 F.3d 891 (11th Cir. 2007); Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1252-53 (S.D. Cal. 2000); In re Fotochrome, 377 F. Supp. 26, 30-31 (D.C.N.Y. 1974).

[83] *See* Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 673 n.29 (2009).

preemption of the FAA in cases where state law bars arbitration of insurance disputes.[84] While reverse preemption is uncontroversial in domestic disputes falling entirely under Chapter 1 of the FAA, difficulties arise in international matters due to questions involving the nature of the New York Convention and the relationship between the Convention and Chapter 2 of the FAA.[85]

At this point, the two opposing positions are most cogently described by the Second Circuit in *Stephens v. American International Insurance Co*.[86] and the Fifth Circuit in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*.[87] Although the Third and Fourth Circuits have also weighed in on this issue and have both concluded that the FAA and New York Convention are not reverse preempted by the McCarran-Ferguson Act,[88] these opinions are less relevant to the current discussion, since the Third Circuit analysis focuses largely on issues relating to foreign sovereign immunity[89] and the Fourth Circuit ultimately decided the dispute as a matter of statutory, rather than treaty, interpretation.[90] Those district courts that have considered the issue appear to agree that reverse preemption does not occur in cases falling under the Convention.[91]

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[84] *See* 9 U.S.C. §§1-307 (2012); 15 U.S.C. §1012(b) (2012) ("No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."); Bernstein, *supra* note 83, at 673 n.29.

[85] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08.

[86] *See* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995).

[87] *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010).

[88] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 390-91 (4th Cir. 2012); Suter v. Munich Reins. Co., 223 F.3d 150, 162 (3d Cir. 2000).

[89] *See Suter*, 223 F.3d at 162.

[90] *See ESAB Group*, 685 F.3d at 388; *see also* 15 U.S.C. §1012(b).

[91] *See* New York Convention, *supra* note 9; Murphy Oil USA, Inc. v. SR Int'l Bus. Inc. Co., No. 07-CV-1071, 2007 WL 2752366, at *3 (W.D. Ark. Sept. 20, 2007); Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I., 466 F. Supp. 2d 1293, 1297 (N.D. Ga. 2006); Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, No. 96-4173-CV-C-2, 1996 WL 938126, at *2 (W.D. Mo. June 10, 1996), *appeal dismissed by* 119 F.3d 619 (8th Cir. 1997); In re Arbitration Between Engl. Ship Owners Mut. Ins. Ass'n

The Second Circuit was the first appellate court to discuss reverse preemption under the New York Convention and conducted a brief and somewhat superficial analysis in *Stephens* that some authorities believe was quickly called into question by another panel sitting in the same circuit.[92] The decision in *Stephens* turned largely on the court's characterization of Chapter 2 of the FAA as implementing legislation necessary to give effect to the Convention.[93] As a result, the Second Circuit concluded that the New York Convention was not self-executing and was therefore "inapplicable" in the circumstances at bar.[94]

In its discussion, the court relied entirely on *Foster v. Nielson* for the definition of a self-executing treaty, stating that

> [o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in 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 engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.[95]

The emphasis placed on *Foster v. Nielson* is entirely understandable, given that *Stephens* was handed down in 1995, long before the U.S. Supreme Court's recent jurisprudence on self-executing treaties.[96] However, other courts – including the Fifth Circuit – have found the analysis in *Stephens* not only dated but unhelpfully terse and conclusory.[97]

(Luxembourg) & Am. Marine Corp., No. 91-3645, 1992 WL 37700, at *4-5 (E.D. La. Feb. 18, 1992), *appeal dismissed*, 981 F.2d 749 (5th Cir. 1993).

[92] *See* New York Convention, *supra* note 9; Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995); *see also ESAB Group*, 685 F.3d at 390-91.

[93] *See* 9 U.S.C. §§201-08 (2012); *Stephens*, 66 F.3d at 45; *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833);

[94] *Stephens*, 66 F.3d at 45.

[95] *Foster*, 27 U.S. (2 Pet.) at 313-14, *as quoted in Stephens*, 66 F.3d at 45.

[96] *See Stephens*, 66 F.3d at 45; *Foster*, 27 U.S. (2 Pet.) at 313-14; *see also* Medellin v. Texas, 552 U.S. 491, 521-22 (2009); Garcia v. Texas, 131 S. Ct. 2866, 2868-71 (2011) (Breyer, J., dissenting); Noriega v. Pastrana, 130 S. Ct. 1002, 1002-10 (2010) (Thomas, J., dissenting from the denial of certiorari); Sanchez-Llamas v. Oregon, 548 U.S. 331, 436-37 (2006); Medellin v. Drake, 544 U.S. 660, 685-90 (2005)

When the Fifth Circuit took on the issue in 2009, it conducted a much more robust and detailed discussion of the New York Convention, the McCarran-Ferguson Act and Chapter 2 of the FAA.[98] For example, the court not only considered the mandatory nature of the Convention, it also noted the purpose of Chapter 2 of the FAA in giving effect to the Convention.[99] In so doing, the Fifth Circuit was guided in part by the pro-arbitration policy enunciated in both the New York Convention and Supreme Court precedent.[100] However, the Fifth Circuit also noted that Chapter 2 of the FAA serves a variety of purposes, including the creation of federal jurisdiction and the identification of an appropriate venue.[101] These statements suggest a recognition by the court that the New York Convention requires some sort of supplementary legislation to address certain background procedural matters.[102] Indeed, similar types of legislation have been adopted even in monist states that do not need to use domestic enactments to give direct effect to a treaty, suggesting that Chapter 2 of the FAA does not necessarily have to be considered a form of implementing legislation in the traditional sense.[103]

The Fifth Circuit took a very interesting view of the relationship between a treaty and its implementing legislation in U.S. law, stating that

> [e]ven if the [New York] Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by

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(O'Connor, J., dissenting); Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 735 (2004); Torres v. Mullin, 540 U.S. 1035, 1035 (2003) (Breyer, J., dissenting from the denial of certiorari).

[97] *See Safety Nat'l*, 587 F.3d at 722; *id.* at 737 (Clement, C.J., concurring in the judgment).

[98] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-208; 15 U.S.C. § 1012(b) (2012); *Safety Nat'l,* 587 F.3d at 717.

[99] *See* New York Convention, *supra* note 9, art. II(1); 9 U.S.C. §201; *Safety Nat'l*, 587 F.3d at 719, 722, 725.

[100] *See Safety Nat'l,* 587 F.3d at 730; *see also* New York Convention, *supra* note 9; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638-39 (1985).

[101] *See* 9 U.S.C. §§203-04; *see Safety Nat'l*, 587 F.3d at 719, 722.

[102] *See* New York Convention, *supra* note 9; *Safety Nat'l*, 587 F.3d at 719, 722.

[103] *See* 9 U.S.C. §§201-08; *see also supra* note 72 and *infra* note 316 and accompanying text.

> congressional legislation. Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."[104]

As a result, some authorities have characterized the opinion as indicating "that the provisions of a non-self-executing, implemented treaty 'have full preemptive effect'" in the United States.[105]

In arriving at this conclusion, the Fifth Circuit relied heavily on the fact that Chapter 2 of the FAA invokes rights arising out of the Convention, which can be seen as directing the court to the Convention itself.[106] Furthermore,

> [w]hen Congress amended the FAA in 1970 to include provisions that dealt with the Convention, it provided in 9 U.S.C. §203, that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." This is a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States.[107]

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[104] *Safety Nat'l*, 587 F.3d at 722-23 (footnotes omitted). Similar conclusions have been reached in other contexts. *See* Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 902-03 (5th Cir. 2005) (citing Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985)); *see also* Prokopeva v. Carnival Corp., No. C-08-213, 2008 WL 4276975, at *3 n.8 (S.D. Tex. Sept. 10, 2008); Matter of Arbitration Between England Ship Owners Mut. Ins. Ass'n (Luxembourg) and Am. Marine Corp., Nos. 91-3645, 91-3798, 1992 WL 37700, at *4 (E.D. La. Feb. 18, 1992), *appeal dismissed,* 981 F.2d 749 (5th Cir. 1993). Some courts go even further. *See* Riley v. Kingsley Underwriting Agencies, Inc., 969 F.3d 953, 958 (10th Cir. 1992) (noting "ratification of the Convention makes it part of the supreme law of the land, as enforceable as Congressional enactments"); Clow v. Ins. Corp. of British Columbia, No. 07-403-ST, 2007 WL 2292689, at *3 (D. Or. Aug. 6, 2007); Nw. Airlines, Inc. v. R&S Co., 176 F. Supp. 2d 935, 938 (D. Minn. 2001); Filanto, S.p.A., v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992), *appeal dismissed by* 984 F.2d 58 (2d Cir.1993) (though also noting a role for the FAA).

[105] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 387 (4th Cir. 2012) (quoting *Safety Nat'l*, 587 F.3d at 733 (Clement, C.J., concurring in the judgment)).

[106] *See Safety Nat'l,* 587 F.3d at 724-25, 727-28; *see also* New York Convention, *supra* note 9; 9 U.S.C. §§201-08.

[107] *Safety Nat'l,* 587 F.3d at 724; *see also* Missouri v. Holland, 252 U.S. 416, 430-32 (1920).

These factors led a majority of the Fifth Circuit to conclude that courts are empowered under Chapter 2 of the FAA to rely directly on the language of the New York Convention.[108]

Although the Fifth Circuit's analysis of the self-executing nature of the New York Convention is quite detailed, the court did not ultimately decide the case on those grounds.[109] Instead, *Safety National* appears to turn on the court's conclusion that the "commonly understood meaning of an 'Act of Congress' does not include a 'treaty,' even if the treaty required implementing legislation," and that the McCarran-Ferguson Act therefore does not apply in cases falling under the Convention.[110] Nevertheless, the analysis reflected in this case is quite instructive.

In addition to the majority holding, *Safety National* generated both concurring and dissenting opinions.[111] The concurring opinion by Circuit Judge Clement suggested that the New York Convention should be considered self-executing, at least with respect to Article II, which concerns form requirements as well as the mandatory duty to compel arbitration in cases falling under the Convention.[112] In arriving at this conclusion, Circuit Judge Clement focused on the way in which Article II(3) of the Convention speaks directly to the courts of a state party, rather than the state party itself.[113]

Because the concurrence in *Safety National* directly addressed the issue of self-execution, Circuit Judge Clement was forced to address problematic *dicta* from the U.S. Supreme Court

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[108] *See* 9 U.S.C. §§201-08; *Safety Nat'l,* 587 F.3d at 724-25, 727-28; *see also id.* at 734 (Clement, C.J., concurring in the judgment).
[109] *See* New York Convention, *supra* note 9.
[110] *Safety Nat'l*, 587 F.3d at 723; *see also* 15 U.S.C. §1012(b) (2012).
[111] *See Safety Nat'l*, 587 F.3d at 732 (Clement, C.J., concurring in the judgment); *id*. at 737 (Elrod, J., dissenting).
[112] *See* New York Convention, *supra* note 9, art. II; *Safety Nat'l*, 587 F.3d at 733-34 (Clement, C.J., concurring the judgment).
[113] *See Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment).

suggesting that the New York Convention is non-self-executing.[114] Circuit Judge Clement overcame that obstacle by concluding that the Supreme Court was referring to Article III, rather than Article II, of the Convention.[115] While this approach may have its supporters, scholars have noted the incongruity of giving different effects to different parts of a single legal instrument.[116]

Safety National also included a dissenting opinion that concluded that the New York Convention, as a non-self-executing treaty, had no place in the national legal order.[117] Instead, the three dissenting judges believed that "only the implementing legislation [i.e., Chapter 2 of the FAA] had preemptive effect."[118] Because Chapter 2 constitutes an "act of Congress," it falls within the scope of the McCarran-Ferguson Act and can be reverse preempted.[119]

The opinions in *Stephens* and *Safety National* address a range of issues and demonstrate a variety of perspectives concerning the relationship between the New York Convention and the FAA.[120] However, one item that is missing from both discussions as well as the associated commentary is serious consideration of the "difficult constitutional question" that arises when a particular issue is governed by both a treaty and a statute that is meant to incorporate that treaty into domestic law.[121] This is an area of significant practical and theoretical concern in

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[114] *See* New York Convention, *supra* note 9; Medellin v. Texas, 552 U.S. 491, 521-22 (2009); *Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment).
[115] *See* New York Convention, *supra* note 9, arts. II-III; *Medellin*, 552 U.S. at 521-22; *Safety Nat'l*, 587 F.3d at 736-37 (Clement, C.J., concurring in the judgment).
[116] *See* RUTLEDGE, *supra* note 25, at 108.
[117] *See* New York Convention, *supra* note 9; *Safety Nat'l.,* 587 F.3d at 748 (Elrod, C.J., dissenting).
[118] *Safety Nat'l,* 587 F.3d at 748 (Elrod, C.J., dissenting); *see also* New York Convention, *supra* note 9; 9 U.S.C. §§201-08 (2012); 15 U.S.C. § 1012(b) (2012).
[119] *Safety Nat'l,* 587 F.3d at 752 (Elrod, C.J., dissenting); *see also* New York Convention, *supra* note 9; 9 U.S.C. §§201-08; 15 U.S.C. § 1012(b).
[120] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307; *Safety Nat'l,* 587 F.3d at 714; Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995).
[121] *Safety Nat'l,* 587 F.3d at 732-33 (Clement, C.J., concurring in the judgment).

international commercial arbitration (as well as in other fields) and requires clear analysis if courts are to interpret and apply the New York Convention properly.[122]

III. Interpreting Treaties Relating to International Commercial Arbitration

A. Interpreting and Implementing the New York Convention as a Matter of Theory

Although contemporary commentary often overlooks the public international law attributes of international commercial arbitration, several international authorities have nevertheless indicated that the New York Convention should be interpreted "in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties."[123] Article 31 of the Vienna Convention provides the general rules of interpretation and indicates that

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) any relevant rules of international law applicable in the relations between the parties.

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[122] *See* New York Convention, *supra* note 9.

[123] INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION 12 (2011) [hereinafter ICCA GUIDE]; *see also* Vienna Convention, *supra* note 43, arts. 31-32; VAN DEN BERG, *supra* note 71, at 3-5; Bachand, *supra* note 72, at 95; Toby Landau, *The Requirement of A Written Form for An Arbitration Agreement: When "Written" Means "Oral," in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, XI ICCA CONG. SER. 19, 74-79 (Albert Jan van den Berg ed., 2003).

> 4. A special meaning shall be given to a term if it is established that the parties so intended.[124]
>
> Article 32 provides supplementary rules of interpretation and indicates that
>
> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> > (*a*) leaves the meaning ambiguous or obscure; or
> > (*b*) leads to a result which is manifestly absurd or unreasonable.[125]

The emphasis placed by international commentators on the Vienna Convention could give rise to some difficulties in the United States, since the U.S. has signed but not yet ratified that instrument.[126] However, the Vienna Convention has been relied upon by several members of the U.S. Supreme Court and various lower federal courts in contexts other than international commercial arbitration.[127] Indeed, some circuits consider the Vienna Convention "'an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices."[128] Furthermore, "[t]he Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice."[129] Therefore, reliance on the interpretive principles outlined in the Vienna Convention would appear to be appropriate in the United States.[130]

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[124] Vienna Convention, *supra* note 43, art. 31.
[125] *Id.* art. 32.
[126] *See id.*; Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1362 (2d Cir. 1992), *rev'd on other grounds sub nom.* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
[127] The rationale for reliance differs from case to case. *See, e.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 2007 n.11 (2010) (Stevens, J., dissenting); Sanchez-Llamas v. Oregon, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); *Sale*, 509 U.S. at 191 (Blackmun, J., dissenting); Gonzalez v. Gutierrez, 311 F.3d 942, 950 n.15 (9th Cir. 2002), *abrogated on other grounds by Abbott*, 130 S. Ct. at 1983; Sanchez Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000); *Haitian Centers Council*, 969 F.2d at 1362.
[128] Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008).
[129] *Id.*
[130] *See* Vienna Convention, *supra* note 43, arts. 31-32.

Some problems could arise as a result of the Vienna Convention's non-retroactivity clause, since the New York Convention was opened for signature more than a decade prior to the Vienna Convention's opening date.[131] However, the United States acceded to the New York Convention on September 30, 1970, several months after the United States signed the Vienna Convention, which suggests that the retroactivity clause should not apply in cases involving international commercial arbitration.[132]

Ultimately, it may not matter whether the Vienna Convention formally applies to disputes involving the New York Convention, since numerous commentators have concluded that the interpretive approach reflected in "the Vienna Convention does not differ greatly from U.S. practice."[133] Indeed, these similarities can be seen in at least one case involving international commercial arbitration.[134] Furthermore, the rising influence of textualism in the United States may minimize any methodological differences that currently exist,[135] since the primary distinction between the U.S. approach and the Vienna Convention appears to be that "U.S. courts have consulted extratextual sources a bit more readily than the convention suggests."[136]

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[131] *See id.* art. 4; *see also* New York Convention, *supra* note 9.
[132] *See* Vienna Convention, *supra* note 43, art. 4.
[133] Glashausser, *supra* note 6, at 1262. Most interpretive canons used in the United States require construction of a treaty in a manner consistent with its "text, intent, and purpose," which many observers believe would yield an outcome similar to that under the Vienna Convention. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 957 (1994); *see also* Vienna Convention, *supra* note 43, arts. 31-32; David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 575-80 (2010).
[134] *See* Kahn Lucas Lancaster Inc. v. Lark Int'l Inc., 186 F.3d 210, 216-18 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005).
[135] At this point, Supreme Court jurisprudence appears somewhat split as to the degree to which textual analyses prevail and the level of clarity that must be exhibited in the text of a treaty. *See* Abbott v. Abbott, 130 S. Ct. 1983, 1990, 1993-95 (2010); Medellin v. Texas, 552 U.S. 491, 506-12 (2008); *see also id.* at 540-42 (Breyer, J., dissenting); Dubinsky, *supra* note 61, at 461, 471.
[136] Glashausser, *supra* note 6, at 1262; *see also* Dubinsky, *supra* note 61, at 461, 470-72; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002) [hereinafter Sloss, Constitutional]. *But see* Jonas & Saunders, *supra* note 133, at 578.

