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Hollow Spaces

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INTRODUCTION

Restatements entail magisterial achievements, in which every word receives and survives scrutiny by “thousands[] of . . . adept juridical eyes.”¹ Heavy tomes set forth the law exhaustively and with painstaking attention to detail.² In the end, they project a weight of authority that almost defies criticism.³ Even at the milestone known as Tentative Draft No. 2 of the Restatement of the U.S. Law of International Commercial Arbitration (Draft Restatement),⁴ dozens of sections and hundreds of pages embody a formidable distillation of wisdom.⁵

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1. Richard A. Falk, *Conceptual Foundations*, 14 YALE J. INT’L L. 439, 440 (1989).

2. *Id.* at 439.

3. *Id.*

4. For a description of the evolution of Restatements from Preliminary Drafts, to Council Drafts, to Tentative Drafts and Official Drafts, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES XI (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS].

5. See RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION (Tentative Draft No. 2, 2012) [hereinafter DRAFT RESTATEMENT (Tentative Draft No. 2)] (encompassing more than three dozen sections and 400 pages of text).

To remain credible at this stage, criticism must aim not at the hardened shells of the surviving words, but at the hollow spaces left by omissions that raise doubts about structural integrity. Building on the concepts of hollow spaces and things left undone, this article explores the failure to adopt an explicit standard for managing the central challenge posed by *U.S.* Restatements on *international* topics, namely the charting of a deliberate course among domestic, foreign, and global sources in the elaboration of international law.⁶ To that end, Part I elaborates the unusual challenges faced by this genre of Restatements.⁷

Next, Part II reviews American Law Institute (ALI) practice, documenting the importance of drafting standards in the context of two Restatements on Foreign Relations. In so doing, Part II.A describes how the Restatement (Second) of Foreign Relations successfully used a drafting standard to emphasize global perspectives.⁸ By contrast, Part II.B describes the neglect of drafting standards in the Restatement (Third) of Foreign Relations, as well as the unfortunate consequences.⁹

Building on the lessons to be drawn from Part II, Part III proposes a drafting standard for the Restatement on International Commercial Arbitration that reflects a more domestic orientation. In so doing, Part III.A illustrates how *any* drafting standard could have been more effective in bringing protagonists to equilibrium on controversial topics,

6. See George A. Bermann, *Restating the U.S. Law of International Commercial Arbitration*, 42 N.Y.U. J. INT'L L. & POL. 175, 182 (2009) [hereinafter Bermann (N.Y.U.)] (explaining that "there exists an entire overlay of challenges that are traceable specifically to the *international* character of the subject undergoing restatement," including the question of "how conscious should one be, in restating the U.S. law of an international subject, of the legal principles and practices within other jurisdictions?"); George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 PENN. ST. L. REV. 1333, 1336 (2009) [hereinafter Bermann et al. (PENN. ST.)] ("[T]here are . . . separate questions about the role of foreign and international decisions in a restatement of U.S. law.")

7. See *infra* notes 18-31 and accompanying text.

8. See *infra* notes 32-42 and accompanying text.

9. See *infra* notes 43-58 and accompanying text.

such as the legal status of interim measures.¹⁰ Part III.B, in turn, explains why a *domestic* orientation seems consistent with views expressed in the reporters' academic writings.¹¹ It also explains why an emphasis on domestic perspectives seems likely to enhance the Draft Restatement's public reception outside the charmed circle of international arbitration specialists.¹²

Adding granularity, Part IV refines the proposed drafting standard to encompass the rules that the United States Supreme Court would apply if charged with deciding a controversy in the field of international commercial arbitration. In so doing, Part IV examines the Court's role both in limiting the reporters' discretion on reasonably settled issues and in guiding their consideration of unresolved issues.¹³ With respect to the last point, it explains how the reporters could avoid the perils of speculation and vote-counting by focusing on the Court's jurisprudence regarding the predicate issues of treaty and statutory interpretation.¹⁴

Next, using the *forum non conveniens* doctrine, Part V illustrates the proper application of Supreme Court jurisprudence to the interpretation of relevant treaties, such as the New York Convention.¹⁵ Finally, using the Draft Restatement's fusion of the grounds for vacating U.S. Convention awards with the grounds for refusing to enforce Convention awards,¹⁶ Part VI illustrates the proper application of Supreme Court jurisprudence to

10. See *infra* notes 61-85 and accompanying text.

11. See *infra* notes 86-87 and accompanying text.

12. See *infra* notes 90-92 and accompanying text.

13. See *infra* notes 111-22 and accompanying text.

14. See *infra* notes 121-22 and accompanying text.

15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; see also *infra* notes 125-287 and accompanying text.

