CHAPTER 2
The New York Convention as an Instrument of International Law

§2.01 THE NEW YORK CONVENTION AS AN INSTRUMENT OF INTERNATIONAL LAW

The family of nations has endlessly – some say since the Tower of Babel – sought to breach the barrier of language. The delegates had to comprehend concepts familiar in one State that had no counterpart in others and to compromise entrenched and differing national commercial interests. Concededly, 45 nations cannot be expected to produce a document with the clear precision of a mathematical formula. Faced with the formidable obstacles to agreement, the wonder is that there is a Convention at all, much less one that is serviceable and enforceable.¹

§2.02 THE DUAL LEGAL NATURE OF THE NEW YORK CONVENTION AND ITS CONSEQUENCES

Recognition and enforcement of foreign arbitral awards were among the most complex problems known in the doctrine and jurisprudence of private international law, owing mainly to the diversity of domestic laws on the subject.²

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² Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of fourth meeting, at 3, U.N. DOC E/Conf.26/SR.4 (Sep. 12, 1958) (comments of Mr. Beasarovic (Yugoslavia)).
The Convention is an unusual instrument. To recall the observations made in the Foreword, most treaties create reciprocal rights between signatory States, to be asserted and exercised under international law. The Convention creates advantages for countless unknown parties, most of them private individuals or entities, to be interpreted and made effective within the national space through the agency of the most archetypical institutions of national law: municipal courts. Parties who rely on perceived advantages under the Convention do so whether or not any particular State-signatory agrees with their interpretation of its provisions, or whether any State considers that it is desirable to invoke it in a given instance as a matter of diplomatic relations.

Since 1958, the phenomenon of treaties creating substantive and procedural rights for private third parties has become a familiar feature of the landscape, in instruments ranging from multilateral human rights conventions to bilateral treaties for the protection of foreign investment. Still, the Convention is by its nature destined to effect an extraordinary intervention into the workings of municipal civil procedure and public enforcement mechanisms. Moreover, parties who invoke the New York Convention need not even be nationals of a signatory State.

It should therefore be expected that considerable difficulties arise as this instrument is carried from the international space in which it was created into the national domain where it is intended to serve, as it were, as an obligatory element of national civil procedure even though it is not an act of the national legislature. If the State is also a party to the Vienna Convention on the Law of Treaties (the “VCLT” or the “Vienna Convention”), the rules of interpretation that apply to the substantive provisions of the Convention should also be applied by the relevant courts if the Convention is to have, as it should, a constant meaning. Furthermore, the Convention’s drafting history, as we shall see throughout this book, reveals a deceptively simple text whose provisions are often elliptical and on many occasions will remind us of the disabused lament of so many international lawyers: a treaty is a disagreement reduced to writing.3 The fact that delegates in an international drafting conference agree to a formulation does not, as we know all too well, mean that they would all give the same answer as to the outcome of a concrete issue of application.

For example, the Convention does not tell us what the words “in writing” (Article II) might mean with respect to a document which refers to another document, or to written evidence which might be said to prove the existence of an oral agreement. Similarly, the drafters contented themselves with saying that awards might be covered by the treaty, even if they are rendered in the country where their enforcement is

3. Philip Allot describes the phenomenon as “the eventual parties to a treaty enter into negotiation with different ideas of what they want to achieve. Negotiation is a process for finding a third thing which neither party wants but both parties can accept.” The Concept of International Law, 10 European Journal of Int’l Law 31, 43 (1999). Multilateral negotiations self-evidently multiply the unexpected consequences.
sought as long as they are not deemed to be domestic – but without telling us how to define that characteristic. To take perhaps the most salient example of leaving important matters indeterminate and open-textured, the drafters accepted that the requirements of the Convention are neutralized if the enforcement of an award would be contrary to public policy, without further explanation as to what that expression might mean in the five equally authentic texts of the Convention and as a matter of national jurisprudence.

If applying the Convention were just a matter of giving effect to national implementing acts, this book would have little purpose; in each case the lawyer would need only to consult the relevant local codes or regulations, and the Convention itself would be little more than background music. Most courts, however, do heed the provisions of the Convention in a purposive manner. They understand the importance of uniform reciprocal application. They understand the Convention to be in the nature of a bargain between Contracting States and therefore to imply a notion of mutuality inherent in all treaties. If Contracting State A applies a treaty restrictively, Contracting State B will be discouraged from applying it liberally, as the latter’s nationals may not be treated as well as the former’s.4

Implementing acts or even the words of the Convention itself, whether literally reproduced in the implementing act or as directly applied by courts in countries where no such act is needed – have showed themselves to contain lacunae, ambiguities, or simply open and flexible formulations. In such cases, courts may look to the Convention’s purpose: viewing arbitration agreements and arbitral awards with a pro-enforcement attitude. Like any treaty, the Convention should be interpreted according to international principles of interpretation as codified in the Vienna Convention. This would, in theory, ensure that the Convention’s provisions are perceived in the same way across borders, enhance the effectiveness of arbitration, and promote harmonization of judicial application.5

Any State-party should comply with the obligation vis-à-vis other Contracting States in order to adhere to the provisions of a convention (pacta sunt servanda) and the overriding notion of good faith.6 A realistic approach to the statutory interpretation of acts implementing the Convention must include a degree of alignment with the Vienna Convention. Many enforcement courts fortunately rely directly on the

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4. There are situations in which the courts can do nothing. In legal systems where the treaty must take the form of a national implementing act, courts are paralysed if no such act has been promulgated, or if that act exists but simply does not correctly reproduce the elements of the Convention.


pro-enforcement attitude under the Convention. This purposive approach is one of the pillars of the Vienna Convention (Article 31(1)). Richard Gardiner, one of the leading commentators on the Vienna Convention, has observed that “the most common venue for airing issues of treaty interpretation in public will be the courts. Judgments interpreting treaties increasingly make use of the Vienna Convention.”7 This is most realistic in national orders that have implemented the Convention ad verbatim or rely on similar interpretation methods such as insisting on the ordinary meaning of a text in conjunction with its purpose. Still, when States transform treaty provisions into domestic acts, differences of wording may be taken to indicate the legislature’s understanding of the terms of the treaty.8

Perhaps the lesson to be drawn from this case is that not only should the Vienna rules be applied where interpretation of a treaty is in issue in a municipal court, but also that the approach to application of those rules should be more closely aligned to that which an international lawyer or tribunal would take, including their approach to preparatory work.9

An interpretation of implementing acts through the prism of what I will refer to as the Charming Betsy rule, formulated over two centuries ago by the US Supreme Court,10 should lead courts to decide on requests for enforcement under the presumption that Contracting States intend legislation to comply with their international obligations. Courts may operate under the presumption that their government wants to act purposefully in accordance with the two principal obligations set forth in the Convention: (1) upholding arbitration agreements and (2) enforcing awards. This rule will be discussed in more detail at the end of this chapter under Appraisal.11

This chapter considers how States become parties to the Convention, how the treaty is transformed in the national space and how the Vienna Convention plays its essential role. It aims to provide tools for appraising the desirable alignment of statutory interpretation with treaty interpretation. Finally, this chapter addresses the possibility for sanctioning Contracting States for non-compliance with the Convention.