B. Interpreting and Implementing the New York Convention as a Matter of Practice

The philosophical distinction between "ought" and "is" suggests that it is not enough to identify how the New York Convention should be construed.[137] Instead, it is necessary to consider how the Convention actually is interpreted and applied in practice.[138] Such analyses are particularly important because the Vienna Convention indicates that the parties' subsequent agreements and practices are to be taken into account as an interpretive tool.[139] Commentators have also noted the propriety of a "dynamic" form of interpretation in cases involving commercial treaties.[140]

Interestingly, international commercial arbitration stands in a somewhat privileged position with respect to questions of subsequent practice, since a variety of public and private institutions have been compiling data on the interpretation and application of the New York Convention for over fifty years, thereby making comparative analysis easy for both courts and commentators.[141] The large and increasing number of arbitration-related disputes in U.S. courts also provide useful comparative data.[142]

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[137] *See* New York Convention, *supra* note 9; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE (1739).
[138] *See* New York Convention, *supra* note 9; ICCA GUIDE, *supra* note 123, at 12.
[139] *See* Vienna Convention, *supra* note 43, art. 31(3).
[140] Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 692 (1998). *But see* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989).
[141] *See, e.g.*, UNCITRAL, Working Grp. II (Arbitration), Preparation of Uniform Provisions on Written Form for Arbitration Agreements, Note by the Secretariat, ¶¶11-23, U.N. Doc. A/CN.9/WG.II/WP.139 (Dec. 14, 2005) [hereinafter UNCITRAL Note]; ICCA GUIDE, *supra* note 123; VAN DEN BERG, *supra* note 71; Edward S. Cohen, *Normative Modeling for Global Economic Governance: The Case of the United Nations Commission on International Trade Law (UNCITRAL)*, 36 BROOK. J. INT'L L. 574, 574-96 (2011); Pieter Sanders, Foreword, *in* ICCA GUIDE, *supra* note 123, at v, vi.
[142] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753-60 (2010) [hereinafter Gluck, Laboratories]; *see also supra* note 12 and accompanying text.

1. The UNCITRAL survey

One of the most useful studies in this area of law involves a survey conducted by UNCITRAL on the implementation of the New York Convention worldwide.[143] The project, which was completed in 2008, generated responses from 108 of the then-142 states parties to the New York Convention and found that:

> [f]or a vast majority of States, the New York Convention was considered as "self-executing", "directly applicable" and becoming a party to it put the Convention and all of its obligations in action. Most of those States mentioned that, in accordance with their Constitution, conventions "enjoy a hierarchy above laws", "form an integral part of domestic law and prevail over any contrary provision of the law", or that "they have force of law after their conclusion, ratification and publication according to the established procedures."[144]

Thus, most states appear to have adopted a monist approach to the New York Convention.[145] However, monism simply describes the way in which a legal system integrates international law into its domestic realm as a matter of constitutional law.[146] Questions still remain as to how a particular treaty is interpreted by national courts.[147]

According to UNCITRAL, "[a] significant number of responses emphasized the fact that the Convention should be interpreted according to articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, either in combination with other rules of interpretation, or as

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[143] *See* UNCITRAL, Secretariat, *The Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. Doc. A/CN.9/656 (June 5, 2008) [hereinafter UNCITRAL Survey Report], *available at* http://www.uncitral.org/uncitral/en/commission/sessions/41st.html (last visited Dec. 1, 2012).
[144] UNCITRAL Survey Report, *supra* note 143, ¶10; *see also id.* ¶6.
[145] *See* New York Convention, *supra* note 9; *see also* Ferreira Dos Santos, *supra* note 68, at 460; de Mestral & Fox-Decent, *supra* note 59, at 606-07; Jackson, *supra* note 51, at 320; Rao, *supra* note 68, at 181-82 & n.16; Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 453 (2006).
[146] *See* BROWNLIE, *supra* note 51, at 31-34; Ginsburg, *supra* note 50, at 713-14; Jackson, *supra* note 51, at 311.
[147] *See* UNCITRAL Survey Report, *supra* note 143, ¶¶34-40.

the sole source of interpretation."[148] However, the report also noted that "[u]pon ratifying or acceding to the [New York] Convention, several States made a declaration that the Convention was to be interpreted in accordance with the principles of their Constitution," a practice that could diminish the scope and effectiveness of the New York Convention.[149]

The UNCITRAL report also noted that, in addition to various constitutional canons, states relied on judicial precedent or advice from a particular ministerial or governmental office when interpreting the New York Convention.[150] Furthermore, some states indicated that they could or would rely on the New York Convention's *travaux préparatoires*.[151] Though appropriate as a matter of constitutional law, this type of interpretive diversity is potentially problematic in an area of law where international consistency and predictability is paramount.

Although a majority of the states surveyed by UNCITRAL appear to have adopted a monist approach to the New York Convention, a number of states indicated that they gave domestic effect to the Convention on a dualist basis.[152] This information was unsurprising, since commentators had long recognized the need for some states to provide for domestic application of the New York Convention through implementing legislation.[153] However, the UNCITRAL study reinforced some of the dangers of dualism by noting that in these jurisdictions, the Convention could be deemed to have no legal significance as a matter of national law.[154]

UNCITRAL also noted that various states "mentioned that distinct rules of interpretation were used depending on the instrument to be interpreted, i.e., the Convention or the

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[148] *Id.* ¶36; *see also* Vienna Convention, *supra* note 43, arts. 31-32.
[149] UNCITRAL Survey Report, *supra* note 143, ¶36; *see also* New York Convention, *supra* note 9; Vienna Convention, *supra* note 43, arts. 18, 31-32.
[150] *See* UNCITRAL Survey Report, *supra* note 143, ¶¶36-37; *see also* New York Convention, *supra* note 9.
[151] *See* Vienna Convention, *supra* note 43, art. 32; UNCITRAL Survey Report, *supra* note 143, ¶38.
[152] *See* UNCITRAL Survey Report, *supra* note 143, ¶11.
[153] *See* ICCA GUIDE, *supra* note 123, at 28; BORN, *supra* note 9, at 100.
[154] *See* UNCITRAL Survey Report, *supra* note 143, ¶11.

implementing legislation."[155] Furthermore, the method of incorporation varied significantly, with some legal systems using "an 'Arbitration Act, to which the Convention [was] attached as a schedule,'" while other jurisdictions used "'the enactment of a special act on Foreign Arbitral Awards', or the 'enactment of a legislative decree.'"[156] Still other countries amended their laws so as to give effect to the Convention.[157]

The report went on to identify the types of practical problems that can arise in a dualist legal system. For example, UNCITRAL noted that "[c]hanges of varying scope might have been introduced in the implementing legislation."[158] These potential variations included "changes of substance, additions, or omissions"[159] as well as "only a partial adoption of the Convention."[160] UNCITRAL identified additional problems in states that allow the text of implementing legislation to prevail over the treaty itself as a matter of constitutional law.[161]

Although the UNCITRAL survey focused solely on matters relating to the New York Convention, the report provides useful empirical data for comparative constitutional lawyers, since the information provided by the 108 state respondents confirms the ways in which implementing legislation can vary from jurisdiction to jurisdiction.[162] Furthermore, the UNCITRAL survey notes the diversity of interpretive methods used in treaty-related disputes, a feature that commentators working in many areas of public international law will find intriguing.[163]

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[155] *See id.* ¶36.
[156] *Id.* ¶11; *see also id.* ¶22.
[157] *See id.* ¶11.
[158] *Id.* ¶12.
[159] *Id.* ¶18.
[160] *Id.* ¶12.
[161] *See id.* ¶20; *see also id.* ¶25 (noting few actual problems in implementation).
[162] *See also* New York Convention, *supra* note 9; UNCITRAL Survey Report, *supra* note 143.
[163] *See also* New York Convention, *supra* note 9; UNCITRAL Survey Report, *supra* note 143.

2. The Federal Arbitration Act

Federalist legal systems such as the United States expect a number of permissible variations to arise in the way in which certain laws are interpreted and applied in the domestic setting.[164] However, the U.S. Supreme Court has recognized that "[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."[165]

The need for predictability and consistency is particularly high in cases involving international commercial arbitration, since commercial actors around the world need to be able to anticipate how a particular issue will be resolved by national courts.[166] Thus, the U.S. Supreme Court famously stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, that

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context.[167]

Indeed, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."[168]

Specialists in international commercial arbitration have conducted a considerable amount of research into the way in which U.S. courts interpret and apply the New York Convention, but

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[164] *See* Gluck, Laboratories, *supra* note 142, at 1753-60. This phenomenon has been seen in the area of arbitration. *See* RUTLEDGE, *supra* note 25, at 96-97, 122-24.
[165] U.S. v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring).
[166] *See* BORN, *supra* note 9, at 75.
[167] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-19 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).
[168] Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995).

most of those studies have focused on specific issues within the field.[169] Thus, for example, one line of analysis attempts to either reconcile or reject the use of manifest disregard of law as a means of vacating an arbitral award in disputes falling under the New York Convention[170] while other research efforts focus on the interaction between the form requirements contained in the New York Convention and those reflected in the FAA.[171] Debates also rage about the extent to which anti-suit injunctions[172] and U.S. "gateway" analyses are consistent with the New York

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[169] *See* New York Convention, *supra* note 9.

[170] *See id.*; Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767-68 (2010); Hall St. Ass'n, LLC v. Mattel, Inc., 552 U.S. 576, 584-85 (2008); Telenor Mobile Comic's AS v. Storm LLC, 584 F.3d 396, 407 (2d Cir. 2009); BORN, *supra* note 9, at 2639-46; RUTLEDGE, *supra* note 25, at 49; Kenneth R. Davis, *The End of an Error: Replacing "Manifest Disregard" With a New Framework for Reviewing Arbitral Awards*, 60 CLEV. ST. L. REV. 87, 119-31 (2012); Richard W. Hulbert, *The Case for A Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT'L ARB. 45, 46-48 (2011); Gabrielle Kaufmann-Kohler, *Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration*, 20 ICSID REV. 339, 345-46 (2005); Park, *supra* note 70, at 1249-54. Debates about the doctrine of manifest disregard ultimately do not shed a great deal of light on matters relating to the interpretation of treaties and implementing legislation because (1) the doctrine is not rooted in the relevant legislation and (2) very few courts have actually vacated an award on the grounds of manifest disregard. *See* Hulbert, *supra*, at 47 ("It may seem quixotic to express concern about a doctrine which, although brandished as a threat to the validity of New York Convention arbitration awards, seems never to have been actually employed to invalidate one.").

[171] *See* New York Convention, *supra* note 9, arts. II, IV(1), V(1)(a); 9 U.S.C. §§2, 202 (2012); BORN, *supra* note 9, at 580-81; VAN DEN BERG, *supra* note 71, at 387-89; Guillermo Aguilar Alvarez, *Article II(2) of the New York Convention and the Courts, in* ALBERT JAN VAN DEN BERG, IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, IX ICCA CONG. SER. 67, 68-82 (1999) [hereinafter Alvarez, Article II(2)]; Phillipp A. Habegger, *Extension of Arbitration Agreements to Non-Signatories and Requirements of Form*, 22 ASA BULL. 398, 403-05 (2004); Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT'L 211, 215-16 (1999); Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitration in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 412-14, 418-21 (2005); Landau, *supra* note 123, at 25-33; Renaud Sorieul, *UNCITRAL's Current Work in the Field of International Commercial Arbitration*, 22 J. DISP. RESOL. 543, 543-44, 547-49 (2005); Strong, Writing, *supra* note 30, at 58-78; Yongping Xiao & Weidi Long, *Enforcement of International Arbitration Awards in Chinese Courts*, 25 ARB. INT'L 569, 570 (2009).

[172] *See* Oppenheimer & Co. Inc. v. Deutsche Bank AG, No 09 Civ. 8154 (LAP), 2009 WL 4884158, *2 (S.D.N.Y., Dec. 16, 2009); *see also* Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003); BORN, *supra* note 9, at 1036-41; Robert Force, *The Position in the United States on Foreign Forum Selection Clauses and Arbitration Clauses*, Forum Non Conveniens, *and Antisuit Injunctions*, 35 TUL. MAR. L.J. 401, 441-64 (2011); Emmanuel Gaillard, *Anti-Suit Injunctions Issued by Arbitrators, in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? XIII ICCA CONG. SER. 235, 235-66 (Albert Jan van den Berg ed., 2006); Dominique T. Hascher, *Injunctions in Favor of and Against Arbitration*, 21 AM. REV. INT'L ARB. 189, 190-97; Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24 AM. REV. INT'L ARB. 489, 499-519 (2009); Chetan Phull, *U.S. Anti- Suit*

Convention.[173] Circuit splits exist with respect to a number of these issues,[174] and certiorari has been sought from the Supreme Court on various occasions.[175]

As useful as these subject-specific discussions are, they fail to address more systemic issues relating to the relationship between the New York Convention and the FAA.[176] Those matters, which can be framed as either textual or conceptual in nature, demonstrate a number of concerns that arise as a matter of both international and constitutional law.

a. Textual issues

When analyzing the relationship between the New York Convention and the FAA, the first matter to consider involves the text of the two instruments.[177] Section 201 of the FAA indicates that "[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."[178] This statutory formulation appears to be nearly unique in U.S. law, for although other federal statutes occasionally use the term "in accordance with this chapter" or similar language, the FAA's

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Injunctions in Support of International Arbitration: Five Questions American Courts Ask, 28 J. INT'L ARB. 21 (2011); Reisman & Iravani, *supra* note 17, at 30-36; Strong, Borders, *supra* note 12, at 12.

[173] *See* New York Convention, *supra* note 9; Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2777-79 (2010); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); BORN, *supra* note 9, at 1020-48, 2028-66; LEW ET AL., *supra* note 24, ¶¶15-1 to 15-57; George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012); S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 160-62 [hereinafter Strong, GPS]; V.V. Veeder, *Strategic Management in Commencing Arbitration, in* ARBITRATION ADVOCACY IN CHANGING TIMES, XIV ICCA CONG. SER. 27, 33-34 (2011).

[174] *See* Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003); Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005); Sphere Drake Ins. plc v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994); *see also* Strong, Writing, *supra* note 30, at 58-78.

[175] *See supra* note 32 and accompanying text.

[176] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307.

[177] *See* Medellin v. Texas, 552 U.S. 491, 506 (2008); *see also* New York Convention, *supra* note 9; 9 U.S.C. §§1-307.

[178] 9 U.S.C. §201.

incorporative framework is entirely different from those other examples.[179] Therefore, it appears impossible to construe this term using any interpretive canons relating to the use of the same or similar terms in different contexts.[180]

Furthermore, it is unclear from the face of Section 201 whether Chapter 2 is intended to supplement, diminish or amend the terms of the New York Convention in any way.[181] On the one hand, Section 201's reference to other parts of Chapter 2 could simply reflect a recognition that the New York Convention neither intends to nor in fact does address all matters relating to international arbitration, and that states need to enact supplementary legislation to create an adequate regulatory framework in which the Convention can operate.[182] On the other hand, the reference to other parts of Chapter 2 could suggest an intention to somehow alter the terms of the Convention.[183]

Close consideration of the other aspects of the statute yield potentially contradictory results. For example, a number of items discussed in Chapter 2 of the FAA have no analogue in the New York Convention and therefore cannot be said to affect the interpretation or application of the treaty in U.S. courts.[184] These provisions, which relate to federal jurisdiction, venue, removal, compelling arbitration, naming of arbitrators and confirming the award, are consistent with the type of background procedural matters that are contained in arbitration statutes enacted

[179] The closest analogue appears to be found in the REAL ID Act of 2005. *See* REAL ID Act of 2005, Pub. L. No. 109-13, §106(a)(4), 119 Stat. 302, 310 (codified at 8 U.S.C. §1252(a)(4)). Other enactments use this type of language primarily to authorize regulatory action consistent with an international treaty. *See, e.g.*, 10 U.S.C. §2350d(e) (2012); 16 U.S.C. §916d(d) (2012); 16 U.S.C. §957(b) (2012); 16 U.S.C. §3321(e)(2)(E) (2012); 18 U.S.C. §4102(4) (2012); 22 U.S.C. §6724(f)(1) (2012); 42 U.S.C. §11602(4), (6) (2012); 42 U.S.C. §14923 (b)(1)(B) (2012); 43 U.S.C. §1571(a) (2012).
[180] *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 374-75 (2010); *see also* Suter v. Munich Reins. Co., 223 F.3d 150, 160 (3d Cir. 2000).
[181] *See* New York Convention, *supra* note 9; 9 U.S.C. §201.
[182] *See* VAN DEN BERG, *supra* note 71, at 9-10; *see also* BORN, *supra* note 9, at 95-96.
[183] *See* New York Convention, *supra* note 9; 9 U.S.C. §201.
[184] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08.

other jurisdictions, including statutes adopted in states that reflect a monist approach to international treaties.[185]

The final provision of Chapter 2 of the FAA, Section 208, also suggests that Chapter 2 is not meant to alter the terms of the Convention.[186] This section states that "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter [i.e., Chapter 2] to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."[187] While this provision may initially appear to constitute nothing more than a gap-filling mechanism similar to that found in Sections 203 to 207 of the FAA, the express limitation embodied in Section 208 (i.e., that the incorporation of Chapter 1 cannot be conducted in a way that is inconsistent with the Convention) can be used to demonstrate a congressional disinclination to alter the terms of the treaty.[188]

However, there is one aspect of the statute that could be read to alter the United States' obligations under the New York Convention.[189] Section 202 of the FAA discusses form requirements, a subject that is also covered under Article II of the New York Convention, and does so in a way that could be seen as inconsistent with the language of the Convention.[190]

Section 202 states that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the [New York] Convention."[191] Unfortunately, section 2 (which is found in Chapter 1) of the FAA predates the

[185] *See* 9 U.S.C. §§203-07; *see also* 9 U.S.C. §§1-16; Bachand, *supra* note 72, at 89-90; *supra* note 72 and *infra* note 316 and accompanying text.
[186] *See* 9 U.S.C. §208.
[187] *Id.* §208.
[188] *See* New York Convention, *supra* note 9; 9 U.S.C. §§202, 208.
[189] *See* New York Convention, *supra* note 9.
[190] *See id.* art. II; 9 U.S.C. §202.
[191] 9 U.S.C. § 202.

New York Convention and therefore does not mirror the language found in the Convention.[192] For example, while section 2 of the FAA only needs evidence of a "written provision" or "an agreement in writing," the New York Convention requires either "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[193]

Difficulties relating to the interpretation and application of Section 202 of the FAA and Article II of the Convention have generated a longstanding circuit split[194] that is distinguishable from the burgeoning debate about whether the New York Convention, and particularly Article II, is self-executing as a matter of U.S. law.[195] However, both situations are exacerbated by judicial opinions suggesting that Article II of the Convention is the only section (or perhaps one of the only sections) of the treaty that is self-executing.[196]

This Article will not attempt to resolve these particular issues, since they are beyond the scope of the current discussion. However, it would appear logical to extend the admonition contained in Section 208 (i.e., that no aspect of Chapter 1 that was inconsistent with the Convention should be relied upon in cases falling under Chapter 2) to issues arising under

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[192] *See* New York Convention, *supra* note 9, art. II; 9 U.S.C. §2; BORN, *supra* note 9, at 607; STRONG, GUIDE, *supra* note 13, at 37-92.

[193] New York Convention, *supra* note 9, art. II(2); 9 U.S.C. §2.

[194] *See* Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005); Sphere Drake Ins. plc v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994); *see also* Strong, Writing, *supra* note 30, at 59-64.

[195] *See* New York Convention, *supra* note 9, art. II; Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 733-34 (5th Cir. 2009) (Clement, C.J., concurring in the judgment), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); *see also* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 387 (4th Cir. 2012).

[196] Although some references in the concurring opinion in *Safety National* were to Article II as a whole, it is clear that Circuit Judge Clement was focusing on Article II(3) rather than Article II(1) or (2), which involve the form requirements. *See* New York Convention, *supra* note 9, art. II; *Safety Nat'l,* 587 F.3d at 733-34 (Clement, C.J., concurring in the judgment).

Section 202.[197] This reading would conform with the overall text of Chapter 2 as well as the notion that Congress should not be assumed to legislate in contravention to the United States' international obligations, absent evidence to the contrary.[198]

b. Conceptual issues

Although textual analyses give rise to their own set of problems, the more striking issues arise as a conceptual matter. Indeed, as one commentator recently noted, "[i]t is now 40 years since the United States became a party to the [New York] Convention, and there is still an absence of consensus on the application of the Convention" in U.S. law, at least in some regards.[199]

Perhaps the most significant difficulty facing U.S. courts is a widespread confusion about the circumstances in which the New York Convention and Chapter 2 of the FAA apply.[200] The issue here involves the distinction in the Convention between "arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought" (i.e., "foreign" arbitral awards) and "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought" (i.e., "non-domestic" awards).[201]

Although most states parties to the New York Convention only recognize the Convention's applicability to foreign arbitral awards, Article I(1) of the Convention specifically allows states to determine whether to extend the protections of the Convention to both foreign

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[197] *See* 9 U.S.C. §§202, 208; *see also* Hulbert, *supra* note 170, at 71-76

[198] *See* 9 U.S.C. §§201-08; Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that ambiguous statutes "ought never to be construed to violate the law of nations if any other possible construction remains"); Cabrera-Alvarez v. Gonzalez, 423 F.3d 1006, 1009 (9th Cir. 2005); *see also infra* notes 392-432 and accompanying text.

[199] Hulbert, *supra* note 170, at 45.

[200] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08; *see* STRONG, GUIDE, *supra* note 13, at 24-30.

[201] New York Convention, *supra* note 9, art. I(1); *see also* Hulbert, *supra* note 170, at 46.

and non-domestic awards.[202] The United States has explicitly agreed to do so pursuant to Sections 2 and 202 of the FAA, which state that Chapter 2 of the FAA applies to agreements and awards relating to foreign arbitrations (i.e., arbitrations that are or were seated outside of the United States) and also to arbitrations that are or were seated within the United States and that arise

> (1) between a U.S. and foreign party;
> (2) entirely between foreign parties; or
> (3) entirely between U.S. citizens, but only if there is a sufficient international nexus.[203]

Even though these latter types of proceedings are seated within the United States, they are considered non-domestic as a matter of U.S. law and therefore fall under the New York Convention pursuant to the second sentence of Article I(1).[204] The problem is that although the statutory scheme is quite clear (albeit slightly convoluted), a number of U.S. courts continue to insist erroneously "that Chapter 1 of the Federal Arbitration Act . . . still has an independent and decisive role to play in determining the legal effectiveness of an international award subject to the New York Convention of 1958, if that award is rendered in the United States."[205] Not only do these sorts of misapplications of the FAA violate federal law, they also constitute a breach of international law.[206]

Issues relating to non-domestic awards and agreements are not the only type of conceptual difficulties that can arise in international commercial arbitration. Additional problems exist with respect to the way in which the FAA interacts with underlying principles of

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[202] *See* New York Convention, *supra* note 9, art. I(1); BORN, *supra* note 9, at 2364-83.
[203] *See* 9 U.S.C. §§2, 202; Indus. Risk Insurers v. M.A.N. Gutehoffnungshuette GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998); BORN, *supra* note 9, at 2364-83; STRONG, GUIDE, *supra* note 13, at 25-29; Hulbert, *supra* note 170, at 60, 62.
[204] *See* New York Convention, *supra* note 9, art. I(1); 9 U.S.C. §§2, 202.
[205] Hulbert, *supra* note 170, at 46; *see also* Park, *supra* note 70, at 1248.
[206] *See* New York Convention, *supra* note 9; ICCA GUIDE, *supra* note 123, at 30.

domestic law.[207] The issue here involves various requirements relating to personal and subject-matter jurisdiction in U.S. federal courts.[208]

The first set of difficulties relates to the need for parties to establish federal jurisdiction over either the person or the property in question by relying on either (1) the appropriate constitutional test (such as those relating to general or specific personal jurisdiction[209] or *in rem* or quasi-*in rem* jurisdiction[210]) or (2) principles set forth in the Federal Rules of Civil Procedure.[211] However, because these requirements do not exist in the New York Convention, they can be seen as constituting an additional, and often invisible, hurdle for parties to overcome in cases brought in U.S. courts.[212]

This issue reflects a potential conflict between international and constitutional law. In one line of cases, courts have given primacy to the constitutional tests for jurisdiction by relying

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[207] *See* 9 U.S.C. §§1-307.

[208] *See* U.S. CONST., art. III, §2; Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114. 1120-28 (9th Cir. 2002); Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F. 3d 208, 214-15 (4th Cir. 2002), *cert. denied*, 537 U.S. 822; Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr., 311 F.3d 488, 498-501 (2d Cir. 2002); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS: COMMENTARY & MATERIALS 1-229 (2011); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 3D §§1063, 3561, 3563 (2012).

[209] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, SA v. Hall, 466 U.S. 408, 414-15 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); CME Media B.V. v. Zelezny, No. 01 Civ. 1733, 2003 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §487 cmt. c (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW]; S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. INT'L ARB. 439, 449-51 (2004) [hereinafter Strong, Invisible Barriers].

[210] *See* Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977); *Frontera*, 582 F.3d at 396-98; Dardana Ltd. v. A.O. Yuganskneftegaz, 317 F.3d 202, 208 (2d Cir. 2003); *Glencore Grain*, 284 F.3d at 1128; *Base Metal Trading*, 283 F.3d at 213-14; Strong, Invisible Barriers, *supra* note 209, at 445-49.

[211] *See* FED. R. CIV. P. 4(k)(2); Transatlantic Bulk Shipping v. Saudi Chartering, 622 F. Supp. 25, 27 (S.D.N.Y. 1985); Strong, Invisible Barriers, *supra* note 209, at 449-51.

[212] *See* New York Convention, *supra* note 9; *Glencore Grain*, 284 F.3d at 1120-28; *Base Metal Trading*, 283 F. 3d at 214-15; *Monegasque de Reassurances*, 311 F.3d at 498-501; Park, *supra* note 70, at 1263-64; William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 254-56, 264 (2008); Strong, Invisible Barriers, *supra* note 209, at 451.

on longstanding principles regarding the supremacy of the U.S. Constitution over treaties[213] and on Article III of the New York Convention, which allows courts to enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon."[214] However, the presumptive superiority of U.S. domestic law is less defensible when jurisdiction is based on the Federal Rules of Civil Procedure, since statutes carry the same constitutional weight as treaties.[215] In those instances, the better solution might be to give full effect to claims made by various commentators that Article III of the Convention was never meant to constitute an additional grounds upon which to deny enforcement of an arbitral award or agreement.[216]

Issues also arise with respect to federal subject-matter jurisdiction, even though Chapter 2 of the FAA establishes an independent basis for federal subject-matter jurisdiction in disputes arising under the New York Convention.[217] The problem here can be traced back to the failure of some courts to recognize the applicability of Chapter 2 of the FAA to disputes involving non-domestic agreements or awards.[218] Because Chapter 1 of the FAA does not provide for federal subject-matter jurisdiction, a court operating under the mistaken impression that Chapter 2 does

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[213] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned. . . ."); *see also* Reid v. Covert, 354 U.S. 1, 16-17 (1957); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 209, §111 cmt. a (1987); Vasan Kesavan, *Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1480 (2006).

[214] New York Convention, *supra* note 9, art. III; *see also* U.S. CONST., art. VI, cl. 2.

[215] *See* U.S. CONST., art. VI, cl. 2; FED. R. CIV. P. 4(k)(2); *see also* Rules Enabling Act, 28 U.S.C. §§2071-72, 2074 (2012); Strong, Invisible Barriers, *supra* note 209, at 450-52.

[216] *See* Park, *supra* note 70, at 1263-64; Park & Yanos, *supra* note 212, at 254-56, 264; Strong, Invisible Barriers, *supra* note 209, at 450-52.

[217] *See* New York Convention, *supra* note 9; 9 U.S.C. §203.

[218] *See* New York Convention, *supra* note 9, art. I(1); 9 U.S.C. §§1-208 (2012); Hulbert, *supra* note 170, at 46. Problems can also arise with respect to the removal of disputes from state court to federal court, the proper standard to be used to vacate an award that is non-domestic and the potential need for an agreement to the entry of a court judgment. *See* Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc., 13 F.3d 196, 199-203 (7th Cir. 1993); Splosna Plovba of Piran v. Agrelak SS Corp., 381 F. Supp. 1368, 1371 (S.D.N.Y. 1974); Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC, __ Cal. Rptr. 3d __ (Cal. App. 2012); 9 U.S.C. §§9, 207; BORN, *supra* note 9, at 2788; Hulbert, *supra* note 170, at 50-51, 67-68; Strong, GPS, *supra* note 173, at 192; *see also* Drahozal, *supra* note 73, at 104.

not apply might ask the parties to establish subject-matter jurisdiction through some other means, such as the existence of a federal question or diversity of the parties.[219] Although it might appear that it would be easy to establish the requisite facts, that is not always the case.[220]

Problems with either personal or subject matter jurisdiction could result in the dispute's being dismissed from federal court. While the matter could be reasserted in U.S. state court, that raises the question of whether the denial of federal jurisdiction in matters relating to international commercial arbitration constitutes a breach of international law.[221] To answer that question, it is necessary to determine whether and to what extent the New York Convention applies in U.S. state court as a matter of both U.S. and international law.[222]

The New York Convention considers matters of federal-state competence in Article XI, which states:

> In the case of a federal or non-unitary State, the following provisions shall apply:
>
> (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
>
> (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

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[219] *See* 9 U.S.C. §§1-16; Hulbert, *supra* note 170, at 49-50 .
[220] *See* Hulbert, *supra* note 170, at 49-50. For example, although diversity jurisdiction might seem to be an easy means of establishing subject-matter jurisdiction, a court hearing a matter arising entirely between non-U.S. parties would run up against constitutional limitations on jurisdiction over such matters. *See id.*
[221] A breach of the New York Convention arises whenever a court in a state that is bound by the Convention "does not apply the Convention, misapplies it or finds questionable reasons to refuse recognition or enforcement that are not covered by the Convention." ICCA GUIDE, *supra* note 123, at 30; *see also* New York Convention, *supra* note 9.
[222] *See* New York Convention, *supra* note 9.

> (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.[223]

Under this provision, the first issue to determine is whether international commercial arbitration falls within the competence of state or federal government (or both). Under U.S. law, such matters are clearly fall within the ambit of federal law in whole or in part, either by virtue of the Commerce Clause of the U.S. Constitution (which is broadly construed as a matter of both constitutional and arbitral law)[224] or as a result of *Missouri v. Holland* (which extends federal legislative competence beyond its traditional constitutional boundaries in cases involving treaties).[225] Furthermore, "[i]n joining the Convention, the executive did not take advantage of . . . [Article XI(b)] because it viewed arbitration as coming within federal legislative jurisdiction, namely the Federal Arbitration Act."[226] Therefore, the U.S. federal government appears responsible for the full and appropriate implementation of the New York Convention as a matter

[223] *Id.* art. XI.
[224] *See* U.S. CONST., art. I, §8, cl. 3; Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 115-19 (2001); Sumitomo Corp. v. Parakopi Compania Maritima, S.A., 477 F. Supp. 737, 740-41 (S.D.N.Y.), *aff'd* 620 F.2d 286 (2d Cir. 1980); LEW ET AL., *supra* note 24, ¶¶4-2 to 4-26; Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 704 (2003) [hereinafter Alford, Deference].
[225] *See* U.S. CONST., art. II, §2, cl. 2; Missouri v. Holland, 252 U.S. 416, 433 (1920); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 209, §302 cmt. d (1987); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1330 (2006); Robert B. Looper, *"Federal State" Clauses in Multi-Lateral Instruments*, 32 BRIT. Y.B. INT'L L. 162, 169, 196-97, 202 (1955-1956) (discussing how federal-state clauses are unnecessary as a matter of U.S. law, given *Missouri v. Holland*); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?* 103 COLUM. L. REV. 403, 406 (2003).
[226] Hollis, *supra* note 225, at 1372 (citation omitted); *see also* Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration (Aug. 15, 1958), *reprinted in* 19 AM. REV. INT'L ARB. 91, 114 (2008) [hereinafter Official Report]; Drahozal, *supra* note 73, at 1098.

of international law, regardless of whether the individual disputes are heard in state or federal court.[227]

There is no general principle of public international law that requires a dispute to be heard in a particular forum, so long as the relevant international standards are properly applied.[228] Indeed, "[i]n the vast majority of cases, there is nothing in the treaty text, negotiating history, or ratification record that specifies which domestic actors have the power or duty to implement the treaty."[229] The New York Convention reflects this standard approach by simply placing the obligation to recognize and enforce arbitral awards and agreements on the "competent authority where the recognition and enforcement is sought" rather than designating what qualities that authority should have.[230] Thus, it can be said the New York Convention gives federal or non-unitary states that fall within the ambit of Article XI(a) the discretion to decide the means by which the Convention will be given domestic application.[231]

Although only a handful of cases relating to international commercial arbitration have been heard in U.S. state courts thus far,[232] commentators agree that U.S. state courts constitute a "competent authority" within the terms of the New York Convention.[233] The FAA also contemplates the possibility that matters relating to international commercial arbitration can and will be heard in state court, since the provisions in Chapter 2 relating to removal from state court are permissive rather than mandatory.[234] As a result, it is clear that U.S. state courts may hear

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[227] *See* New York Convention, *supra* note 9; Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 902-03 (5th Cir. 2005); Drahozal, *supra* note 73, at 108-09.
[228] *See* Looper, *supra* note 225, at 163-64, 202-03.
[229] Sloss, Two-Step, *supra* note 62, at 137.
[230] New York Convention, *supra* note 9, art. V
[231] *See id.* art. XI(a).
[232] *See* Strong, Borders, *supra* note 12, at 2-3; Whytock, Relationship, *supra* note 12, at 58-67, 75-79.
[233] *See* New York Convention, *supra* note 9, art. V; *see also* BORN, *supra* note 9, at 2398, 2703 n.4 ; Drahozal, *supra* note 73, at 113.
[234] *See* 9 U.S.C. §205 (2012).

matters arising under the New York Convention, although those courts would appear obliged to apply and uphold the terms of the Convention pursuant to the Supremacy Clause.[235]

While U.S. state courts may be competent to hear matters relating to international commercial arbitration as a matter of theory, the practical application of this principle could give rise to a number of problems. For example, there is currently a great deal of debate regarding the extent to which the FAA preempts state law,[236] with further developments anticipated in light of two cases that are currently pending in the U.S. Supreme Court.[237] Preemption remains an issue of concern in international matters, for although numerous authorities clearly indicate that Chapter 2 of the FAA and the New York Convention both apply in state court,[238] that approach has not been universally adopted.[239]

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[235] *See* U.S. CONST., art. VI, cl. 2.