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8. As Gardiner notes, with specific reference to the UK Arbitration Act 1996, ss 53 and 100, legislation may “correct” judicial interpretation of treaty terms, which may result when the courts apply the Vienna rules “haphazardly;” in this instance, Parliament reversed a decision of the highest court of England (then the House of Lords) which had insisted that the word “made” and “signed” are synonymous, whereas the word “made” (which is the one that appears in the New York Convention) denotes the place of arbitration in a more holistic way than the place where the arbitrator happened to sign the award, which should not be determinative of whether it falls under the treaty or not.
9. Ibid., at 48.
10. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights...further than is warranted by the law of nations as understood as understood in [that] country.”)
11. Please see: “APPRAISAL: CHARMING BETSY.”
§2.03 POLICY ISSUES FOR THE EXECUTIVE

[A] Signature, Accession, Ratification and Entry into Force (Articles VIII, X, IX, XII and XV)

The Convention was adopted in New York, on June 10, 1958, and entered into force on June 7, 1959 (Article XII), with twenty-five States having signed the Convention. At this writing, 156 States are parties to the Convention. States commit to the Convention by instruments of signature, ratification, or accession. The international act of ratification and accession is the consent of a State, on the international plane, to be bound by the treaty. How exactly these instruments bind a state is provided for in Articles VIII (ratification) and IX (accession).

The instrument needs to be deposited with the Secretary-General of the United Nations (UN). States that signed the Convention upon its creation were bound upon its entering into force on June 7, 1959. With respect to States that ratified or acceded to it subsequently, the treaty enters into force after the deposit of an instrument to that effect. Once the treaty is in force, it is binding upon the Contracting State. By these instruments, Contracting States undertake to comply with the treaty and to ensure its effectiveness in their domestic space. They cannot justify non-compliance by invoking their own failures to fulfil domestic formalities such as publication in the official gazette.

[B] Issue: “All States?”: Is the New York Convention Universal?

The Conference had been limited by a political formula which artificially excluded a number of important nations.

The Polish delegate pleaded for a universal convention. International trade would be hampered if parties risked exposure to unknown systems. Parties might fear long and

12. Argentina, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Ceylon, Costa Rica, Czechoslovakia, Ecuador, El Salvador, Finland, France, Germany, India, Israel, Jordan, Luxembourg, Monaco, the Netherlands, Pakistan, the Philippines, Poland, Sweden, Switzerland, Ukraine and the Union of the Soviet Socialist Republic.
15. See Vienna Convention Art. 2(1)(b).
18. Article 26 of the Vienna Convention.
The Convention, prepared by delegates from different regions of the world, would “allay the fears of those who had hitherto refrained from such trading.” Yet, Article XIII made it clear that the Convention was open only to Member States of the UN.

The US delegate had opposed the Polish amendment. He reminded the delegates that the issue had already been dealt with at the occasion of commenting on the report of the Committee of March 18, 1955. ECOSOC had decided in its resolution 604 (XXI) to invite only State Members of the UN to participate in the drafting of a new convention. Adopting the Polish amendment would be contrary to the view of the ECOSOC. The Czech delegate disagreed, castigating the formula in Article XIII as being an old device designed to exclude certain States from participation in international life. He called the US delegate the “leading advocate of restriction.” Yet, that purported “restriction” was maintained. It is relevant today, not because of its supposed restrictive nature, which has been contradicted by the worldwide success of the treaty, but because it makes clear – perhaps more as a matter of abstract principle than practical effect – that the Convention adheres to certain standards endorsed by the UN.

[C] Reservations (Articles I(3) and XIV)

The Swiss delegate helpfully observed that drafters could make a choice between a: (i) large number of reservations to ensure the greatest number of accessions and (ii) a limited number of reservations, which would be more conducive to the harmonization of national bodies of law. According to the Swiss delegate, the latter was more in keeping with the modern trend. The delegates agreed and thus the Convention allows the possibility of two reservations only. The first is the reciprocity reservation defined in Articles I(3) and XIV and the second is the commercial reservation defined in Article I(3). Article 19(b) of the Vienna Convention establishes that a State may not formulate

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21. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Amendments to the Draft Convention submitted by the Polish Delegation, at 1, U.N. DOC E/Conf.26/7 (May 21, 1958) (“This Convention shall be open for signature and ratification on behalf of all states.”)
23. New York Convention Art. XIII(1) (“This Convention shall be open until Dec. 31, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.”).
25. Ibid., (comment of Mr. Pscolka (Czechoslovakia)) at p. 3.
26. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the fifteenth meeting, at 3, U.N. DOC E/Conf.26/SR.15 (Sep. 12, 1958) (comments of Mr. Pointet (Switzerland)). See also ibid., at 8 (comments of Mr. de Sydow (Sweden)).
any other reservation if the treaty provides that only specified reservations may be made. The Convention does so in the Final Act:

The Conference decided that, without prejudice to the provisions of its articles I(3), X, XI and XIV, no reservation shall be admissible . . . 27

No other reservations were permissible as they would “most likely defeat the very purpose which the Convention was designed to achieve.” 28

[D] First Reservation: Article I(3)

Any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. (Article I(3))

The function of reservations is to exclude a treaty’s application. In the case of this first reservation, that means that State A (although it has signed the Convention) will not apply it to awards rendered in States which are not parties to the Convention. It matters not if the party seeking to rely on the Convention is a national of a State-party. This likely strikes most lawyers as odd, since it is often the case that the objective of a treaty from the perspective of each signatory State is to protect the interests of its nationals. The answer may lie in the observation that the existence of this reservation means that States which have not become a party to the Convention will lose their appeal as venues of arbitration. In other words, the Convention does not provide a free ride to those who do not join it. Once that choice has been made, the nationality of the party relying on the Convention is immaterial. 29

[E] Article XIV: General Reciprocity Clause

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention. (Article XIV)

29. The infamous Indonesian Regulation of 1990, explicitly (if probably unintentionally) contradicts the New York Convention by requiring certification that the country of nationality of the enforcing party has adhered to the Convention, which as seen reserves such a condition of reciprocity only to the country where the award was made – irrespective of the nationality of the prevailing party. Karen Mills and Hanna Azkiya, National Report Indonesia, Suppl. 74, in International Handbook on Commercial Arbitration, (Jan Paulsson ed., Kluwer Law International (2013)).
The drafters originally inserted this provision as part of the federal-state clause contained in Article XI. The intention was to provide that if a constituent State or province of a Contracting State was not bound to apply the Convention, other Contracting States were not bound to apply it to awards made in such constituent State or province. It was then decided to upgrade this provision to a general reciprocity clause because some Conference delegates observed that no corresponding provisions were found in the second reservation of Article I(3) (“commercial reservation”) and in Article XI, and that a general provision could remedy this lacuna.