[236] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1989); Southland Corp. v. Keating, 465 U.S. 1, 16 (1985); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 295, 405-06 (1967); Stawski Distributing Co. v. Browary Zywiec S.A., 349 F.3d 1023, 1025-26 (7th Cir. 2003); Arbitration Between Lemoine Skinner III v. Donaldson, Lufkin, Jenrette Sec. Corp., No. C 03-2625 VRW, 2003 WL 23174478, at *8 (N.D. Cal. Dec. 29, 2003); Matter of Arbitration Between Trans Chemical Ltd. and China Nat'l Machinery Import and Export Corp., 978 F. Supp. 266, 302 (S.D. Tex. 1997), *aff'd,* 161 F.3d 314 (5th Cir. 1998); Nafta Traders, Inc. v. Quinn, 339 S.W. 3d 84, 101 (Tex. 2011); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 598-99 (Cal. 2008); Bradley, Breard, *supra* note 51, at 552-54; Glashausser, *supra* note 6, at 1252; Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L L. 435, 534 (2011); Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 393-96 (2011).

[237] *See* Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 222-23 (3d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3070 (2012); In re Am. Express Merchs. Litig., 667 F.3d 204, 219 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 81 U.S.L.W. 3070 (2012).

[238] *See* U.S. CONST., art. VI, cl. 2; Indus. Risk Insurers v. M.A.N. Gutehoffnungshuette GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269-73 (1995); McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1208 n.12 (5th Cir. 1991); Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc., Nos. 3:95CV2362 AWT, 2000 WL 435566, at *3 (D. Conn. Mar. 14, 2000); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992), *appeal dismissed by* 984 F.2d 58 (2d Cir.1993); Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 36-38 (2002).

[239] *See* Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC, 151 Cal. Rptr. 3d 229, 231 (Cal. App. 2012); Tong v. S.A.C. Capital Mgmt., LLC, 835 N.Y.S. 2d 881, 883, 887-888 (N.Y. Sup. 2007), *aff'd as modified*, 52 A.D. 3d 386 (N.Y. App. Div. 2008). However, some state courts have taken due account of the Convention. See New York Convention, *supra* note 9; Gueyffier v. Ann Summers, Ltd., 50 Cal. Rptr.

Another concern relates to the extent to which U.S. state courts can rely on foreign and international law. At this point, state courts play a "major role in the implementation of . . . treaty obligations"[240] and "routinely apply international law and foreign law."[241] However, a significant number of states have recently adopted (or attempted to adopt) state statutes or state constitutional amendments limiting their courts' ability to rely on anything other than U.S. state or federal law.[242] A number of these measures are quite broad and could threaten the use of foreign and international law not only in judicial disputes relating to international commercial arbitration[243] but also in arbitral proceedings themselves.[244] While most commentators believe that these provisions cannot withstand constitutional scrutiny, they are nevertheless disturbing.[245]

Finally, U.S. courts have exhibited certain conceptual difficulties relating to the question of whether the New York Convention or the FAA should prevail in cases of actual or potential conflict.[246] Although this could be a simple issue to resolve under the last-in-time rule,[247] in that

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3d 294, 299-308 (Cal. App. 2006), *reversed on other grounds*, 184 P.3d 739 (Cal. 2008); Fiske, Emery & Assoc. v. Ajello, 577 A.2d 1139 (Conn. Super. Ct. 1989); F.A. Richards & Assoc. v. Gen. Marine Catering Co., 688 So.2d 199 (La. Ct. App. 1997); Cocoran v. Ardra Ins. Co., 77 N.Y.2d 225, 567 N.E.2d 969 (1990); Karamanian, *supra* note 238, at 38 n.139.

[240] Ku, *supra* note 15, at 1064.

[241] Dubinsky, *supra* note 61, at 477; *see also* Koh, Litigation, *supra* note 49, at 2353.

[242] These provisions have primarily been brought as a means of blocking the influence of Shari'a law in the domestic U.S. context. *See* Awad v. Ziriax, 754 F.Supp.2d 1298, 1301-02 (W.D. Okla. 2010), *aff'd by* 670 F.3d 1111 (10th Cir. 2012); John R. Crook, *Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-International Law Constitutional Amendment*, 106 AM. J. INT'L L. 365, 365 (2012). Proposals have been made in Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Iowa, Louisiana, Missouri, Nebraska, New Jersey, Oklahoma, South Carolina, South Dakota, Texas, Utah and Wyoming. *See* Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law,* 106 AM. J. INT'L L. 107, 107-17 (2012).

[243] Courts become involved in international arbitration in a variety of ways and at a variety of times. *See* STRONG, GUIDE, *supra* note 13, at 37-87.

[244] *See* Fellmeth, *supra* note 242, at 107.

[245] *See id.* at 113.

[246] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08 (2012).

[247] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 599-600 (1884) (the "Head Money Cases"); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 722 n.32 , 725 n.47 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-

Chapter 2 of the FAA was enacted before after the United States' international obligations were formally established under the Convention,[248] courts and commentators have not relied on this sort of mechanistic analysis.

C. Potential Solutions

The arbitral community has proposed a number of means of resolving the various practical and jurisprudential issues that can and do arise with respect to the interpretation of the FAA and the New York Convention.[249] For example, some commentators have suggested that the best way to address conflicts between the FAA and the New York Convention is to amend the FAA, with the leading proposal advocating the adoption of the Model Arbitration Law in whole or in part.[250] Because the Model Arbitration Law was specifically designed to operate in harmony with the New York Convention, that approach would resolve most, if not all, tensions between national and international law.[251]

Other commentators suggest amending the New York Convention,[252] although this approach has its problems.[253] For example, treaty amendment can be "harder than constitutional

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Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); Bradley, Duality, *supra* note 6, at 160; Moore, Duality, *supra* note 6, at 2233; Wu, *supra* note 63, at 574.

[248] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 382 (4th Cir. 2012); *see also* H.R. Rep. No. 91-1191 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602.

[249] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307.

[250] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08; Model Arbitration Law, *supra* note 70; Born, Freedom, *supra* note 25, at 23-24; Park, *supra* note 70, at 1243; *see also supra* note 70 and accompanying text.

[251] *See* New York Convention, *supra* note 9; Model Arbitration Law, *supra* note 70, Explanatory Note to 1985 version, ¶47; BORN, *supra* note 9, at 115-21.

[252] *See* Report of the Secretary General, UNCITRAL Working Group II (Arbitration), ¶18, U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (Jan. 26, 2000); Charles N. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the International Adjudication System*, 19 ARB. INT'L 415, 437 (2003); Carolyn B. Lamm, *Comments on the Proposal to Amend the New York Convention, in* 50 YEARS OF THE NEW YORK CONVENTION: XIV ICCA CONG. SER. 697, 706 (Albert Jan van den Berg ed., 2009); Landau, *supra* note 123, at 61-79.

amendment."[254] Furthermore, amending a treaty does not address problems generated by dualism's need for implementing legislation.[255]

However, there is a third alternative to consider, namely the adoption of an appropriate rule of interpretation that takes into account the fact that Chapter 2 of the FAA is meant to incorporate the New York Convention into domestic law.[256] This possibility is considered in the next section.

IV. Interpretive Alternatives Involving the New York Convention and the FAA

A. Incorporative Statutes – Intermediaries Between Domestic and International Law

One of the biggest problems facing U.S. courts in cases relating to international commercial arbitration involves the interaction between the New York Convention and Chapter 2 of the FAA.[257] Some courts have framed this "difficult constitutional question" as involving the "preemptive effect (if any) non-self-executing but implemented treaty provisions have under the Supremacy Clause."[258] Other courts have set aside the question of self-execution to focus on

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[253] *See* New York Convention, *supra* note 9; Born, Freedom, *supra* note 25, at 23-24; Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention, in* 50 YEARS OF THE NEW YORK CONVENTION, *supra* note 9, at 689, 690; Albert Jan van den Berg, *Striving for Uniform Interpretation,* in *in* Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 41, 41 (1999), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf (last visited Dec. 2, 2012).

[254] Glashausser, *supra* note 6, at 1292.

[255] *See* Hulbert, *supra* note 170, at 51-52; Strong, Monism and Dualism, *supra* note 20.

[256] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08 (2012).

[257] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08.

[258] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732-33 (5th Cir. 2009) (Clement, C.J., concurring in the judgment) (footnote omitted), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London,131 S. Ct. 65 (2010); *see also* U.S. CONST., art. VI, cl. 2.

other aspects of the relationship between the New York Convention and the FAA.[259] Regardless of how the issue is characterized, it is one that requires resolution.

Post-*Medellin* jurisprudence suggests that courts faced with a treaty should look at the text of the treaty, along with certain other ancillary factors, to determine what role, if any, that treaty has in the domestic legal order.[260] While this sort of detailed analysis would of course be ideal, some courts and commentators instead use a shorthand method of analysis arising out of *Foster v. Neilson* and focus on the simple idea that only non-self-executing treaties require implementing legislation.[261] Under this abbreviated interpretive approach, the mere existence of Chapter 2 of the FAA can constitute evidence that the Convention is not self-executing.[262] Therefore, the determination about the nature of a treaty, and thus the character of the relationship between the treaty and domestic law, can sometimes turn as much on the character of domestic legislation as it does on the character of the treaty.

One major problem with this methodological approach (beyond its potential for circularity) is that very little judicial or scholarly attention has been paid to the question of what constitutes implementing legislation.[263] This lacuna is a somewhat surprising given the centrality of implementing legislation to the definition of a self-executing treaty,[264] although the sheer volume and diversity of international agreements to which the United States is a party suggests that Congress must wield a wide variety of legislative tools to integrate those various

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[259] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08; ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 388 (4th Cir. 2012).
[260] *See* Medellin v. Texas, 552 U.S. 491, 506-07 (2008); Coyle, *supra* note 3, at 660, 666.
[261] *Medellin*, 552 U.S. at 504-05; Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-15 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).
[262] *See* 9 U.S.C. §§201-08. Indeed, the Supreme Court may itself be prone to this type of analytical shortcut. *See Medellin*, 552 U.S. at 521-22. *But see* Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91, 109-10 (2009) [hereinafter Young, Treaties].
[263] *See* Coyle, *supra* note 3, at 660.
[264] *See, e.g.*, David Sloss, *Schizophrenic Treaty Law,* 43 TEX. INT'L L. J. 15, 17-19 (2007); *see also supra* notes 64, 260-62 and accompanying text.

instruments and principles into the domestic legal order.[265] As a result, it is helpful to consider briefly the various ways that domestic legislation can relate to international agreements. One interesting and useful analytical paradigm involves the concept of incorporative statutes.[266]

1. Purpose of incorporative statutes

As a functional matter, incorporative statutes fulfill a variety of practical and policy-based purposes relating to the integration of principles of international law into a domestic legal system.[267] For example, using domestic legislation to implement international law offsets concerns that direct application of international law would lead to a democratic deficit[268] or threaten constitutional principles regarding the separation of powers.[269]

Use of domestic legislation can also minimize debates about whether a particular legal system should adopt a broad ("transnationalist") or narrow ("nationalist") approach to international treaties.[270] Over the years, friction between nationalists and transnationalists has become increasingly intractable, largely because it is virtually impossible to ascertain which of

[265] The United States is currently party to more than 12,000 international agreements. *See* U.S. DEPARTMENT OF STATE, TREATIES IN FORCE (2012); Wu, *supra* note 63, at 572.
[266] *See* Coyle, *supra* note 3, at 658, 660-61.
[267] *See id.*; *see also* Jackson, *supra* note 51, at 321-40; de Mestral & Fox-Decent, *supra* note 59, at 583-84.
[268] *See* Jackson, *supra* note 51, at 315; de Mestral & Fox-Decent, *supra* note 59, at 582, 606; Paulsen, *supra* note 4, at 1804.
[269] *See* Coyle, *supra* note 3, at 661; de Mestral & Fox-Decent, *supra* note 59, at 582; Paulsen, *supra* note 4, at 1817.
[270] Nationalists (also referred to as "sovereigntists") typically want to limit the extent to which a national legal system cedes its sovereignty to an international body or international treaty regime, while transnationalists (also referred to as "internationalists") typically favor the increased influence of international law in a domestic regime, even if the legal system does not adopt a monist approach as a matter of constitutional law. *See* Bachand, *supra* note 72, at 83; Bradley, Breard, *supra* note 51, at 530-31; Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 749 (2006); Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469, 501-02 (2011); Sloss, Two-Step, *supra* note 62, at 137; Young, Treaties, *supra* note 262, at 93-94.

the two approaches is ultimately "correct" as a matter of law.[271] Instead, the continuing discussion about these issues reflects "deeper uncertainties" about international law as a general concern and, as such, may not be "susceptible to technical or doctrinal solutions" alone.[272]

Although it is often tempting to attempt to identify and impose broad, sweeping, universally applicable rules, the ongoing tension between nationalist and transnationalist perspectives suggests that there may be times when it is preferable as both a practical and jurisprudential matter to adopt what are known as "incompletely theorized agreements."[273] This concept, as articulated by Cass Sunstein, posits that "people can often agree on constitutional practices, and even on rights, when they cannot agree on constitutional theories."[274]

Incorporative statutes can be viewed as a type of incompletely theorized agreement because they outline certain necessary legal practices while simultaneously avoiding deeper debates about the extent to which certain international principles automatically apply in U.S. courts.[275] Furthermore, courts asked to interpret and apply treaties that involve incorporative statutes do not have to rely on any interpretive canons or analytical presumptions regarding the extent to which international law can or should be incorporated into the domestic legal regime.[276] Instead, the incorporative statute provides all of the necessary information about the domestically

[271] Mills, *supra* note 270, at 503.
[272] *Id.*
[273] Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739, 1746-51 (1995) [hereinafter Sunstein, Incompletely Theorized Agreements]; *see also* Cass R. Sunstein, *Constitutional Agreements Without Constitutional Theories*, 13 RATIO JURIS 117 (2000) [hereinafter Sunstein, Constitutional Agreements].
[274] Sunstein, Constitutional Agreements, *supra* note 273, at 117 (emphasis omitted).
[275] As shall be discussed shortly, incorporative statutes include, but are not limited to, implementing legislation associated with non-self-executing treaties. *See infra* notes 294-324 and accompanying text.
[276] *See* Bradley, Breard, *supra* note 51, at 539.

applicable legal principles, although in some cases the statute may refer the court back to the treaty itself.[277]

Operationally, incorporative statutes can achieve several different goals. For example, an incorporative statute can translate principles of public international law into terms that are consistent with a state's domestic legal regime.[278] Alternatively, an incorporative statute can amend the scope or nature of the principle that is transferred into national law so as to make various principles more palatable to domestic audiences.[279] While these measures could change the content of the relevant duty so much that a breach of international law occurs,[280] it is often difficult to enforce international norms in cases where voluntary compliance has failed.[281] Indeed, there are no known cases where a claim has been brought against a state for a violation of the New York Convention, nor is there any mechanism built into the Convention to facilitate such a suit.[282]

Because incorporative statutes are a form of domestic legislation, their status within a state's constitutionally mandated legal order is easily established.[283] This is not always the case

[277] *See* Coyle, *supra* note 3, at 664-65.
[278] *See* Zhou, *supra* note 145, at 45.
[279] *See* UNCITRAL Survey Report, *supra* note 143, ¶¶12, 18; *see also* Moore, Duality, *supra* note 6, at 2231.
[280] The international legal obligations remain in effect at the state-to-state level, regardless of the terms of any incorporative statute, since a country cannot rely on its own national law to diminish or avoid any obligations that properly exist as a matter of international law. *See* Vienna Convention, *supra* note 43, art. 27; BROWNLIE, *supra* note 51, at 34-35; Jackson, *supra* note 51, at 313, 316-17.
[281] *See* Glashausser, *supra* note 6, at 1285-87.
[282] *See* New York Convention, *supra* note 9.
[283] For example, incorporative statutes in the United States supersede executive orders and statutes that were rendered earlier in time. *See* Coyle, *supra* note 3, at 661.

with international law, which may be given no role whatsoever in the domestic regime[284] or may be constitutionally inferior to other sorts of law.[285]

As useful as incorporative statutes may be, they do not avoid all potential problems.[286] Perhaps the most troubling issue arises when judges fail to recognize the international origins of these types of enactments.[287] While it is possible for courts to reach an internationally acceptable solution without relying directly on international principles of law,[288] a lack of appreciation for the international principles underlying a particular statute increases the likelihood that a breach of public international law will occur.[289]

Although it is often difficult to establish the appropriate remedy for a breach of international law,[290] continued misapplication of the law by national courts can have serious repercussions, particularly in the commercial realm.[291] Indeed, the connection between ineffective participation in the international commercial arbitration regime and reduced trade is well-established in international legal circles.[292] Therefore, states that continually misapply the New York Convention are not only likely to see lower levels of international trade as foreign parties decide to forego business with entities located in countries that make recovery on an

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[284] *See* UNCITRAL Survey Report, *supra* note 143, ¶11.
[285] The U.S. Constitution prevails over international law. *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 209, §111 cmt. a (1987); Kesavan, *supra* note 213, at 1480.
[286] *See* Coyle, *supra* note 3, at 662.
[287] *See id.* The 2006 version of the Model Arbitration Law has attempted to address this issue. *See* Model Arbitration Law, *supra* note 70, art. 2(A)(1).
[288] *See* VAN DEN BERG, *supra* note 71, at 268-69.
[289] *See* ICCA GUIDE, *supra* note 123, at 30.
[290] *See* Glashausser, *supra* note 6, at 1285-87.
[291] *See* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 395 (4th Cir. 2012) (Wilkinson, C.J., concurring); José E. Alvarez, *The Internationaliztion of U.S. Law*, 47 COLUM. J. TRANSNAT'L L. 537, 571-72 (2009) [hereinafter Alvarez, Internationalization]; Ginsburg, *supra* note 50, at 734; Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 134-40 (2003).
[292] *See* UNCITRAL, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1-2, 11-12 (2013); Born, Adjudication, *supra* note 20, at 831.

arbitral award inherently risky, but those transactions that do go forward may be subject to a "litigation premium" to offset the cost and uncertainty associated with recovery on an award.[293]

2. Types of incorporative statutes

The ever-increasing relevance of international law to matters of previously exclusive domestic concern[294] has resulted in an exponential increase in the number of incorporative statutes over the last few decades.[295] However, different legal systems use different means of incorporating international principles into domestic law, as the UNCITRAL survey report shows.[296] As a result, it can be difficult to determine which pieces of legislation are incorporative. Indeed, the only reliable means of identifying an incorporative statute is by its function.[297]

> Under a functional approach, it is possible to conclude that
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> an "incorporative statute" is any statute that incorporates language or concepts derived from an international treaty. On a functional level, this definition includes any statute (1) that incorporates a treaty by reference, (2) whose text mirrors or closely tracks the test of a treaty, or (3) is otherwise clearly intended to give effect to a particular treaty provision.[298]

[293] *See* Joseph A. Grundfest, *The Unexpected Value of Litigation: A Real Options Perspective,* 58 STAN. L. REV. 1267, 1288 (2006).
[294] *See* Stephan, *supra* note 7, at 1612; *see also* Harold Hongju Koh, *International Law as Part of Our Law,* 98 AM. J. INT'L L. 43, 53 (2004) [hereinafter Koh, Part of Our Law].
[295] *See* de Mestral & Fox-Decent, *supra* note 59, at 578 (noting "roughly 40 per cent of federal statutes [in Canada] implement international rules in whole or in part").
[296] *See* UNCITRAL Survey Report, *supra* note 143,¶¶11, 22; Ingrid Wuerth, *Medellín: The New, New Formalism?* 13 LEWIS & CLARK L. REV. 1, 4 (2009); *see also supra* notes 294-324 and accompanying text. A certain degree of diversity also exists within a single legal system. *See infra* notes 294-324 and accompanying text.
[297] *See* Ralf Michaels, *The Functional Method of Comparative Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).
[298] Coyle, *supra* note 3, at 664-65 (citations omitted).

Such statutes can "use[] all or part of the treaty language and incorporate[] it as a statutory matter into domestic law" or can "paraphrase the treaty language, or 'clarify' or elaborate on the treaty language."[299]

This emphasis on functionality is extremely useful because it permits further distinctions between archetypical forms of "enabling" or "implementing" legislation, on the one hand, and statutes intended to "facilitate the domestic implementation of self-executing treaties," on the other.[300] Although the two types of enactments may not seem all that different,

> including facilitating legislation in the definition [of incorporate statutes] focuses attention on the question of what it means when a statute, by its terms, incorporates language or concepts from a document that has a separate existence on the international plane, even if its ultimate goal is simply to supply procedural rules for the domestic enforcement of those norms.[301]

This is an important observation, since it suggests that there may be times when it is necessary or appropriate to adopt domestic legislation ancillary to a self-executing treaty. Indeed, international commercial arbitration might constitute an excellent example of this type of situation, given the brevity of the New York Convention and the need, even in monist legal systems, to adopt domestic legislation to create various procedural mechanisms to support the international arbitral regime.[302]

The next question, of course, is how to determine whether a particular statute is enabling or facilitative. Because the function of the two types of legislation is directly related to the question of self-execution, it might initially appear appropriate to consider whether the treaty that

[299] Jackson, *supra* note 51, at 315; *see also* BROWNLIE, *supra* note 51, at 45-46.
[300] Coyle, *supra* note 3, at 665-66 (noting a third type of incorporative statute, the congressional-executive agreement).
[301] *Id.* at 667.
[302] *See* New York Convention, *supra* note 9; Bachand, *supra* note 72, at 89-90.

generated the relevant statute is self-executing or not. However, that inquiry can prove inconclusive, as illustrated by the case of the New York Convention.[303]

Furthermore, focusing solely on the status of the treaty would ignore important information regarding the intent of Congress in adopting the statute in question. While the self-execution analysis does include an intent element, that inquiry focuses primarily on the President's and Senate's intent in ratifying the treaty.[304] It is possible that an analysis of the incorporative statute could yield a slightly different result, since the entire Congress is involved in the process of enacting domestic legislation.[305] Given that incorporative statutes play an important and diverse role in dualist regimes as both a practical and policy-based matter,[306] it appears appropriate to consider both the text and the purpose of such legislation when determining whether that enactment is facilitative or enabling.[307]

Although a comprehensive examination of the text and drafting history of Chapter 2 of the FAA is beyond the scope of this Article, it is nevertheless possible to outline some of the basic issues relevant to this analysis.[308] On the one hand, it appears as if Chapter 2 could be construed as a form of implementing legislation, based on language in Section 201 stating that "[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."[309] This

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[303] *See* New York Convention, *supra* note 9; *see also supra* notes 78-122 and accompanying text.
[304] *See* Bederman, *supra* note 133, at 1000; Glashausser, *supra* note 6, at 1334-35; Jackson, *supra* note 51, at 328; Wuerth, *supra* note 296, at 4, 9; *supra* note 64 and accompanying text.
[305] *See* Medellin v. Texas, 552 U.S. 491, 522 n.12 (2008); Wuerth, *supra* note 296, at 4, 9.
[306] *See supra* notes 433-82 and accompanying text.
[307] No effort is made here to assign the relative weight of each of these constituent elements. However, it would appear appropriate to conclude that a high degree of certainty regarding the outcome of one analysis (either statutory construction or treaty interpretation) would diminish the degree of certainty needed to establish the other element.
[308] Further reading is available. *See* Hulbert, *supra* note 170, at 53-59 (regarding Chapter 2); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. Rev. 99, 101-13 (2006) (regarding Chapter 1).
[309] 9 U.S.C. §201 (2012); *see also Medellin*, 552 U.S. at 521-22.

conclusion is further supported by the fact that when "President Johnson forwarded the New York Convention to the Senate for its advice and consent on American accession, . . . the President's message stated that American ratification would be deferred until necessary implementing legislation had been enacted."[310]

On the other hand, it is also possible to conclude that Chapter 2 does not in fact implement the New York Convention but instead simply "facilitate[s] the domestic implementation of [a] self-executing treat[y]."[311] This interpretation of Chapter 2 may seem more appropriate, given that "[a] treaty-facilitating statute is one that spells out how a given provision in a self-executing treaty should be applied by courts called upon to resolve cases and controversies that turn on this provision."[312] Many of the procedural provisions found in Chapter 2, including those relating to federal jurisdiction, venue, removal, compelling arbitration, naming of arbitrators and confirmation of the award, appear facilitative, as does the explicit direction to incorporate Chapter 1 of the FAA (a patently non-incorporative statute focusing entirely on procedural issues) to the extent possible and necessary.[313] Furthermore, this interpretation of Chapter 2 is not inconsistent with the language of Section 201, which can be read as facilitative in nature.[314]

Characterizing Chapter 2 of the FAA as facilitative would also be consistent with practices found in other jurisdictions.[315] For example, France, a well-known monist state, has

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[310] Hulbert, *supra* note 170, at 54; *see also* Message from the President of the United States Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Exec. E., 90th Cong., 2d Sess. 17, 22 (Apr. 24, 1968), 7 I.L.M. 1042, 1042 (1968) (stating "[c]hanges in Title 9 (Arbitration) of the United States Code will be required before the United States becomes a party to the convention"); Drahozal, *supra* note 73, at 102-03.
[311] Coyle, *supra* note 3, at 666-67.
[312] *Id.*
[313] *See* 9 U.S.C. §§202-08; *see also* 9 U.S.C. §§1-16.
[314] *See* 9 U.S.C. §201.
[315] *See* 9 U.S.C. §§201-08.

adopted an international commercial arbitration statute that covers many of the same issues as Chapter 2 of the FAA and achieves many of the same purposes.[316] The Model Arbitration Law serves a similarly facilitative function and makes no effort to operate as a form of implementing legislation.[317] Indeed, the Model Arbitration Law has been adopted in numerous jurisdictions that do not need to adopt any sort of enabling legislation to give domestic effect to treaties.[318] Framing Chapter 2 as a facilitative instrument would also be consistent with the views of numerous scholars and practitioners who have recognized the need for states to adopt ancillary legislation to provide a procedural environment in which the New York Convention can operate.[319]

Based on the above, it is at least arguable that Chapter 2 of the FAA is facilitative, rather than enabling.[320] However, consistent with Sunstein's theory of incompletely theorized agreements, it may not be necessary to reach a definitive conclusion about the nature of Chapter 2.[321] Instead, simply framing those provisions as incorporative may yield sufficiently useful results.[322] The following discussion therefore considers the various differences in outcome that would result if Chapter 2 of the FAA were considered to be an incorporative statute as opposed to a form of implementing legislation.[323] In so doing, it is necessary to consider the interpretive

[316] *See* BORN, *supra* note 9, at 121-25; FOUCHARD GAILLARD GOLDMAN, *supra* note 17, ¶¶131-51; Bachand, *supra* note 72, at 89-90; Hulbert, *supra* note 170, at 62; Rao, *supra* note 68, at 181-82 & n.16.
[317] *See* Model Arbitration Law, *supra* note 70; BORN, *supra* note 9, at 95-96, 117-19.
[318] *See* UNCITRAL, Status, UNCITRAL Model Arbitration Law, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [hereinafter Model Arbitration Law Status].
[319] *See* New York Convention, *supra* note 9; VAN DEN BERG, *supra* note 71, at 9-10; *see also* BORN, *supra* note 9, at 95-96.
[320] *See* 9 U.S.C. §§201-08.
[321] *See* 9 U.S.C. §§201-08; Sunstein, Incompletely Theorized Agreements, *supra* note 273, at 1772.
[322] *See* Sunstein, Incompletely Theorized Agreements, *supra* note 273, at 1772.
[323] *See* 9 U.S.C. §§201-08.

approach that would be taken if the New York Convention were considered self-executing, an issue that is taken up first.[324]

B. Interpreting the New York Convention and the FAA Under the Vienna Convention

If the New York Convention is considered self-executing, then it should be interpreted pursuant to Articles 31 and 32 of the Vienna Convention.[325] Numerous works have been written on how to apply these measures, and it is unnecessary for this Article to delve into those matters too deeply.[326] Nevertheless, it is useful to discuss how this analysis might be conducted under the New York Convention, since international commercial arbitration presents some unique challenges and opportunities.[327] Interestingly, this approach allows the introduction of some important information that has not typically been considered by U.S. courts.[328]

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[324] *See* New York Convention, *supra* note 9.

[325] *See id.*; Vienna Convention, *supra* note 43, arts. 31-32; *see also* ICCA GUIDE, *supra* note 123, at 12; VAN DEN BERG, *supra* note 71, at 3-5; Landau, *supra* note 123, at 74-79.

[326] *See* BROWNLIE, *supra* note 51, at 630-36; RICHARD GARDINER, TREATY INTERPRETATION (2009); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2007); TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON (Malgoisa Fitzmaurice et al. eds., 2010); Bradley, Breard, *supra* note 51, at 529; Coyle, *supra* note 3, at 655; de Mestral & Fox-Decent, *supra* note 59, at 573; Dubinsky, *supra* note 61, at 455; Jackson, *supra* note 51, at 310; Jonas & Saunders, *supra* note 133, at 565; Sloss, Two-Step, *supra* note 62, at 135; Sloss, Constitutional, *supra* note 137, at 1; Turley, *supra* note 59, at 185.

[327] *See* New York Convention, *supra* note 9.

[328] No U.S. court appears to have interpreted the New York Convention pursuant to the terms of the Vienna Convention, although courts in other jurisdictions have. *See, e.g., id.*; Vienna Convention, *supra* note 43, arts. 31-32; X v. Z, Federal Supreme Court of Switzerland, July 2, 2012, Case No. 5A_754/2011, Digest by von Segesser, *available at* kluwerarbitration.com; Dowans Holding SA v. Tanzania Elec. Supply Co., [2011] EWHC 1957, ¶17 (Comm.) (Engl.); Cour d'Appel, Nov. 18, 2010, Case. No. 50, Kalingrad v. Lithuania, XXXVI Y.B. COMM. ARB. 170 (2011); Yugraneft Corp. v. Rexx Mgmt. Corp., 2010 SCC 949, ¶¶19-21 (Can.) (citing common practice); High Court of the Hong Kong Special Administrative Region, Court of Appeal, Feb. 10, 2010, Case No. 24, ¶¶77-80, FG Hemisphere LLC v. Democratic Republic of the Congo (US v. Congo), *available at* kluwerarbitration.com.

According to Article 31 of the Vienna Convention, a court must look at "the ordinary meaning" of the treaty, in its "context and in the light of its object and purpose."[329] Context can be gleaned from both the text of the treaty as well as "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[330] Article 32 indicates that the *travaux préparatoires* may be taken into account to confirm the interpretation resulting from the analysis under Article 31 or to assist in cases of ambiguity or absurdity.[331] Each of these factors is considered separately.

1. Purpose

The purpose of the New York Convention is uncontroversial and widely acknowledged by authorities both inside and outside the United States.[332] In the words of the U.S. Supreme Court, the "principal purpose of the [New York] Convention 'was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'"[333] Furthermore, international commercial arbitration holds a place of special esteem in the U.S. legal order, since

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the

[329] Vienna Convention, *supra* note 43, art. 31(1).
[330] *Id.* art. 31(2)-31(3).
[331] *See id.* art. 32.
[332] *See* New York Convention, *supra* note 9; BORN, *supra* note 9, at 91-101; FOUCHARD GAILLARD GOLDMAN, *supra* note 17, ¶¶247-72; LEW ET AL., *supra* note 24, ¶¶2-14 to 2-21.
[333] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 658 (1985) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)); *see also* New York Convention, *supra* note 9.

> parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[334]

As a result, U.S. courts "should be most cautious before interpreting . . . domestic legislation in such manner as to violate international agreements" such as the New York Convention.[335]

2. Context

The second interpretive element to be considered under the Vienna Convention is the context of the agreement.[336] This step includes an analysis of both the text of the treaty to be interpreted as well as the subsequent agreements and practices of the parties.[337]

a. Text

A comprehensive analysis of the text of the New York Convention is beyond the scope of this Article, although courts construing the Convention in light of a particular dispute will of course need to focus on the precise language at issue.[338] However, for purposes of this discussion it is sufficient to consider the overall structure of the Convention, which can be in some ways confusing.[339]

On the one hand, a number of provisions in the New York Convention explicitly state that they are to be applied exclusively, suggesting that the treaty is to be applied by states parties

[334] *Mitsubishi Motors*, 473 U.S. at 629.
[335] Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995); *see also* New York Convention, *supra* note 9.
[336] *See* Vienna Convention, *supra* note 43, art. 31.
[337] *See id.*
[338] *See* New York Convention, *supra* note 9.
[339] *See* New York Convention, *supra* note 9.

in a single, uniform manner.[340] On the other hand, the Convention also contemplates a significant role for domestic law.[341] There are several issues on which the New York Convention is entirely silent, thereby creating a gap that only national law can fill.[342] Other matters are specifically made subject to domestic law, again diminishing the expectation that the Convention creates a single comprehensive and universally applicable international regime.[343] In still other instances, the New York Convention allows the parties to choose whether to rely on procedures outlined in the Convention or those available under national law.[344]

The New York Convention therefore demonstrate a mixed system which reserves a significant amount of discretion to states parties to decide how to address certain matters relating to international commercial arbitration while nevertheless imposing a single, internationally applicable standard with respect to other questions of arbitral law and procedure.[345] Those elements that are subject to domestic law by choice or necessity typically cannot lead to a breach of international law, since the treaty does not establish any internationally enforceable criteria.[346]

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[340] This edict is most clearly seen in provisions relating to the permissible grounds for objection to recognition and enforcement of an arbitral award. *See id.* art. V; BORN, *supra* note 9, at 2736; ICCA GUIDE, *supra* note 123, at 80.

[341] *See* New York Convention, *supra* note 9; BORN, *supra* note 9, at100-01; Bachand, *supra* note 72, at 87-88.

[342] *See* New York Convention, *supra* note 9; ICCA GUIDE, *supra* note 123, at 28-29.

[343] *See* New York Convention, *supra* note 9, art. III; *see also* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 736-37 (5th Cir. 2009) (Clement, C.J., concurring in the judgment) (concluding that Article III was non-self-executing), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); Park, *supra* note 70, at 1263-64; Park & Yanos, *supra* note 212, at 254-56, 264.

[344] The best-known of these types of references is found in Article VII(1). *See* New York Convention, *supra* note 9, art. VII(1); ICCA GUIDE, *supra* note 123, at 26-27; Strong, Writing, *supra* note 30, at 75 n.202. However, other aspects of the New York Convention also refer to national law. *See* New York Convention, *supra* note 9, arts. I, III, V; ICCA GUIDE, *supra* note 123, at 29.