This general reciprocity clause is unusual in international usage, where typically each State gives the subjects of the other State certain privileges on the condition that its own subjects shall enjoy similar privileges in the other State. Party nationality, as seen above, is not a condition for the Convention’s applicability.

Could this reservation be used by an enforcement court if the Contracting State where the award was rendered does not keep to its side of the bargain and refuses to comply with the Convention by not enforcing awards falling under the Convention? This question was raised from the start by Leonard Quigley, one of the first commentators on the new Convention:

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention. The adoption of this Article gives States a defensive right to take advantage of another State’s reservations with regard to territorial, federal or other provisions. The clause presumably will also cover the case where the courts of a State have placed a restrictive interpretation upon its obligations under the Convention.  

As things have turned out, courts have tested the enforceability of awards under Article V alone rather than to engage in what would be a dangerous calculation to the effect that “we won’t enforce more than you,” which could easily escalate into subjective value judgments and speculations as to the intentions and reliability of foreign judges.

[F] Second Reservation: Article I(3)

It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration (Article I(3)).

The second reservation pertains to the nature of the arbitration. This reservation was inserted at the instigation of some countries of the civil law tradition, which distinguished between commercial and non-commercial transactions, and did not accept the enforceability of arbitration agreements with respect to future disputes by non-merchants. Courts tend to interpret the word “commercial” broadly although some

divergent applications exist. The US Court of Appeals for the Eleventh Circuit held in Bautista that:

[S]eamen’s employment contracts are “commercial” contracts under the New York Convention. [The act implementing the New York Convention] does not indicate an intent to limit the definition of commercial. . . . Congress meant for commercial legal relationships to consist of contracts evidencing a commercial transaction.

In contrast, an Argentinean Court of Appeal decision raised some eyebrows in which was held that a shipbuilding contract was not commercial under Article I(3) of the Convention, reasoning that:

[T]he shipyard in question was owned by the Province of Buenos Aires, which, according to the Court, acted within its administrative function when it concluded the contract through the shipyard to promote a public interest. The administrative function . . . rules out the commercial nature of all activities (actos de gestion) within such function.

Courts seeking uniformity of application do well to rely on the description of commercial in the UNCITRAL Model Law on International Commercial Arbitration of 1985:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

[G] Retroactivity

A treaty does not apply retroactively unless “a different intention appears from the treaty or is otherwise established.” The Convention does not contain a retroactivity clause; nor is that the case with respect to agreements and documents concluded in

32. Ibid., at ¶ 15.
35. Vienna Convention Art. 28.
connection with the adoption of the Convention, such as the Final Act. Therefore, no such intention is “otherwise” established.

The drafting history reveals disagreement on the notion of retroactivity. Subsequent implementation and judicial application are equally divergent. If one is to interpret the text of the Convention in its contextual framework, one might accept retroactive application of the Convention as warranted by its pro-enforcement attitude. However, at the Conference, the following language suggested non-retroactivity:

This Convention shall apply only to arbitral awards which acquired the force of res judicata and became final after the entry into force of the Convention.37

The provision proposed by the Yugoslavian delegate seems to be redundant as this is provided for by the Vienna Convention. The Yugoslavian delegate justified this proposal as intended to facilitate procedures for enforcement in the future. If the Convention were to apply retroactively, unnecessary difficulties would follow. Some opponents of the provision wanted the Convention to apply to as many awards as possible. Others opposed the provision because they considered the language too vague. The proposal was rejected (seventeen in favor and eleven against, with ten abstentions). This does not mean that one can conclude a contrario that the Convention does apply retroactively. Voting behavior is not enough to establish an intent given that some delegates may have felt that non-retroactivity goes without saying, or should be left for judicial determination in specific cases.

A pro-enforcement stance alone is a feeble justification for accepting retroactive application of the Convention, when one considers the stricture imposed by Article 28 of the Vienna Convention that a treaty does not apply retroactively. Having made that acknowledgement, though, one may doubt that it matters much, more than fifty years after the entry into force of the Convention.

§2.04 THE CONVENTION’S RECEPTION IN THE NATIONAL SPACE

[A] Implementation

Implementation transforms the obligation of signatory States to action. It enables, and indeed commands, courts to give effect to the advantages parties are intended to enjoy.

36. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958). It is the only agreement that was concluded at the time of adoption of the text of the New York Convention. It contains recommendations for further additional measures that should be taken to increase the effectiveness of international arbitration.


39. As did the Swiss and Turkish delegates. However, they did not make a proposal to add a provision to that extent, which would have been necessary on the basis of international customary law and Art. 28 of the Vienna Convention.
under the Convention. Adherence to the Convention implies that national civil procedure must conform to it. In order to grasp the interface between the Convention in the international space and the implementing act in the national space, one must commence with an analysis of what are broadly known as dualist and monist systems. Statutory interpretation of implementing acts come to the fore as the natural means of aligning national law with the Convention. A reasonable and useful premise is that the Convention is either properly implemented or, if not, may be correctly realigned by courts, notably by adoption of the *Charming Betsy* approach. Of course in aberrant situations the premise may be defeated by irremediably misconceived national regulations.

[B] Monism and Dualism

The place of an international instrument in the national legal order depends, broadly speaking, on the constitutional vision of treaties as reflected in the choice between monist and dualist approaches. The monists deem international law to be directly applicable: international and national law are a unity. In case of conflict, international law prevails. The dualists regard international law and national law as two separate legal spheres. In order for an international instrument to have effect in the national sphere, it must be transformed into legislation. In the United Kingdom, for example, a treaty has no direct effect internally and could become effective only after an act of Parliament. In a dualist system, a court operates within the national sphere and can only apply national law. This presents the advantage of relieving a judge from the burden of having to be versed in both national and international law. A State may endorse dualism because it prefers that its courts apply national law only and refrain from entering into assessments on an international level, which are left to the executive branch. If States agree to implement certain rules of international law, they will be liable for a breach thereof vis-à-vis the other Contracting States. This is of no consequence within the national sphere as far as the court is concerned. For that, international law needs to be implemented. The courts will thus apply the implementing act as a matter of national law, and not – to bring this back to our concern – the Convention which was its raison d’être.