[345] *See* BORN, *supra* note 9, at 100-01.

[346] Improper reliance on domestic law would, however, violate the terms of the New York Convention. *See* New York Convention, *supra* note 9; Strong, Writing, *supra* note 30, at 74-75 nn.198, 202 (discussing improper use of Article VII(1)).

However, a violation of international law can occur with respect to those aspects of the New York Convention that must be applied in a single, internationally consistent manner.[347] The most well-known areas of tension involve Article V, which describes the exclusive grounds for objections to the recognition or enforcement of an arbitral award under the Convention,[348] and Article II, which sets forth the necessary form requirements.[349] Some of the variations in approach can clearly be traced to the use of implementing legislation in dualist jurisdictions.[350]

b. Subsequent practices of the parties

Part of the contextual analysis under the Vienna Convention involves an evaluation of the subsequent practices of the parties.[351] While this inquiry may be difficult to undertake in some areas of law as a practical matter, the international arbitral community has spent a considerable amount of time and effort compiling detailed and reliable data on the way in which the New York Convention has been construed and applied around the world.[352] This information, which has been gathered for more than fifty years, is published in various yearbooks and electronic

[347] *See* New York Convention, *supra* note 9.
[348] *See id.* art. V; ICCA GUIDE, *supra* note 123, at 80; BORN, *supra* note 9, at 2736; Hulbert, *supra* note 170, at 65.
[349] *See* New York Convention, *supra* note 9, art. II; ICCA GUIDE, *supra* note 123, at 37-38, 43; VAN DEN BERG, *supra* note 71, at 387-89; Alvarez, Article II(2), *supra* note 171, at 71; Strong, Writing, *supra* note 30, at 53-72.
[350] *See* BORN, *supra* note 9, at 100-01, 2868-69; STRONG, GUIDE, *supra* note 13, at 69; Park, *supra* note 70, at 1249-54; Strong, Monism and Dualism, *supra* note 20.
[351] *See* Vienna Convention, *supra* note 43, art. 31(3)(b). Notably, incorrect interpretation of an international treaty, even if on a widespread basis, cannot constitute a subsequent practice. *See* IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138 (2d ed. 1984). Therefore, any errors in actual practice cannot be considered a guide to interpretation under the Vienna Convention. *See* Vienna Convention, *supra* note 43; SINCLAIR, *supra*, at 138.
[352] *See* UNCITRAL, *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by Secretariat*, ¶¶8, 16, U.N. Doc. A/CN.9/267, (Feb. 21, 1985); VAN DEN BERG, *supra* note 71, at 2-3; Sanders, *supra* note 141, at vi.

databases so as to promote international consistency relating to the interpretation and application of the New York Convention.[353]

These materials could be viewed in one of two lights. First, these resources could be seen as reflecting the subsequent practices of the parties to the New York Convention and could be considered relevant to an analysis of an arbitration agreement or award falling under the Convention on those grounds.[354] This approach is consistent with that taken in U.S. courts, since the U.S. Supreme Court has itself relied on "'the postratification understanding' of signatory states" when interpreting treaties in other contexts.[355] Therefore, U.S. courts can and likely should consider the materials contained in these yearbooks and databases as relevant to the interpretation of the New York Convention.[356] Indeed, a judge's guide recently published by the Federal Judicial Center specifically suggests that courts consider international consensus when considering matters relating to international commercial arbitration.[357]

Second, these yearbooks and databases might be viewed as reflecting the customary international law of international commercial arbitration. Although the international arbitral community has not discussed the development of customary international law with respect to the procedural aspects of the New York Convention,[358] Ian Brownlie has noted that "collections of

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[353] *See* New York Convention, *supra* note 9; STRONG, RESEARCH, *supra* note 23, at 71-137; VAN DEN BERG, *supra* note 71, at 2-6 (discussing the *Yearbook of Commercial Arbitration*); Bachand, *supra* note 72, at 98; Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 5 (2007); Sanders, *supra* note 141, at vi; Strong, Sources, *supra* note 14, at 137.

[354] *See* New York Convention, *supra* note 9; Vienna Convention, *supra* note 43, art. 31(3).

[355] Medellin v. Texas, 552 U.S. 491, 507 (2008) (citation omitted); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 209, §03 cmt. c; Glashausser, *supra* note 6, 1257;

[356] *See* New York Convention, *supra* note 9; Strong, Monism & Dualism, *supra* note 20; Strong, Writing, *supra* note 30, at 85, 87.

[357] *See* STRONG, GUIDE, *supra* note 13, at 93.

[358] Extensive commentary exists regarding the possible development of a substantive form of international customary law known as *lex mercatoria*. *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW *LEX MERCATORIA* (2010); Emmanuel Gaillard, *Transnational Law: A Legal System of a Method of Decision Making?* 17 ARB. INT'L 59, 59-72 (2001).

municipal cases . . . are important in any assessment of the customary law."[359] These decisions therefore might be admissible in U.S. courts pursuant to Article 31(3)(c) of the Vienna Convention, which can be read as referring to customary international law as well as international treaties.[360]

Although this second approach appears viable as a jurisprudential matter, some problems could arise. For example, as a practical matter, U.S. courts are often more inclined to "consult convenient codifications or summaries" of customary international law rather than the original materials.[361] While this obstacle could be overcome by recourse to any one of a number of excellent treatises in this area of law,[362] U.S. courts may be somewhat hesitant to rely on customary international law given its somewhat suspect status in U.S. domestic law.[363] Therefore, at this point, parties are probably better off relying on the subsequent practices provision of the Vienna Convention or on U.S. Supreme Court precedent when presenting this material in U.S. courts,[364] unless and until the Court provides any additional guidance regarding the role of customary international law in U.S. law.[365]

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[359] BROWNLIE, *supra* note 51, at 52; Bachand, *supra* note 72, at 84.
[360] *See* Vienna Convention, *supra* note 43, art. 31(3)(c); SINCLAIR, *supra* note 351, at 139.
[361] Dubinsky, *supra* note 61, at 463.
[362] *See* STRONG, GUIDE, *supra* note 13, at 95.
[363] *See* Bradley, Breard, *supra* note 51, at 545; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 860-61 (1997); Dubinsky, *supra* note 61, at 462-63; Harold Hongju Koh, *Is International Law Really State Law*? 111 HARV. L. REV. 1824, 1861 (1998); Ernest A. Young, *Sorting Out the Debate Over Customary International Law,* 42 VA. J. INT'L L. 365, 435-38 (2002); *see also* Louis Henkin, *International Law as Law in the United States,* 82 MICH. L. REV. 1555, 1565-66 (1984).
[364] *See* Vienna Convention, *supra* note 43, art. 31.
[365] Some assistance may be forthcoming in *Kiobel v. Royal Dutch Petroleum Co.,* which is being heard by the Supreme Court this Term. *See* 132 S. Ct. 1738 (2012).

c. Subsequent agreements of the parties

"Context" in the Vienna Convention also includes any subsequent agreements of the parties.[366] Because the Convention requires, rather than merely permits, recourse to the parties' subsequent agreements, courts should give significant weight to these authorities.[367] However, the term "agreement" is not defined in the Convention, thus raising questions as to the level of formality that is needed to constitute an "agreement" under the Convention.[368]

Commentators have suggested that "[t]he agreement need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation."[369] One item in the area of international commercial arbitration that might qualify under these criteria is a recommendation promulgated by UNCITRAL regarding the interpretation and application of Articles II(2) and VII(1) of the New York Convention (UNCITRAL Recommendation).[370] The Recommendation is very brief in its substantive provisions, stating in relevant part that it "[r]ecommends that article II, paragraph 2, of the [New York Convention] be applied recognizing that the circumstances described therein are not exhaustive."[371] Although the UNCITRAL Recommendation is somewhat limited in its scope,

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[366] Vienna Convention, *supra* note 43, art. 31(3)(a).
[367] *See id.*; Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 200 (2010).
[368] Vienna Convention, *supra* note 43, art. 31(3)(a).
[369] Roberts, *supra* note 367, at 199.
[370] *See* New York Convention, *supra* note 9, art. II(2); UNCITRAL, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006) [hereinafter UNCITRAL Recommendation]; *see also* Vienna Convention, *supra* note 43, art. 31(3)(a).
[371] UNCITRAL Recommendation, *supra* note 370, ¶1. Paragraph two of the UNICITRAL Recommendation states that article VII(1) of the New York Convention "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." *Id.* ¶2; *see also* New York Convention, *supra* note 9, art. VII(1). However, paragraph two of the UNCITRAL Recommendation does not alter the terms or interpretation of the Convention in any way and therefore will not be discussed herein. *See* Strong, Writing, *supra* note 30, at 86-88; *see also* UNCITRAL Recommendation, *supra* note 370.

the document could nevertheless result in a significant change in how form requirements are interpreted and applied around the world, since the provision not only allows but encourages a widespread liberalization of the current regime.[372]

The UNCITRAL Recommendation is part of a recent "explosion in the number of declarative texts in the field of international law."[373] This kind of "soft law" is often seen as advantageous because it allows international agreement and implementation to be reached more quickly and more easily than more formal measures.[374] Soft law also encourages incremental development of the law, which many observers believe to be useful in achieving legitimacy.[375] However, soft law's real advantage may be the way that it provides direct and authoritative guidance to judges regarding the way in which certain international instruments are to be construed.[376]

Commentators have long supported the use of soft law in international commercial arbitration, since "nonbinding general principles can achieve the goal of uniform or, at least, harmonized law by providing general principles that can more easily accommodate various legal traditions."[377] Some of these devices "can serve as evidence of the formation of customary international law."[378]

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[372] *See* Strong, Writing, *supra* note 30, at 78-80.
[373] *See* Dubinsky, *supra* note 61, at 468.
[374] Soft law can be developed more quickly because it does not need to harmonize conflicting legal principles or obtain formal ratification from states. *See* Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Arbitration: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655, 661-65 (2009); *see also* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 STAN. L. REV. 573, 594-99, 624-25 (2008).
[375] *See* Sharon Block-Lieb & Terence C. Halliday, *Incrementalism in Global Lawmaking*, 32 BROOK. J. INTL L. 851, 853-55 (2007); *see also* BORN, *supra* note 9, at 100-01.
[376] *See* Strong, Writing, *supra* note 30, at 78-80.
[377] Gabriel, *supra* note 374, at 655-56 (footnote omitted).
[378] Dubinsky, *supra* note 61, at 468.

At this point it is unclear how U.S. courts will treat the UNCITRAL Recommendation.[379] On the one hand, some commentators have noted that "[w]hen interpreting U.S. statutes that incorporate . . . international law, courts typically refuse to regard informal international agreements and declarations as sources of law for purposes of construing and applying the domestic statute."[380] However, UNCITRAL reports and recommendations have proven persuasive to federal courts in other contexts where Congress has adopted an instrument drafted by UNCITRAL.[381] Furthermore, at least one federal court has looked to a UNCITRAL report to help construe the provisions of a U.S. state statute based on the Model Arbitration Law.[382] These phenomena suggest that U.S. courts may be amenable to considering the UNCITRAL Recommendation when construing Article II(2) of the New York Convention.[383]

3. *Travaux préparatoires*

The final factor that may be considered in a Vienna Convention analysis involves the *travaux préparatoires*, which may be used to supplement the inquiry conducted under Article 31.[384] Although *travaux préparatoires* can provide a wealth of information regarding the drafting history of various elements of the New York Convention,[385] U.S. courts have seldom referred to these materials in practice.[386] It is unclear whether the failure to refer to the *travaux*

[379] *See* UNCITRAL Recommendation, *supra* note 370.
[380] Dubinsky, *supra* note 61, at 468.
[381] *See* In re Condor Ins. Ltd., 601 F.3d 319, 321, 326 (5th Cir. 2010).
[382] *See* Bahrain Telecomm'ns Co. v. Discoverytel, Inc., 476 F.Supp.2d 176, 183-84 (D. Conn. 2007).
[383] *See* New York Convention, *supra* note 9, art. II(2); UNCITRAL Recommendation, *supra* note 370; Strong, Monism & Dualism, *supra* note 20; Strong, Writing, *supra* note 30, at 84.
[384] *See* Vienna Convention, *supra* note 43, art. 32.
[385] *See* New York Convention, *supra* note 9; New York Arbitration Convention, History: 1923-1958 http://www.newyorkconvention.org/travaux-preparatoires (last visited Dec. 2, 2012) (containing the *travaux préparatoires*); Official Report, *supra* note 226.
[386] Only a few U.S. courts have considered the original *travaux préparatoires* associated with the New York Convention thus far. *See* New York Convention, *supra* note 9; Figueiredo Ferrz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 296 (2d Cir. 2011); Martinez v. Colombian Emeralds,

préparatoires results from a desire to limit recourse to international legal resources or from a conclusion that consideration of such materials is unnecessary in a particular instance.

4. Interim conclusion

As the preceding shows, a full-fledged evaluation of the New York Convention under a Vienna Convention analysis would open the door to consideration of a number of new materials, including judicial opinions from other jurisdictions, the UNCITRAL Recommendation and, to a lesser extent, the *travaux préparatoires*.[387] Although many of these resources are not currently part of the standard U.S. analysis, the methodological approach outlined in the Vienna Convention is nevertheless consistent with that reflected in U.S. law and practice, which suggests that courts can and likely should consider these types of materials going forward.[388]

One element that is notably missing from the Vienna Convention analysis is any consideration of the text or purpose of Chapter 2 of the FAA.[389] This lack of attention to domestic legislation is understandable in situations where the underlying treaty is to be given direct effect within the domestic legal order.[390] However, international commercial arbitration is a field that involves both international treaties and domestic legislation.[391] The question therefore becomes how best to proceed when an international treaty and a domestic statute address the same or complementary subject matters.

Inc., Nos. 2007-06, 2007-11, 2009 WL 578547, at *21 (V.I. Mar. 4, 2009); Kahn Lucas Lancaster Inc. v. Lark Int'l Inc., 186 F.3d 210, 217-18 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005).

[387] *See* New York Convention, *supra* note 9; Vienna Convention, *supra* note 43; UNCITRAL Recommendation, *supra* note 370.

[388] *See supra* notes 124-36, 325-86 and accompanying text.

[389] *See* Vienna Convention, *supra* note 43; 9 U.S.C. §§201-08 (2012).

[390] *See* Vienna Convention, *supra* note 43. .

[391] This phenomenon appears in both monist and dualist states. *See supra* notes 72, 316 and accompanying text.

C. Interpreting the New York Convention and the FAA under the Charming Betsy Canon

Under the analytical framework adopted by U.S. courts, reliance on the Vienna Convention or similar interpretive methodologies is only appropriate if the New York Convention is determined to be self-executing.[392] If the Convention is not self-executing, then its provisions are not directly applicable in U.S. courts, although the United States remains bound to the terms of the Convention as a matter of international law.[393] In these situations, courts are required to analyze the relationship between domestic and international law as a matter of constitutional law.[394]

One of the most well-known constitutional canons relating to potential conflicts between international and domestic law is the Charming Betsy canon.[395] This longstanding interpretive device arose out of a case known as *Murray v. Schooner Charming Betsy*, which involved a ship (the Charming Betsy) that was seized by the U.S. Navy on the grounds that the ship was operating in violation of a domestic statute prohibiting U.S. citizens from trading with France.[396] The owner, who claimed that he had previously renounced his U.S. citizenship in favor of Danish citizenship, took the view that applying the statute to him would violate the law of nations, particularly those provisions that protected the commercial trading rights of citizens from neutral states.[397]

The case resulted in the U.S. Supreme Court's historic edict that ambiguous domestic statutes "ought never to be construed to violate the law of nations if any other possible

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[392] *See* New York Convention, *supra* note 9; Vienna Convention, *supra* note 43.
[393] *See* New York Convention, *supra* note 9.
[394] *See id.*; *see also* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732-33 (5th Cir. 2009) (Clement, C.J., concurring in the judgment), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); Vázquez, Treaties, *supra* note 62, at 667 n.308.
[395] *See* Eskridge & Frickey, *supra* note 6, at 97-108.
[396] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 64-65 (1804).
[397] *See id.* at 66-68.

construction remains."[398] This principle, which has subsequently been held to apply to situations involving both self-executing and non-self-executing treaties,[399] has been considered by commentators in a variety of contexts, including international commercial arbitration.[400] However, no federal court appears to have relied upon the Charming Betsy when considering the potential overlap between the New York Convention and the FAA.[401]

Although this situation is in some ways inexplicable given the confusion about the relationship between and interpretation of the New York Convention and Chapter 2 of the FAA, it may be that the conventional reading of the Charming Betsy, which is somewhat narrow, does not appear relevant to matters relating to international commercial arbitration.[402] However, some commentators believe that the canon has expanded beyond its traditional boundaries and now offers three additional applications.[403] Some of these principles may find traction in cases involving international commercial arbitration.