Implementation allows a legislature to tailor the treaty to its national legal framework. This process is even more important in the case of international agreements on procedural law; few things are more divergent across the globe than procedural law. Article III of the Convention recognizes that the multitude of details of civil procedure could not be articulated in full and imposed on all signatories of an

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40. To wit the presumption of concordance between national legislation and treaty obligations, see further under Appraisal. See “APPRASIAL: CHARMING BETSY.”
instrument like the Convention. It must therefore rely, for its effectiveness, on proper reception within local procedural frameworks.

The fact that the implementing act forms part of the national legal order may lead to divergent consequences. In the United States, for example, a later act will supersede the implementing act. Subsequent federal laws trump the act implementing the New York Convention (albeit in principle giving rise to a breach of international law) on the basis of the “later in time” rule (lex posterior derogat legi priori).

The US’s approach also demonstrates the possibility of sub-categories of monism and dualism. The US approach might be described as “moderate monist”; a treaty provision may be regarded to be on the same footing as a federal statute only when it is self-executing:

> Whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.\(^{43}\)

If the provisions of a treaty are not considered to be self-executing, statutory implementation of its provisions is thus indispensable.\(^{44}\) A provision is self-executing if it may be directly applied in a national legal system and if it may be relied upon directly by a party.\(^{45}\) The matter is put as follows in the Restatement (Third) on the Foreign Relations Law of the US, at paragraph 111:

> In the absence of a special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.\(^{46}\)

US courts will endeavor to construe the international agreement and the national rule so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.\(^{47}\)

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46. In the US, Restatements of the law are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. These treatises are drafted by the American Law Institute. Restatement 3rd of the Foreign Relations Law of the US (1987).
The issue of present interest seems to be that in some systems, parties cannot rely directly on the Convention’s provisions because they are not self-executing since:

[f]or a number of other States, the adoption of implementing legislation was required for the Convention to gain force of law in their internal legal order. . . . [T]he text of the Convention has no legal significance. It is an international treaty and such treaties are not self-executing in the law but are seen as actions of the executive.48

The following matrix provides a snapshot of this discussion:

<table>
<thead>
<tr>
<th>Monism</th>
<th>No implementing act needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moderate monism</td>
<td>Implementing act needed if treaty not self-executing</td>
</tr>
<tr>
<td>Dualism</td>
<td>Implementing act needed</td>
</tr>
</tbody>
</table>

§2.05 INTERPRETING THE CONVENTION

[A] The Vienna Convention

The Vienna Convention – sometimes called the “Treaty on Treaties”– lays down rules for the interpretation of treaties in Articles 31 (“General Rule of Interpretation”), 32 (“Supplementary Means of Interpretation”), and 33 (“Interpretation of Treaties Authenticated in Two or More Languages”). Article 31 refers to the primary elements of a treaty of relevance for interpretation: (1) the ordinary meaning of its terms, (2) their context; and (3) the treaty’s object and purpose. Those are the first ports of call. Whenever the meaning derived from the primary elements would lead to ambiguous or unreasonable outcomes, Article 32 points to the legislative history if it provides indications that lead to firmer ground. Article 33 is of direct relevance to the present study because the Convention is drawn up in five official languages.49

The Vienna Convention entered into force only in 1980; the New York Convention in 1959. Treaties predating the entry into force of the Vienna Convention are nevertheless subject to Articles 31–33 because they codify pre-existing international customary law. Thus, the Vienna Rules are relevant for the Convention. Cases and commentary that predate 1980 also provide possible legitimate reference points.

True enough, the Vienna Convention does contain a non-retroactivity clause.50 Even without adhering to the Vienna Convention, however, States are bound by

49. Please see http://www.newyorkconvention.org/texts: the Convention’s authentic texts are English, French, Spanish, Russian and Chinese.
50. Article 4 provides:
international customary law. That principle is acknowledged in the first prong of Article 4, which stresses the applicability of international customary law independently of the Vienna Convention.

Moreover, the International Court of Justice (ICJ) has made clear that the Vienna Convention (Articles 31–33) is, in principle, applicable to the interpretation of all treaties. That proposition now constitutes a statement of customary international law. The application of these provisions is essential to the harmonization of the application of the Convention.

Articles 31–33 of the Vienna Convention reflect a taxonomy of interpretive approaches and the sensible conclusion that each method has its place. Sometimes the words are so clear that there can be no legitimate reason to look for any other purpose than that they were meant to be obeyed. The Vienna Convention embraces the teleological approach as an adjunct to primary reliance upon the text of a treaty. The teleological objective is to attribute to a text the sense it ought to have in light of its purpose. For example, the drafters of the Convention envisaged a treaty that could be adapted to evolving trade practices.

The proposal for Articles 31–33 of the Vienna Convention was based on the view that the text must be presumed to be the authentic expression of the intentions of the parties and implicitly rejects the proposition that the search for intent may be divorced from the text. It is important to adhere to the presumption that the drafters’ intent in fact appears in the text of a treaty. If not, one may read into any treaty intentions which are simply not there.

Nevertheless, it seems that Articles 31–33 may themselves require interpretation. For example, how does an enforcement court determine the exact object and purpose of the Convention? Or, when the Vienna Convention refers to “ordinary” meaning, is that understood to be the plain meaning? Article 31(3) refers to subsequent practice. Is it subsequent practice by courts only? Or also by authoritative institutions or bodies monitoring the Convention? For instance, do pronouncements of UNCITRAL or ICCA (International Council for Commercial Arbitration) have sufficient legitimacy to create subsequent practice? Courts are encouraged to treat conventions as dynamic instruments instead of static. If so, may enforcement courts adapt the Convention to current trade practices in a manner that over time becomes normative? Also, are the definitions


52. The Convention itself does not state its “purpose.” It is derived from its context, drafting history and judicial application to contribute to the effectiveness of international arbitration with a pro-enforcement attitude.
to be understood as found in the dictionary? Persons engaged in the same trade may develop their own glossary, which is both incomprehensible to outsiders and far removed from the concerns of lexicographers, however erudite.

Article 32 refers to supplementary means including the preparatory work of the treaty and circumstances of its conclusion. Is the list provided in Article 32 illustrative or limitative? Does Article 32 only encompass the drafting history of a treaty? What do “circumstances” mean? Preparatory works are problematic. Many proposed amendments, remarks, and suggestions are put forward by a multitude of delegates and may moreover not be properly recorded. There is often no means of ascertaining who (if anyone) was listening. If a proposed amendment by one delegation would not survive the voting at the Conference, one cannot interpret the delegates’ voting behavior such that the proposed amendment was rejected on principle. For example, delegates had suggested that tacit acceptance might be sufficient to establish consent to an agreement in writing. In fact, many delegates seemed to have reached consensus that tacit acceptance was an emerging phenomenon in international trade. The many remarks and suggestions were overshadowed by amendments pertaining to other textual issues; no explicit agreement or disagreement about tacit acceptance was reached. One cannot conclude a contrario that tacit acceptance was unanimously rejected by the Conference. One must, here as elsewhere, tread with care when seeking to derive instruction from the drafting history.

[B] Synergy of Vienna Sources

Article 31 allows for the context of the treaty, its text as a whole, to be taken into account. This may certainly refer to the other provisions of the treaty, and perhaps also to the environment in which the instrument emerged. This includes the treaty’s object and purpose, as they appear from primary elements such as the preamble,

53. Vienna Convention Art. 31:

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.
4. A special meaning shall be given to a term if it is established that the parties so intended.

An example of the \textit{textual} and \textit{contextual} use of words is the manner in which judges might determine whether the word “may” attributes an express discretionary power to enforcement courts. Some deem the ordinary meaning of the word “may” to confer a discretionary power, or compare the word “may” in Article V(1) to the use of the word “shall” in Article III and understand the distinction to be the product of a conscious choice. Others perceive the context of the word to be such that is confers very little discretion, if any.

The Vienna Convention does not identify object and purpose as independent elements. They are placed at the end of the first paragraph of Article 31, preceded by the words “and in the light of . . . ,” to stress that they must be looked at as a way of elucidating, not supplanting or correcting, the provisions of the treaty. Article 31(3) lists as further primary elements the subsequent agreements and subsequent practice. Max Huber long ago famously described his idea of the process of interpretation being one of \textit{encerclement progressif}:

\begin{quote}
The text is departed from only gradually, in concentric circles, proceeding from the central to the peripheral.\footnote{See Jimenez de Arechaga, ‘International Law in the past Third of a Century’, 159 \textit{Recueil des cours} 1 (1978) at 43. See also Gardiner at p. 141.}
\end{quote}

Article 32 identifies the drafting history as a secondary element of interpretation, but only to identify the meaning if the tools of Article 31 yield ambiguity.\footnote{Recourse 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 Art. 31, or to determine the meaning when the interpretation according to Art. 31:
\begin{itemize}
  \item leaves the meaning ambiguous or obscure; or
  \item leads to a result which is manifestly absurd or unreasonable.
\end{itemize}} Without ambiguity, its role is only to confirm a meaning consistent with Article 31. Accordingly, one cannot refer to the Convention’s drafting history to attribute a meaning to its provisions that does not follow from its wording, context, and purpose. For example, Article I(1) extends the scope to awards not considered as domestic. The drafting history is exceedingly complex, and suggests a variety of different possible propositions. Yet, since the text is clear – deference to the enforcement court regarding the concept of non-domestic awards – one cannot rely on that drafting history to establish a divergent meaning. The drawhorse cannot be shackled behind the carriage. The reason for the prevalence of the text was explained by the International Law Commission:\footnote{The International Law Commission was established by the United Nations General Assembly in 1947 for the purposes of the development of international law post-World War II. See http://legal.un.org/ilc/}
The text must be presumed to be an authentic expression of the intention of the parties; ... in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intention of the parties. 58

One is not allowed to pick and choose among the sources as may suit one’s fancy, or one’s preferred outcome. Nor can one cherry pick elements within a source. The temptation is great with legislative history, and perhaps even more so with judicial decisions rendered under the Convention.

Finally, the sources of treaty interpretation are not independent elements operating in isolation. A treaty is to serve as a living, breathing instrument rather than an inert tablet of commandments.

Article 33: Interpretation of Treaties Authenticated in Two or More Languages

The Convention was prepared in five official languages. They are equally authentic. 59 Three were also working languages: English, French and Spanish. 60 The meetings at the Conference establishing the New York Convention were originally recorded in English. 61 To say that texts are equally authentic is, of course, no assurance that all will agree that they mean the same thing. The Vienna Convention responds to this


This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.


Rule 32: ... English, French and Spanish shall be the working languages.
Rule 33: Speeches made in any of the working languages shall be interpreted into the other two working languages.
Rule 34: Speeches made in either of the other two official languages shall be interpreted into the three working languages.
Rule 35: Any representative may make a speech in a language other than the official languages. In this case he shall himself provide for interpretation into one of the working languages. Interpretation into the other working languages by the interpreters of the Secretariat may be based on the interpretation given in the first working language.

61. Ibid., at Art. VII (“Records”) provides:

Rule 36: Summary records of the plenary meetings of the Conference and of the meetings of its committees shall be kept by the Secretariat in the working languages. They shall be sent as soon as possible to all representatives who shall inform the Secretariat within three working days after the circulation of the summary record of any changes they wish to have made.
complexity in Article 33.\(^{62}\) First, there is a presumption of identical meaning of the texts. Second, if the different languages disclose a meaning that cannot be reconciled by following Articles 31 and 32, the meaning that best fits the purpose of the treaty is to prevail (Article 33(4)). The unity of the Convention is thus, at least aspirationally, safeguarded.

[D] **Statutory Interpretation versus Treaty Interpretation**

The essence of the Convention could get lost in implementation. If courts apply the act implementing the Convention as a matter of national law, they should in principle follow municipal rules of statutory interpretation. When the courts apply what has been enacted rather than the Convention itself, they naturally rely on the parliamentary history of the national statute rather than the Convention’s drafting history – and in so doing have no reason to resort to an interpretation on the basis of the Vienna Convention. What, then, is the instructive value of the Vienna Convention?

In reality, courts do look to foreign judgments that interpret the Convention. Jurisprudence is the subsequent practice of the Convention in the international space. Further, national courts often rely on the perception of the purpose of the Convention – a teleological approach that forms part of the Vienna Convention’s taxonomy. That notion of a pro-enforcement attitude has overridden the formal requirement of statutory interpretation in practice. Admittedly, one can never presume to know how judges come to their ultimate decision and how they interpret a legal text. Whether statutory or treaty interpretation is followed, the outcomes seem to converge in the prism of a purposive approach. That, one might say, is the hallmark of a successful treaty.

In June 2008, UNCITRAL’s Secretariat published a Report on the Survey relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).\(^{63}\) Paragraphs 8–25 contain information on the ratification of, and accession to the Convention and its implementation in domestic legislation:

62. Article 33 of the Vienna Convention reads as follows:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

For a vast majority of States, the Convention was considered as “self-executing,” “directly applicable,” and becoming a party to it put the Convention and all of its obligations in action. For a number of other States, the adoption of an implementing legislation was required for the Convention to gain force of law in their internal legal order.  