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[398] *Id.* at 118; Coyle, *supra* note 3, at 699; Hathaway et al., *supra* note 6, at 89.
[399] *See* Kane v. Winn, 319 F. Supp. 2d 162, 196 (D. Mass. 2004); Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1804-05 (2011).
[400] However, in most instances the references to the Charming Betsy canon are somewhat cursory. *See* Alford, Deference, *supra* note 224, at 700-04, 731-35; Park & Yanos, *supra* note 212, at 253; Rich, *supra* note 74, at 127-27, 133.
[401] *See* Goss, *supra* note 8, at 93; *see also* ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 388 (4th Cir. 2012) (citing, but not relying upon, the Charming Betsy). However, the government did cite the Charming Betsy canon in its papers supporting a denial of certiorari in *Safety National*, as did the respondents. *See* Brief for the United States as Amicus Curiae, La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010) (No. 09-945), 2010 WL 3375626, at *13; Brief of Respondents Certain Underwriters at Lloyd's London, *La. Safety*, 131 S. Ct. at 65 (No. 09-945), 2010 WL 1453142, at *31; *see also* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom. La. Safety*, 131 S. Ct. at 65; Goss, *supra* note 8, at 93.
[402] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08 (2012); *see also supra* notes 79-122, 201-06 and accompanying text. However, the problem may also be that the Charming Betsy is more often cited by commentators than by courts. *See* Alford, Internationalization, *supra* note 7, at 147; Stephan, *supra* note 7, at 1646-47.
[403] *See* Coyle, *supra* note 3, at 699-714; Crootof, *supra* note 399, at 1810.

First, commentators suggest that the Charming Betsy could be interpreted as establishing a presumption against extraterritorial application of a statute.[404] This reading of the canon acts as a type of "'braking mechanism' intended to 'restrain the scope of federal enactments'"[405] and could prove useful in cases where parties seek to apply the FAA extraterritorially in contravention to the law and practice of international commercial arbitration.[406]

One place where this principle might be relevant is in disputes involving Section 206 of the FAA.[407] That provision indicates that U.S. courts may compel arbitration at "any place . . . provided for" in the arbitration agreement, "whether that place is within or without the United States."[408] While this provision encourages robust enforcement of arbitration agreements and may therefore appear to comply with the pro-arbitration principles of the New York Convention, the arbitral community is split as to whether a court has the power to compel arbitration extraterritorially.[409]

Because the Charming Betsy only applies in cases of statutory ambiguity, it could be difficult to apply the canon to cases involving motions to compel arbitration, since this aspect of Section 206 is not ambiguous.[410] However, the second portion of Section 206 does seem to reflect the necessary degree of ambiguity, since that provision indicates that U.S. courts "may also appoint arbitrators in accordance with the provisions of the agreement" but does not state

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[404] *See* Coyle, *supra* note 3, at 702-03.
[405] *Id.* at 706-07 (quoting Bradley, Breard, *supra* note 51, at 490, 504).
[406] *See* 9 U.S.C. §§1-307 (2012).
[407] *See* 9 U.S.C. §206.
[408] 9 U.S.C. §206.
[409] *See* New York Convention, *supra* note 9, art. II(3); BORN, *supra* note 9, at 1014-20; STRONG, GUIDE, *supra* note 13, at 33-41; Murphy, *supra* note 74, at 1552-53.
[410] Ambiguity exists if a court "determines that Congress did not resolve the issue under consideration." Negusie v. Holder, 129 S. Ct. 1159, 1183 (2009) (Stevens, J., concurring in part and dissenting in part); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); Kankamalage v. I.N.S., 335 F.3d 858, 862 (9th Cir. 2003); Curtis A. Bradley, Chevron *Deference and Foreign Affairs,* 86 VA. L. REV. 649, 652-53 (2000); Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation,* 112 YALE L.J. 1927, 1928 (2003); Crootof, *supra* note 399, at 1783.

whether that power is limited to arbitrations seated within the United States.[411] Commentators have universally denounced the extraterritorial appointment of arbitral tribunals, which suggests that the Charming Betsy canon could prove useful in limiting this sort of questionable behavior.[412]

Other U.S. practices could also benefit from an extraterritorial braking device. For example, the international arbitral community is strongly divided about the propriety of foreign anti-suit injunctions[413] and discovery under 28 U.S.C. §1782,[414] and the Charming Betsy canon could provide a principled means of limiting one or the other of those devices.[415]

The second variation on the Charming Betsy requires courts to "endeavor to construe" any statute and treaty that "relate to the same subject" in a manner that would "give effect to both, if that can be done without violating the language of either."[416] This principle has been

[411] 9 U.S.C. §206.
[412] *See id.*; BORN, *supra* note 9, at 1014-20; STRONG, GUIDE, *supra* note 13, at 45-47.
[413] Many commentators believe that anti-suit injunctions are inconsistent with international arbitral law and practice. *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 105 (2004); STRONG, GUIDE, *supra* note 13, at 42-44; Emmanuel Gaillard, *The Misuse of Antisuit Injunctions*, N.Y.L.J., Aug. 1, 2002, at 2; Reisman, *supra* note 68, at 30-36; Stephen M. Schwebel, Anti-Suit *Injunctions in International Arbitration: An Overview, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5 (Emmanuel Gaillard ed., 2005). However, others believe that certain types of anti-suit injunctions are consistent with the international arbitral regime. *See* Strong, Borders, *supra* note 12, at 16-17.
[414] Section 1782 allows a U.S. court to order discovery in the United States in aid of a foreign or international tribunal, although it is unclear whether that term includes an arbitral tribunal. *See* 28 U.S.C. §1782 (2012); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 341 Fed. App'x 31, 34 (5th Cir. 2009); *In re* Caratube Int'l Oil Co., 730 F. Supp. 2d 101, 107 (D.D.C. 2010) (concluding that reliance on section 1782 constitutes "an attempt to circumvent the Tribunal's control over the arbitration's procedures, and this factor thus weighs against granting the petition"); STRONG, GUIDE, *supra* note 13, at 55-60; Kenneth Beale et al., *Solving the §1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. §1782's Application to International Arbitration,* 47 STAN. J. INT'L L. 51, 96-108 (2011).
[415] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
[416] Whitney v. Robertson, 124 U.S. 190, 194 (1888); *see also Charming Betsy*, 6 U.S. (2 Cranch) at 118; Coyle, *supra* note 3, at 704.

described as "the canon against implied repeal" and works to avoid unnecessary application of the last-in-time rule.[417]

Interestingly, this interpretation of the Charming Betsy could prove somewhat difficult to apply in international commercial arbitration.[418] Indeed, experience suggests that a number of problems can arise when courts attempt to harmonize domestic and international law in the area of arbitration, resulting in potential breaches of the New York Convention.[419]

For example, importation of the concept of manifest disregard of law from domestic law into disputes governed by the New York Convention has generated a considerable amount of controversy and arguably constitutes a breach of the United States' treaty obligations under the Convention.[420] Other difficulties arise when U.S. courts attempt to combine the form requirements of the New York Convention with those reflected in Chapter 2 of the FAA.[421] Not only is it possible that this practice impermissibly alters the standards used to identify when an arbitration agreement or award falls under the Convention, but the various circuit splits that exist within the United States in this area of law violate the New York Convention's overarching goal of promoting predictability in matters relating to international arbitration.[422] Therefore, this second variation on the Charming Betsy canon does not appear beneficial in cases involving international commercial arbitration.[423]

The third and final way of expanding the Charming Betsy canon involves reading the case as standing "for the proposition that Congress generally intends that ambiguous statutes –

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[417] *See* Coyle, *supra* note 3, at 704; Crootof, *supra* note 399, at 1792.
[418] *See Charming Betsy*, 6 U.S. (2 Cranch) at 118.
[419] *See* New York Convention, *supra* note 9.
[420] *See id.* art. V; *see also supra* note 170 and accompanying text.
[421] *See* New York Convention, *supra* note 9, art. II(2); 9 U.S.C. §§2, 202 (2012); *see also supra* notes 30-32 and accompanying text.
[422] *See* UNCITRAL Note, *supra* note 141, ¶14; Strong, Writing, *supra* note 30, at 58-70; *see also supra* notes 30-32, 332-35 and accompanying text.
[423] *See Charming Betsy*, 6 U.S. (2 Cranch) at 118.

including statutes that are not by their nature incorporative – be read to conform to international norms."[424] Under this approach, the Charming Betsy would act as "an 'engine' that seeks to 'conform U.S. law to the aspirations of international law.'"[425]

While some courts and commentators would doubtless applaud this reading of the Charming Betsy canon,[426] others would disagree.[427] The biggest concern about this particular proposal involves its breadth. Not only would this interpretation of the Charming Betsy apply to incorporative statutes that have a direct and logical link to international law, it would also apply to non-incorporative statutes that have no obvious connection to international legal principles.[428] Furthermore, this interpretive technique relies on international customary law to the same extent as international treaties, which can lead to a number of practical and jurisprudential problems.[429]

However, the most notable concern involving this third variation on the Charming Betsy is that it triggers the potentially irreconcilable policy debate between nationalists and transnationalists about the role that international law should play in modern society.[430] Since it is both unwise and unnecessary to adopt an interpretive canon that generates as many problems as

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[424] Coyle, *supra* note 3, at 706.
[425] *Id.* (citation omitted).
[426] *See* Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1183 (D.C Cir. 1994) (Wald, J., dissenting); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 99 (2003); Bachand, *supra* note 72, at 84, 91; David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights,* 37 COLUM. HUM. RTS. L. REV. 627, 646 (2006); Coyle, *supra* note 3, at 708; Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599, 2659 n. 297 (1997); de Mestral & Fox-Decent, *supra* note 59, at 582, 602.
[427] *See* Medellin v. Texas, 552 U.S. 491, 511 (2008); Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1341, 1388 (2006); Bradley, Breard, *supra* note 51, at 491, 546-47; Bradley, Judicial Power, *supra* note 6, at 83; Coyle, *supra* note 3, at 708-09.
[428] *See* Coyle, *supra* note 3, at 709-10.
[429] International customary law is not only more difficult to ascertain than laws based on treaties, it may run afoul of separation of power issues if relied upon directly in U.S. courts. *See* Coyle, *supra* note 3, at 709-10, 713-14; Crootof, *supra* note 399, at 1796-1801.
[430] *See* Bachand, *supra* note 72, at 83; Bradley, Breard, *supra* note 51, at 531; Crootof, *supra* note 399, at 1815; Mills, *supra* note 270, at 501-02; Sloss, Two-Step, *supra* note 62, at 137; Young, Treaties, *supra* note 262, at 93-94; *see supra* note 270 and accompanying text.

it solves, this third approach seems ill-conceived, at least in the context of international commercial arbitration.

The various iterations of the Charming Betsy canon therefore appear largely unhelpful to international commercial arbitration, either because of a lack of relevance (the traditional reading) or inapposite results (the second and third variations).[431] While the first variation on the conventional interpretation of the canon (i.e., the prohibition on extraterritorial application) could prove useful in certain limited circumstances,[432] there may be other interpretive devices that provide assistance on a broader range of issues.

D. Interpreting the New York Convention and the FAA Under the Borrowed Treaty Rule

1. Applying the borrowed treaty rule in theory

Although the third variation on the Charming Betsy canon proved problematic because of its excessive breadth, the proposal's aim (i.e., increased integration of international and domestic law) has been supported by commentators who believe that the recent expansion of international law that has occurred as a result of globalization requires a new understanding of how international legal principles affect national law.[433] One way of obtaining the benefits of that approach while minimizing the concerns enunciated by those adopting more of a nationalist perspective could be through adoption of the borrowed treaty rule, which is an interpretive technique devised by John Coyle.[434] This rule, which could be applied in both the United States

[431] *See* Crootof, *supra* note 399, at 1808, 1815; Paulsen, *supra* note 4, at 1803.
[432] *See supra* notes 404-15 and accompanying text.
[433] *See* Alvarez, Internationalization, *supra* note 291, at 539; Hathaway et al., *supra* note 6, at 105; Wu, *supra* note 63, at 572.
[434] *See* Coyle, *supra* note 3, at 709-11.

and in other jurisdictions, would "facilitate[] the consistent interpretation of texts across multiple jurisdictions, thereby making possible the establishment of truly international standards."[435]

Coyle's moderately internationalist interpretive approach is consistent with techniques proposed by commentators from other countries and in other fields. For example, Frédéric Bachand, a Canadian scholar writing from the arbitral perspective, has suggested that "judges sitting in states that have signalled their willingness to support the international arbitration system must consider the relevant international normative context while answering questions of international arbitration law to which local sources offer no obvious answer."[436] Bachand's thesis is that "domestic courts can and should recognize the existence of this body of transnational rules, but also – in some circumstances – that these rules have constraining effects in [the courts'] domestic legal orders, and thus on their decisionmaking process."[437] Specialists in transnational litigation have also suggested a greater reliance on international and foreign legal principles.[438]

Interestingly, the borrowed treaty rule is not only consistent with the methodology used by several courts in international disputes,[439] it is also similar to certain techniques used within

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[435] *Id.*
[436] Bachand, *supra* note 72, at 84.
[437] *Id.* at 85.
[438] *See* Nicholas M. McLean, *Intersystemic Statutory Interpretation in Transnational Litigation,* 122 YALE L.J. 303, 305 (2012); *see also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine,* 120 YALE L.J. 1898 (2011); *supra* notes 242-45 and accompanying text.
[439] Several examples exist in the arbitral realm. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534-37 (1995); ESAB Group, Inc. v. Zurich Ins. plc, 685 F.3d 376, 395 (4th Cir. 2012) (Wilkinson, C.J., concurring); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); In re Hops Antitrust Litig., 832 F.2d 470, 475 (8th Cir. 1987) (Fagg, C.J., dissenting); Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 902-03 (5th Cir. 2005); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985); Ross, *supra* note 6, at 479. Interpretive methods consistent with the borrowed treaty rule can also be seen outside the context of international commercial arbitration. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-41 (1987); Ross, *supra* note 6, at 479.

the domestic U.S. legal order.[440] The closest of these interpretive analogues is the "borrowed statute rule," which indicates that states that have adopted (or "borrowed") a statute from another jurisdiction are typically deemed to have also adopted the original jurisdiction's interpretation of that statute.[441] However, the borrowed treaty rule also resembles other domestic devices, including reception statutes[442] and law-finding techniques used by federal courts sitting in diversity cases. [443]

The borrowed treaty rule also resembles interpretive methods used in cases involving self-executing treaties.[444] These similarities result from the recognition that there is little, if any, difference between a self-executing treaty and a statute that incorporates a treaty by reference, either in whole or in part.[445] However,

> [t]his does not . . . mean that courts should read a directly incorporative statute as though it were itself a treaty. Rather, it means that when a court is called upon to interpret a statute that copies language from a treaty, that court should seek, whenever possible, to conform its interpretation of that language to its reading of the incorporated treaty.[446]

Furthermore, because the borrowed treaty rule "makes it unnecessary to go down the treacherous path of reading incorporative statutes as though they themselves were treaties," the rule "preserv[es] a clear line between statutes and treaties and, perhaps more

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[440] Some observers believe that it is best to distinguish rules of interpretation used in treaty contexts from those used in statutory and other domestic contexts. *See* Glashausser, *supra* note 6, at 1245, 1247. Other commentators believe that it is better to "normalize" treaty law within the domestic legal order by using principles that are familiar from other contexts. *See* Young, Treaties, *supra* note 262, at 137-38. Those who adopt the latter view may find it useful to note the extent to which the borrowed treaty rule is consistent with domestic rules of interpretation. *See* Coyle, *supra* note 3, at 674-78.

[441] *See* Coyle, *supra* note 3, at 677-78; *see also* Gluck, Laboratories, *supra* note 142, at 1780 n.104; Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.Q. 221, 244 n.102 (2010); Scott, *supra* note 180, at 350-52, 376-78.

[442] Reception statutes were adopted by the United States in its early years as a means of identifying when it was appropriate to rely on a statute from the United Kingdom. *See* Coyle, *supra* note 3, at 674-77.

[443] In these situations, the "federal court must make its best guess as to how the relevant state supreme court would resolve the question if it were to come before it." *Id.* at 679.

[444] *See id.* at 674-76.

[445] *See id.* at 674-75.

[446] *Id.* at 676.

importantly, between canons of treaty interpretation and canons of statutory interpretation.[447]

This approach can be justified on a number of policy grounds.[448] For example, reading an incorporative statute in a manner that is consistent with its underlying treaty can result in enhanced effectiveness of the international legal regime, a decrease in intentional or unintentional failure to implement the relevant norms, increased assurances that all states parties will comply with their obligations and an increased ability for individuals to rely on international law.[449]

Furthermore, many of the policy arguments against allowing direct domestic effect of international treaties do not apply to the borrowed treaty rule.[450] For example, direct application of treaties eliminates the ability of Congress to "reword the treaty to match domestic circumstances," "elaborate on the treaty provisions, which [Congress] may view as ambiguous" and "delay application [of the treaty] to allow internal consensus and acceptance to develop."[451] However, the borrowed treaty rule respects the ability of Congress to limit domestic application of certain aspects of the treaty or alter its meaning in some manner.[452] If such intentions are clear, they will be upheld under this particular interpretive canon.[453]

The borrowed treaty rule also addresses the "difficult constitutional question" relating to the role (if any) that a non-self-executing but implemented treaty has in the

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[447] *Id.* at 675.
[448] *See* Jackson, *supra* note 51, at 321-23.
[449] *See id.* at 320-22.
[450] *See id.* at 323-27.
[451] *Id.* at 324-25.
[452] *See id.* at 325.
[453] *See* Coyle, *supra* note 3, at 680.

U.S. legal system.[454] For example, under the borrowed treaty rule, a "[c]ourt's interpretation of an incorporative statute should always be consistent with its interpretation of the source treaty text unless there is compelling evidence that Congress, in enacting the statute, intended to deviate from the rule set forth in the treaty."[455] The process requires the court to "pivot away from the domestic text (a statute duly enacted by Congress), to the international text (a treaty duly ratified by the United States), and . . . confirm that the court's construction of the former is consistent with its interpretation of the latter."[456] Although this process gives a considerable amount of weight to internationalist concerns, it is also guided, and ultimately controlled, by domestic principles of law.