A liberal or broader implementation of the Convention is in line with its purpose to provide a baseline of obligatory enforcement of arbitration agreements and awards. Statutory application of the implementing act does not pose any problem, because the Convention enables parties expressly to rely on a more favorable domestic act, which includes implementing acts having become part of the national legal order (Article VII(1)). The drafters’ intent seems to be respected when a text is adapted in response to new trade practices; indeed, that was the reason for the drafters to depart from the Geneva Convention of 1927. Otherwise, the reasons for preferring treaty interpretation over statutory interpretation are twofold: (1) alignment with the Convention’s text and essence when the actual implementation might narrow or alter that text and essence, and (2) treaty interpretation on the basis that the Vienna Rules promote the harmonization of judicial application. In practice, the issue might be less problematic than it seems in theory. First, most countries do not adhere to a purely dualist system. Some dualistic countries do recognize the superiority of international law but simply wish to protect its judiciary from having to apply both international law and national law. Second, many Contracting States have implemented the text of Convention ad verbatim. A court may therefore instinctively and implicitly resort to the primary elements of the Convention: the text, the structure, the purpose as derived therefrom and subsequent practice. As the primary elements take precedence, the application of the implemented text will produce the same results as an application of the Convention itself. And even if a treaty is translated into an implementing act and a court is to apply the latter, a court should “remain mindful that it is in the nature of a contract between nations to which [g]eneral rules of construction apply.”

Australia, for example, has implemented the Convention to give effect to Australia’s obligation under the treaty as a matter of a domestic statute, but nevertheless recognizes international judicial application as a legitimate source under certain conditions.

64. UNCITRAL Survey 2008, ¶¶ 9-11.
66. Australia, Supreme Court of Victoria, Commercial and Equity Division, Commercial Court, Jan. 28, 2011 and Feb. 3, 2011 (*Altain Khuder LLC v. IMC Mining Inc, et al.*) and Supreme Court of Victoria, Court of Appeal, Aug. 22, 2011 (*IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*), in Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35), at 242-51, ¶ 37: Ultimately, this Court is required to construe an Australian statute. That process must be performed in accordance with established principles of Australian statutory interpretation. International case law may be useful and instructive, but it cannot supersede the words used in
Australian courts do recognize the difficulty of adopting an unbound pro-enforcement attitude in the national sphere:

It would be inappropriate, however, for this Court to give to a provision of the [implementing] Act a meaning which is not supported by the words used by the Parliament, construed in accordance with conventional principles of statutory interpretation, for the purpose of giving effect to the pro-enforcement policy.\(^67\)

Enforcement courts deal with the reality of having to apply the act on the basis of statutory interpretation. The US Court of Appeals for the Second Circuit applied the rules of statutory interpretation for interpreting section 202 of the Federal Arbitration Act (the “FAA”), which implements Article II(2) of the Convention, to determine whether the phrasing – “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams” – implied that the arbitral clause had to be signed. With respect to the manner of interpreting that provision, it reasoned that:

Treaties are construed in much the same manner as statutes. Statutory construction is a holistic endeavour and must account for the statute’s full text, language as well as punctuation, structure and subject matter.\(^68\)

[E] Appraisal: Purposive Approach for Harmonization through Treaty Interpretation

The Vienna rules may be put to use as follows in the specific context of the Convention, with a simplified breakdown of triggers to assist uniform judicial interpretation, each being an alternative if the previous one is inconclusive.

1. A textual and structural interpretation taking into account its object and purpose (Article 31(1) Vienna Convention):
   (a) The text itself;
   (b) Legislative history to determine the object and purpose;

2. The context based on agreements and instruments of interpretation at the time of conclusion (Article 31(2) Vienna Convention):
   (a) The Final Act;
   (b) Mission Statement;

3. The context based on later agreements (Article 31(3)(a) Vienna Convention):
   (a) UNCITRAL recommendations on Article II;
   (b) UNCITRAL recommendations on Article VII(1);

4. Subsequent practice (Article 31(3)(b) Vienna Convention):
   (a) Judicial decisions;

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67. Ibid., at ¶ 129.
(5) Special meaning based on the drafters’ intent (Article 31(4) Vienna Convention):
   (a) Legislative history;
(6) Unresolved ambiguities and unreasonable outcomes under (1)-(4) (Article 32 Vienna Convention):
   (a) Legislative history.

Figure 2.1 Treaty Interpretation: Snail Figure

In applying the above, the Convention is well served by a purposive approach imbued with common sense. The Convention’s purpose is to facilitate the recognition and enforcement of agreements and awards. A formalistic approach is sterile and does not address the fact that the drafters could not anticipate issues that have surfaced since 1958. Many matters they considered to be problematic have never arisen, whereas others, which they deemed harmless, have caused no little havoc.

The extent to which enforcement courts may usefully adopt a functionalist approach must be determined from case to case. The drafters intended to create a minimum regime for facilitating enforcement, with proper deference to national law. If the text of the Convention is clear but strict application of the ordinary meaning would result in an unreasonable outcome, the use of that purposive approach would enable the enforcement court to decide reasonably.69 Enforcement courts have, effectively, adopted a pragmatic and functionalist approach in order to apprehend the wording of

GOOD FAITH

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69. For the application of a purposive approach, see ibid., at ¶¶ 8-9: “One purpose of the Convention is to unify the standards under which international agreements to arbitrate are observed.”

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the Convention so that its ordinary meaning conforms to the reasonable and legitimate expectation of actors in international trade.

§2.06 ACTIONS FOR NON-COMPLIANCE WITH THE CONVENTION

Treaty compliance is the essence of international law. Breaching the Convention is relevant at the international level only. It is a matter between States. A breach of the Convention as a whole or of its provisions can be quadruple: (1) States either neglect the Convention or their implementation is flawed; (2) States fail to make their national laws compliant with the Convention; (3) their organs, the courts, misinterpret the provisions of the Convention; and (4) the courts deny the rights parties have under the Convention by unacceptable delay in deciding requests for enforcement.

As for the first two types of breach, Contracting States that sign and ratify the Convention have the responsibility to ensure the compliance of past and future laws with the Convention. A Contracting State is bound by the Convention and is to apply the Convention on the basis of good faith. It may not invoke its national laws as a justification for breaching the essence and provisions of the Convention.

The determination of a time limit for states to implement and make national laws compliant is a matter of some complexity. One would expect that the notion of reasonableness applies. For example, the Norwegian delegate pointed out that his country’s legislator did not authorize the enforcement of foreign awards at the time of the drafting of the Convention. Adherence by Norway required legislative action. Once the executive has committed to a treaty, the legislator is to implement the Convention if that is necessary for it to operate in its internal legal order. That implementation must ensure full compliance with the Convention. Many States do not and cannot sign a treaty if it would mean a disruptive alteration of their national laws. A joint attempt is then made to rephrase the wording of a treaty for it to become acceptable to the greatest number of States. The text of a treaty may therefore be less than ideal – or indeed a disagreement reduced to writing – but at least it can correspond to reality.

70. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the fourth meeting, at 8, U.N. Doc. E/Conf.26/SR.4 (Sep. 12, 1958) (comments of Mr. Koral (Turkey)).
72. Vienna Convention Art. 27.
73. As discussed, the 1969 Vienna Convention’s articles on treaty compliance are not per se to the 1958 Convention. It depends as to whether one could assert that a provision is a codification of customary law. Furthermore, one must verify whether the Vienna Convention is applicable in the State where it is relied upon. Article 17 provides when a State has consented to being bound by a treaty. After that consent, a State may not do anything that defeats the purpose of the treaty until that treaty enters into force (Art. 18). Article 24 provides the rules as to when a treaty enters into force. If parties so agree, there might be some time for a State to take the necessary measures before the treaty enters into force. No such arrangements were made for the Convention.
Breaches of the Convention may be avoided by applying the principle of the later in time rule (lex posterior derogat legi priori). After implementation, the Convention is part of the national legal order. Earlier national laws conflicting with that implementing act are thus superseded. Subsequent conflicting national statutes bind the national courts but provide no defence to a claim of breach of the treaty obligation. As we shall see next, these are not simple matters.

[A] No Dispute Resolution Clause in the Convention

Modern international contracts contain forum clauses (which identify the jurisdiction that will be competent to resolve disputes in a binding manner). Since treaties may be viewed as bargains intended to create rights and obligations that are, like contracts, expressed in ways and applied in circumstances that may give rise to disputes, one might expect them too to contain forum clauses. Indeed some do, but many do not, and the Convention is one of the latter category – as ironic as it may seem with respect to an instrument whose raison d’etre is the allocation of competence to resolve disputes. The ECOSOC Draft contained a dispute resolution clause in the following terms:

Any dispute which may arise between any two or more Contracting States concerning the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any one of the parties to the dispute be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.\(^{75}\)

The Russian delegate opposed the adoption of this dispute resolution clause because, so he said, it would affect the principle of sovereignty and would be contrary to the principle of voluntary recognition of the binding character of the jurisdiction of the International Court of Justice (hereinafter the “ICJ”).\(^{76}\)

Other views on the dispute resolution clause were also expressed. The Polish delegate argued that the wording of the clause went beyond Article 36 of the ICJ Statute, which provides for voluntary acceptance of the jurisdiction of the Court. He also therefore deemed mandatory submission to the ICJ to be contrary to the concept of sovereignty.\(^{77}\) The US delegate stressed, to the contrary, that absent such a clause there would be no assurance that a dispute could be finally resolved.\(^{78}\) Similarly, the Swiss delegate pointed out that this clause would ensure the final settlement of any

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76. Ibid., at 16–17.
disputes that might arise concerning the interpretation or application of the Convention.\footnote{79. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the twenty-first meeting, at 6, U.N. Doc. E/Conf.26/SR.21 (Sep. 12, 1958) (comments of Mr. Pointet (Switzerland)).} But the East bloc prevailed, and so the contracting States entered into a bargain with no direct agreed means of resolving complaints about performance under the treaty.

It should be observed that even without a provision to this effect, the ICJ may, by virtue of Article 36(1)\footnote{80. Article 36(1) provides that “the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.”} have jurisdiction over a dispute between Contracting States concerning the interpretation of the Convention. Its jurisdiction is, however, dependent on the consent of the Contracting States concerned to submit the dispute to the Court, unless a State has, in accordance with Article 36(2)\footnote{81. Article 36(2) provides that “the State parties to the present Statute may at any time declare that they recognize as compulsory \textit{ipso facto} and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes ....”} declared that it recognizes as the jurisdiction of the Court compulsory \textit{ipso facto} and without special agreement, with any other State accepting the same obligation. Article 36(2)(a) mentions specifically the interpretation of a treaty.\footnote{82. Article 36(2)(a) provides that “the State parties to the present Statute may at any time declare that they recognize as compulsory \textit{ipso facto} and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning (a) the interpretation of a treaty.”} Disagreements about the interpretation of the Convention to date have even led to the consideration of a new treaty on the occasion of ICCA’s celebration of the Convention’s fiftieth anniversary.\footnote{83. International Council for Commercial Arbitration (ICCA), ICCA Dublin 2008, available at http://www.arbitration-icca.org/conferences-and-congresses/ICCA_Dublin_2008.html.}

The reality is that the unification of interpretation of the Convention depends on the courts of the Contracting States. Sanctioning Contracting States for other breaches, such as implementation flaws or defaulting organs, is to be resolved outside the realm of the Convention.

The explanation for this lacuna is, on the one hand, the inherent difficulty of obtaining adhesion to a specific choice of forum and, on the other hand, a tacit diplomatic consensus to proceed on the questionable premise that most Contracting States adhere to their obligations under the treaties. In cases where Contracting States or their organs fail to live up to the treaty undertakings, one must therefore investigate other possible bases for redress.

\section*{B Overriding Notion of Good Faith}

Even though there is no dispute resolution clause in the Convention, one expects compliance under the \textit{pacta sunt servanda} doctrine. Contracting States have the obligation to ensure that courts apply the Convention, and it is presumptively in their self-interest to comply; why else would they become parties to the treaty? Non-complying States suffer adverse consequences because other states will be reluctant to
cooperate with them in the future. The virtue of international law is derived from the desire of States to comply for two reasons: (1) self-interest to do so, and (2) expecting other states to see their interest in the same way — quid pro quo. That incentive to comply is part of the essence of treaty making and treaty compliance. A treaty is a voluntary engagement between states. Its foundation is trust, or at least trust in the effects of enlightened self-interest.

No supranational legislative body exists that imposes international law upon States. Treaty compliance would be more widespread if treaties were more precise and formal, and if more power were given to institutions charged with the task of monitoring compliance and resolving disputes. Yet, that ideal type of treaty compliance and drafting does not reflect the reality of fragmented notions of sovereignty. Grade-A drafting must give way to more acceptable compromise solutions.

But in the end, if States do not find it in their interest to abide by the Convention, they will not ensure that their courts are properly directed, by law, to give it effect. As we shall now see, however, a new mechanism has emerged that has the potential to alter the equation of interest in favor of compliance.

[C] Sanctions Outside the Realm of the Convention: Claims of Denial of Justice under Treaties or National Laws on the Protection of Foreign Investment

In *International Arbitration: Three Salient Problems*, Judge Stephen Schwebel, the former President of the ICJ, devoted lengthy and documented analysis to what he called “denial of justice by governmental negation of arbitration.” Although Schwebel was focusing on a State’s negation of its own promise to arbitrate, denial of justice may be said to occur whenever there is any willful judicial refusal to adjudicate claims for the enforcement of arbitral agreements or awards. In other words, refusal to comply with the Convention may, broadly, constitute a denial of justice.