When applying the borrowed treaty rule, courts must interpret the underlying treaty in a manner consistent with the Vienna Convention or national law.[457] However, the interpretation of the underlying treaty is not made directly applicable within the United States, as would occur in cases involving a self-executing treaty.[458] Instead, the interpretation of the treaty forms a baseline for comparison with the interpretation of the incorporative statute. The borrowed treaty rule indicates that those two analyses should arrive at the same outcome, absent Congressional intention to the contrary.[459]

This result is considered appropriate because

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[454] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732-33 (5th Cir. 2009) (Clement, C.J., concurring in the judgment) (footnote omitted), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010); *see also* U.S. CONST., art. VI, cl. 2.
[455] Coyle, *supra* note 3, at 669-70.
[456] *Id.*
[457] *See* Vienna Convention, *supra* note 43, arts. 31-32; Coyle, *supra* note 3, at 687; *see also supra* notes 124-36 and accompanying text.
[458] *See supra* notes 124-36 and accompanying text.
[459] *See* Coyle, *supra* note 3, at 680.

> [t]he basic purpose of an incorporative statute is to incorporate into . . . [domestic law] a set of rules that are consistent with an internationally agreed upon standard set forth in a treaty. . . . International treaties first establish these international standards and, thereafter, those states that choose to ratify the treaties incorporate them into their own statutory law.[460]

Thus, the borrowed treaty rule "is entirely consistent with the institutional role of courts in the [U.S.] constitutional structure," since the rule expressly contemplates the fact that whenever "the legislative and the executive branches, acting together, choose to enact legislation that incorporates the terms of a treaty, they are making a decision to conform domestic law to international law."[461] Indeed, if the courts were "to interpret an incorporative statute in a way that differs materially from the way they would interpret the relevant provision in the text of the source treaty, they would, in effect, be undermining the political branches' decision to incorporate a particular international rule into [domestic law]."[462]

2. Applying the borrowed treaty rule in international commercial arbitration

Having described how the borrowed treaty rule is applied as a matter of theory, the next question is how the rule is applied as a practical matter, particularly in cases involving international commercial arbitration. Fortunately, the process is relatively straightforward.

First, courts review the text of the treaty to which the incorporative statute relates.[463] "If the text of the treaty is clear, then the court should read the incorporative statute to conform to the borrowed treaty text unless there is compelling evidence that Congress intended a different result."[464] This is a relatively easy task in international commercial arbitration, given the brevity

[460] *Id.* at 671-72.
[461] *Id.* at 672-73.
[462] *Id.*
[463] *See id.* at 680.
[464] *Id.*

and clarity of the New York Convention.[465] Furthermore, this approach eliminates the possibility that a court might inadvertently adopt a course of action that is contrary to the express language of the Convention.[466]

However, "if there is any ambiguity in the text of the treaty, the court should, as necessary, resort to those special canons of construction that have customarily been used to resolve such ambiguities in treaties."[467] Though the New York Convention is relatively unambiguous, one potential area of concern involves the form requirement under Article II.[468] Under the borrowed treaty rule, those matters would be considered pursuant to the interpretive techniques described in the Vienna Convention or national law,[469] which would empower courts to consult the same kinds of resources (such as international consensus relating to the states parties' subsequent practices and the UNCITRAL Recommendation) that would be available if the New York Convention were considered a self-executing treaty.[470]

"Once the ambiguity has been resolved, the court should read the incorporative statute to conform to the borrowed treaty, . . . unless there is compelling evidence that Congress intended a different result."[471] This step sets the borrowed treaty rule apart from an interpretative methodology based solely on the Vienna Convention, since the borrowed treaty rule expressly directs courts to consider the text and intent of incorporative statutes such as Chapter 2 of the

[465] *See* New York Convention, *supra* note 9.
[466] Unfortunately, this phenomenon has occurred on occasion in recent years. *See* Termorio S.A. E.S.P. v. Eltranta S.P., 487 F.3d 928, 936 (D.C. Cir. 2007); *see also* BORN, *supra* note 9, at 2684-85; STRONG, GUIDE, *supra* note 13, at 81.
[467] Coyle, *supra* note 3, at 680.
[468] *See* New York Convention, *supra* note 9, art. II; *see also* Strong, Writing, *supra* note 30, at 58-70.
[469] *See* Vienna Convention, *supra* note 43, arts. 31-32; Coyle, *supra* note 3, at 687.
[470] *See* New York Convention, *supra* note 9; UNCITRAL Recommendation, *supra* note 370; STRONG, GUIDE, *supra* note 13, at 88, 93; *see also supra* notes 351-65 and accompanying text.
[471] Coyle, *supra* note 3, at 680.

FAA.[472] This approach should give some comfort to proponents of a nationalist approach to international law, since domestic law is allowed to play an important role in the interpretation process.[473] However, the rule also includes a rebuttable presumption that Congress intended to adopt a statute that was consistent with the text and purpose of the underlying treaty.[474] This second attribute should win the support of those who take an internationalist approach to law, since this technique decreases the likelihood that the United States will breach its international obligations in situations where domestic and international law cover the same subject matter.[475]

The borrowed treaty rule can also be contrasted to the Charming Betsy canon.[476] Because "[t]he borrowed treaty rule [is] used to read incorporative statutes even where there is no obvious conflict between the statute and the treaty, and, most importantly, even where the text of the statute at issue is not on its face ambiguous," the rule is somewhat broader than the Charming Betsy canon, which is limited to cases of legislative ambiguity.[477] However, the outcome under the borrowed treaty rule is in many ways analogous to that which arises under the Charming Betsy canon, since both techniques insure that the interpretation of the domestic statute "is consistent with the rule of international law being incorporated."[478] In other ways, the two methodologies are quite distinct, since the borrowed treaty rule engages directly with "the core function of the incorporative statute, that is, to incorporate an internationally agreed upon

[472] *See* Vienna Convention, *supra* note 43; 9 U.S.C. §§1-207 (2012); *see also supra* notes 387-91 and accompanying text.
[473] *See supra* note 270 and accompanying text.
[474] *See* Coyle, *supra* note 3, at 691.
[475] *See supra* note 270 and accompanying text.
[476] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also supra* notes 384-432 and accompanying text.
[477] Coyle, *supra* note 3, at 680-81; *see also Charming Betsy*, 6 U.S. (2 Cranch) at 118; *see also supra* notes 394-432 and accompanying text.
[478] *See Charming Betsy*, 6 U.S. (2 Cranch) at 118.

legal standard into the national law of the United States," while the Charming Betsy canon does not.[479]

The borrowed treaty rule also provides a welcome degree of flexibility, since "[t]he strength of the rule may vary . . . depending on how closely the text of the incorporative statute tracks the language in the relevant treaty."[480] If there are "substantial" differences between the treaty and the statute, then the justification for "conforming one's reading of the statute to the treaty are correspondingly less compelling, even if the underlying aim of the statute is to incorporate the terms of the treaty."[481] In this latter category of cases, the legislature has obviously contemplated important differences between the international understanding and domestic application, and the domestic rule will govern in national courts as a matter of constitutional law, even though the international obligation continues at a state-to-state level.[482] Notably, international commercial arbitration does not appear to suffer from this kind of problem, since the New York Convention and the FAA are consistent (or complementary) in most regards.[483]

4. Interpreting the New York Convention and the FAA Under a Teleological Approach

The final interpretive technique to consider involves a teleological approach to "domestic provisions adopted with a view to giving effect domestically to" the New York Convention.[484] Although this methodology is aimed specifically at international commercial arbitration, it is

[479] Coyle, *supra* note 3, at 681; *see also Charming Betsy*, 6 U.S. (2 Cranch) at 118; *supra* notes 394-432 and accompanying text.
[480] Coyle, *supra* note 3, at 681.
[481] *Id.*
[482] *See id.*
[483] *See* New York Convention, *supra* note 9; 9 U.S.C. §§201-08 (2012).
[484] Bachand, *supra* note 72, at 93.

built on the recognition that "teleological interpretation has traditionally played a part in the interpretation of multilateral, 'legislative' conventions."[485]

Under a teleological approach, courts should "determine whether there is consensus on the answer to the question at hand – not generally among all countries which lend their support to the international arbitration system, but rather among jurisdictions in which the provisions at issue are also in effect."[486] If a single internationally acceptable norm can be identified, then that standard should be used by the court.[487]

The situation is slightly more difficult if a single norm cannot be identified, even after an appropriately comparative analysis has been completed.[488] However, if the instrument to be construed is the New York Convention, then the court may turn to the interpretive techniques outlined in Articles 31 and 32 of the Vienna Convention to determine what standard should apply.[489] Because the New York Convention is intended "to unify certain areas of the law," courts must "refrain from assuming that . . . terms" used in the Convention "unquestionably" have the same meaning that they do in domestic legislation.[490] Furthermore,

> consideration should be given to the practice of states parties to the treaty (which practice includes decisions rendered by their courts, as well as statutes giving an indication of their understanding of the meaning and effect of the treaty's provision) which reveal an agreement regarding its interpretation.[491]

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[485] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 427-28 (2009); *see also* New York Convention, *supra* note 9; Bachand, *supra* note 72, at 85.
[486] Bachand, *supra* note 72, at 94.
[487] *Id.*
[488] *See id.* This might be the case with form requirements. *See* UNCITRAL Note, *supra* note 141, ¶¶11, 22; Strong, Writing, *supra* note 30, at 58-70.
[489] *See* Vienna Convention, *supra* note 43, arts. 31-32; *see also* New York Convention, *supra* note 9; *supra* notes 124-36 and accompanying text.
[490] Bachand, *supra* note 72, at 95.
[491] *Id.*

Recourse also can and should be had to the *travaux préparatoires*, although these documents play "a less important role than the factors just alluded to."[492]

Although the teleological approach bears certain similarities to techniques adopted under both the Vienna Convention and the borrowed treaty rule, the emphasis on international consensus appears to be unique to this particular interpretive mode.[493] Focusing on whether a particular state has "signalled [its] willingness to support the international arbitration system" provides a useful normative context, since it avoids interpreting the New York Convention and the relevant incorporative statutes in a vacuum and instead concentrates on the purpose of the treaty.[494] The teleological approach also avoids problems of over-breadth by limiting itself to "questions of international arbitration law to which local sources offer no obvious answer."[495] Although this is somewhat similar to the way in which the Charming Betsy canon limits itself to ambiguous statutes, the teleological approach addresses a different subset of problems and is somewhat more comprehensive in that it also takes the possibility of conflicting case law (a significant problem in the United States) into account.[496]

However, the teleological approach also suffers from some potential problems. The biggest concern may be its somewhat free-floating nature. U.S. courts appreciate hard and fast

[492] *Id.*; *see also* Jonas & Saunders, *supra* note 133, at 578.
[493] *See* Bachand, *supra* note 72, at 94; *see also* Vienna Convention, *supra* note 43, arts. 31-32; *see also supra* notes 325-92, 433-82 and accompanying text.
[494] Bachand, *supra* note 72, at 84.
[495] *Id.*
[496] Circuit splits exist with respect to whether the New York Convention is self-executing and to the circumstances in which the New York Convention applies. *See* New York Convention, *supra* note 9; UNCITRAL Note, *supra* note 141, ¶14; Strong, Writing, *supra* note 30, at 58-70; *supra* notes 9-11 and accompanying text.

rules, even (or particularly) in areas involving constitutional and international law, and the teleological approach may not provide the necessary degree of methodological specificity.[497]

A second issue involves the propriety of a teleological approach as a matter of U.S. law. Although purposive interpretation does have a place in U.S. law, such practices are not currently in favor, given the contemporary preference for textualism.[498] As a result, it appears unlikely that U.S. courts would adopt an interpretive theory that explicitly relies on teleological methods.

V. Conclusion

Although specialists in the field have long been aware of the many complexities that can arise in cases involving international commercial arbitration, courts and commentators in other areas of law are only now being introduced to the diverse and difficult issues that can and do arise in disputes involving the New York Convention and the FAA.[499] While a number of public and private entities are taking steps to help courts, commentators, arbitrators and advocates understand the nuances of the U.S. law of international commercial arbitration,[500] these efforts are in many ways too little and too late. Several significant circuit splits involving international commercial arbitration already exist, with more appearing likely to arise in the coming years.[501]

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[497] U.S. constitutional law has experienced a longstanding debate between the relative merits of rules versus principles. *See* Frank Cross et al., *A Positive Political Theory of Rules and Standards,* 2012 U. ILL. L. REV. 1, 15-18; James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution,* 92 B.U. L. REV. 1171, 1173 n.11 (2012) (comparing views of Scalia and Dworkin).

[498] Although both the Vienna Convention and U.S. law contemplate an analysis based on the text, purpose and intent of a treaty, the current emphasis appears to be placed on textual matters. *See* Vienna Convention, *supra* note 43, art. 31; *see also supra* note 136 and accompanying text.

[499] *See* New York Convention, *supra* note 9; 9 U.S.C. §§1-307 (2012).

[500] *See* RESTATEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 26; STRONG, GUIDE, *supra* note 13, at 1-93.

[501] *See supra* notes 9-11 and accompanying text.

Most analysts consider these lines of cases in light of their various factual similarities.[502] Though helpful in some regards, those kinds of narrow, subject-specific analyses overlook a number of important commonalities that arise as a matter of constitutional and public international law. Focusing on these broader issues, as this Article has done, not only provides the U.S. judiciary with an opportunity to establish a standard interpretive method that cuts across all aspects of international commercial arbitration, thereby avoiding the practical and jurisprudential problems associated with a more fragmented approach,[503] it also increases the likelihood that courts will render decisions that comply with the United States' international obligations under the New York Convention.[504]

One of the primary means by which these ends are achieved involves characterizing Chapter 2 of the FAA not as implementing legislation per se but as an incorporative statute that can be either facilitative or enabling in nature. This technique is particularly useful because it avoids difficult questions relating to whether the New York Convention is self-executing.[505] While this approach might be intellectually unfulfilling to those people who prefer a more direct, black-or-white analysis, Cass Sunstein has emphasized the benefits of incompletely theorized agreements in the area of constitutional law, and such agreements may also be usefully adopted with respect to matters relating to the interpretation of treaties like the New York Convention.[506]

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[502] For example, one line of cases involves international insurance disputes while another concerns form requirements, although other areas of concern also exist. *See supra* notes 9-11, 30-32, 171-75 and accompanying text.
[503] *See supra* note 115 and accompanying text.
[504] *See* New York Convention, *supra* note 9.
[505] *See id.*; 9 U.S.C. §§201-08 (2012); *see also supra* notes 79-122 and accompanying text. Such an approach is consistent with U.S. Supreme Court precedent. *See* Ashwander v. Tenn. Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 732 n.1 (5th Cir. 2009) (Clement, C.J., concurring in the judgment), *cert. denied sub nom.* La. Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London, 131 S. Ct. 65 (2010).
[506] *See* New York Convention, *supra* note 9; Sunstein, Incompletely Theorized Agreements, *supra* note 273, at 1772; *see also* Sloss, Two-Step, *supra* note 62, at 137.

Framing Chapter 2 of the FAA as incorporative also puts an entirely new spin on the relationship between the New York Convention and domestic law and allows U.S. courts to adopt a new and potentially more accurate means of interpreting and applying the relevant legal provisions.[507] Several alternative methodologies have been discussed herein, including various iterations of the Charming Betsy canon as well as the borrowed treaty rule and a subject-specific teleological approach.[508] Although each interpretive technique has its benefits, the borrowed treaty rule appears to achieve the best and most appropriate results as a matter of constitutional and international law. Not only does the borrowed treaty rule take into account the purpose and nature of incorporative statutes, it also appears to balance the concerns of nationalists and nationalists in a principled and constitutionally valid manner.

Furthermore, the borrowed treaty rule resonates comfortably with the core values of international commercial arbitration, even though the rule was developed in the context of U.S. constitutional law. This consistency of aim is vitally important, given the sophistication and maturity of contemporary arbitral practice around the world and the special status accorded to international commercial arbitration by U.S. courts.[509] International commercial arbitration has achieved a level of legitimacy to which other disciplines can only aspire,[510] and any interpretive theory that does not take these well-established practices and principles into account cannot hold weight.

Although this Article has focused primarily on matters relating to international commercial arbitration, the insights and conclusions provided herein may be equally useful to scholars and practitioners specializing in other fields. International commercial arbitration

[507] *See* 9 U.S.C. §§201-08.
[508] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also supra* notes 392-487 and accompanying text.
[509] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).
[510] *See* Movsesian, *supra* note 39, at 448; Young, Supranational, *supra* note 21, at 477.

provides a wealth of empirical and comparative data about how international treaties are interpreted and applied around the world, which means that theories about arbitration are rooted in longstanding and widespread practical experience. As a result, models developed in international commercial arbitration can provide valuable lessons to courts and commentators working in other areas of law.

It is, of course, possible to carry an analogy too far, and it may very well be that the economic underpinnings of international commercial arbitration provide states, courts and parties with certain incentives or justifications that do not exist in other contexts.[511] However, the widespread success of the New York Convention and the international arbitral regime suggests that this is a field that is eminently worthy of study.[512]

As comprehensive as this Article has tried to be, there is much work left to be done as a matter of both constitutional and public international law. Hopefully, this discussion will act as an inspiration for further developments, initiatives and research by both public and private bodies, for only by understanding the complex interaction of constitutional and public international law can U.S. courts appreciate and appropriately address the various challenges that currently exist in international commercial arbitration.

[511] *See* Strong, Monism and Dualism, *supra* note 20; Young, Supranational, *supra* note 21, at 477.
[512] *See* New York Convention, *supra* note 9.