In modern practice, disputants have found a way to overcome the absence of a forum clause in the Convention by invoking rights under multilateral or bilateral investment-protection treaties, which do have effective forum clauses. In this way, expectations of the reliability of the Convention may be enlivened by the claim of entitlement to be able to rely on international law as manifested in the Convention.

86. Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the sixth meeting, at 12, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Herment (Belgium)) Mr. Herment suggested that criteria in the text should be “adaptable to the different systems and for countries to trust one another for the enforcement of foreign awards.”
88. This was the title of Part II of his book: *Cambridge: Grotius* (1987).
The international wrong committed by a failure to live up to the undertakings of the Convention may be said to breach various provisions of investment treaties, such as, to take them in decreasing order of conceptual straightforwardness: the requirement to treat investments in accordance with international law (of which the Convention is a part); the obligation to afford foreign investors fair and equitable treatment (which notably includes the duty to avoid denials of justice); the specific undertaking to provide effective means to secure one’s rights; or indeed the prohibition of confiscatory expropriations.

For example, in White Industries v. India, the claimant had prevailed in an ICC commercial arbitration conducted in Paris against Coal India (a state-owned entity) only to have its attempts to enforce the award frustrated by nine years of inconclusive procedural wrangling and delays in the Indian courts. White Industries then brought arbitration against the State of India under the Australian/Indian BIT. The arbitrators were not convinced that a nine-year delay in dealing with Coal India’s applications for annulment of the award was sufficient, but “had no difficulty” in concluding that India had breached its obligations to provide “effective means of asserting claims and enforcing rights” with respect to another controversy, namely White Industries’ assertion that the Indian courts had no jurisdiction to hear an application to set aside an award that had been rendered in Paris. That this important matter of purely legal principle could not have been dealt with in over nine years, five of which before the Supreme Court notwithstanding its own order for “expedited” hearings which remained over the years on the Court’s weekly list, was unacceptable; having examined the record and finding that the enforcement of the award could not be resisted under the Convention, the arbitrators ordered India to pay an amount in principal and interest which would put White Industries in the same position as if the ICC award had been enforced.

One cannot, however, conclude that any failures by national courts to abide by their States’ obligations under the Convention may, as a rule, be corrected by investment treaties. Such instruments have specific jurisdictional requirements, and if, for example, claimants cannot demonstrate that they qualify as investors under the relevant treaty, or that their interests constitute or arise out of investments, they will not be entitled to a decision as to the illicitness of the State’s application of the Convention.

89. See, e.g., Pantechnika v. Albania.
90. See, e.g., White Industries Australia Ltd. v. India; Chevron/Texaco v. Ecuador.
91. See, e.g., Saipem v. Bangladesh.
93. See, e.g., White Industries Australia Ltd. v. India.
However, it would be wrong to dismiss the authority of investment tribunals to sanction failures to respect the Convention on the grounds that the delict of denial of justice requires something more than a mere error of law (as some commentators suggest). While it is true that the mere misapplication of national law does not generate a denial of justice, the same is not true with respect to specific rights created by international law. So even if the misapplication of a national act implementing the Convention could not give rise to a denial of justice in the absence of an egregious failure of due process, a “plain-vanilla” failure to respect the substantive terms of the Convention could, in principle, entitle the investment tribunal to find State responsibility as long as the relevant treaty is authorized to sanction non-compliance with international law.

While specific issues may be controversial, the general proposition that investment tribunals may protect the destruction of investors’ enjoyment of rights under international law, and that this includes the frustration of rights under the Convention, does not seem unwarranted. The connection between the protection of investments and upholding international entitlement to reliance on the arbitral mechanism seem undeniable:

Once an investment is established, it continues to exist and be protected until its ultimate disposal has been completed.

§2.07 APPRAISAL: CHARming BETSY

Courts are bound in principle to ensure that their State’s international responsibility under the Convention are fulfilled, notably the obligations laid down in Articles II and III. Their task is to apply the Convention correctly and loyally. Some Contracting States have failed to comply with that international obligation by not ensuring the Convention’s reception into the national legal order. Others have done so, but incorrectly. The

94. Jan Paulsson, Denial of Justice in International Law Ch. 4 (2005).
role of the enforcement court thus remains vital. It can still prevent its government from breaching its international obligations by interpreting the implementing act to operate coherently with the Convention, or even by deeming the Convention to be self-executing.

Courts can apply what I call the Charming Betsy rule and presume that their government and legislature have complied with international obligations rather than violating them. In the case that gave the rule its name, the historic figure of Chief Justice Marshall of the US Supreme Court affirmed that:

An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.\(^{97}\)

The court assumes that the legislator is presumed to legislate consistent with international law. They interpret statutes such to avoid violations of international obligations. Justice Breyer has written:

\[\text{To avoid unreasonable interference with the legitimate interests of other sovereigns. This rule of construction reflects principles of customary international law} \]

\[\text{that (we must assume) Congress ordinarily seeks to follow.}^ {98}\]

The Canadian courts equally recognize the “well-established principle of statutory interpretation” that legislation will be presumed to conform to international law:

The presumption of conformity is based on the rule of judicial policy, that as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. [T]he legislature is presumed to act in compliance with Canada’s obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The presumption applies equally to customary international law and treaty obligations.\(^{99}\)

An UNCITRAL Survey published in 2008\(^ {100}\) acknowledges a presumption of such an influence of the Charming Betsy rule:

\(^{97}\). Murray v. Schooner Charming Betsy, 6 (2 Cranch) 64, 118 (1804). The Charming Betsy rule stands for the proposition that a parliamentary act should never be construed to violate the law of nations (i.e., international law as most prominently reflected in treaties). The case involved the seizure of cargo on a schooner, said to be traded in violation of an Act of 1800 prohibiting commercial intercourse between the United States and France. Chief Justice Marshall rejected the seizure as contrary to international laws of salvage, thereby creating a precedent for the notion that international law may be effective in the interstices of American law by creating a presumption of legislative intent to abide by the former.


\(^{100}\). UNCITRAL conducted a survey amongst the Convention’s parties in order to monitor the implementation and judicial application of the Convention. See http://www.uncitral.org/uncitrал/en/uncitral_texts/arbitration/NYConvention_implementation.html. The purpose of this survey was to determine whether any further action would be required to increase the Convention’s application.
It was assumed that the legislator intended to fulfil rather than break an international agreement so, in cases of doubt as to the meaning of the implementing legislation, the court will, if possible, resolve it in a manner which is consistent with the international agreement.101

The *Charming Betsy* rule thus enables courts to align the Convention with its national enactments and thus contribute to the harmonization of the application of the Convention in all 156 Contracting States.