16. Consistent with the Draft Restatement, this article defines a "U.S. Convention award" as "an international arbitral award rendered in the United States that arises out of a legal relationship" that possesses "some . . . reasonable relation with one or more foreign States." DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1(i).

interpretation of relevant statutes, such as the Federal Arbitration Act (FAA).¹⁷ Whereas the analysis in Part III.B tends to emphasize what the reporters have done right in the Draft Restatement, Parts V and VI tend to identify where they have gone wrong and where drafting standards could have kept them on track.

I. CHALLENGES

Any Restatement calls on its drafters to sift through a mass of judicial decisions and other sources of law, to distill and reconcile those sources,¹⁸ and sometimes to bend the path of the law to avoid the perils of obsolescence and injustice.¹⁹ As mentioned above, U.S. Restatements on

17. 9 U.S.C. §§ 1-307 (2006); *see also infra* notes 288-405 and accompanying text.

18. Restatements have never aspired to be mere digests that simply record “hundreds” of decisions. *See The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 AM. SOC’Y INT’L L. PROC. 180, 189 (1987) [hereinafter 81 AM. SOC’Y INT’L L. PROC.] (remarks by Monroe Leigh); *see also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at XI (1965) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS] (“The Restatement of Foreign Relations Law does not purport to be a digest, the need for which is admirably met by Hackworth’s Digest of International Law, ably supplemented by Whiteman’s Digest.”); Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL’Y 2, 4 (2000) (emphasizing that “a Restatement is more than a digest of existing cases.”). To the contrary, Restatements have always sought to streamline inquiry by distilling a growing body of primary sources into clear statements that capture the essence of the law. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 633 (1995); 81 AM. SOC’Y INT’L L. PROC., *supra* at 189 (remarks by Monroe Leigh); *see also* Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 146 (2007) [hereinafter Traynor, *The First Restatements*] (observing that Restatements have “made significant contributions to unifying as well as simplifying and clarifying the law”). Pursuit of these goals contemplates a process of sifting, distilling, and reconciling sources.

19. In addition to seeking “clarification and simplification of the law,” the ALI’s mission includes “better adaptation [of the law] to social needs,” as well as pursuit of “the better administration of justice.” AMERICAN LAW INSTITUTE, CERTIFICATE OF INCORPORATION 1 (1923), <http://www.ali.org/doc/charter.pdf>. Thus, “[w]hile Restatements of the law seek chiefly to clarify and consolidate the law, they may also afford an occasion for some significant reshaping of the law in one aspect or another.” Bermann (N.Y.U.), *supra* note 6, at 191.

international topics pose the additional challenge of charting a course among domestic, foreign, and global perspectives in the elaboration of international law.²⁰ To the extent that they operate in fields regularly traversed by the Supreme Court,²¹ the drafters of such Restatements also face unusually high stakes. While the drafters of Restatements on traditional, state law topics (such as contracts, property, and torts) may claim success if their work finds purchase in a handful of jurisdictions,²² the drafters of Restatements on international topics (typically regulated by federal statutes, treaties, or customary international law)²³ labor in a context where a single Supreme Court judgment can result in total vindication or total defeat of their work on any particular topic.²⁴ Assuming risk to be a function of the probability and

20. See *supra* note 6 and accompanying text.

21. See Bermann (N.Y.U.), *supra* note 6, at 195 (observing that the Draft Restatement “proceeds on terrain on which the Supreme Court has been keeping remarkably busy . . .”).

22. See *id.* at 192 (discussing traditional Restatement topics that were governed by state law and observing that “while the courts of State A could not be expected to follow a Restatement provision that conflicts with the enacted legislation of that State, the same Restatement provision could nevertheless be influential in States B and C . . .”).

23. See *id.* at 193-96 (explaining the dominant role of federal statutes and treaties in shaping the U.S. law of international commercial arbitration). Of course, federal statutes, treaties, and customary international law all represent federal law, subject to conclusive determination by the Supreme Court for purposes of U.S. law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 111(1) (“International law and international agreements . . . are law of the United States and supreme over the law of the several States.”); *id.* § 111 cmt. e (“Customary international law, like other federal law, is part of the ‘laws . . . of the United States.’”); *id.* § 112(2) (“The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States.”).

24. Cf. Bermann (NYU), *supra* note 6, at 196-97 (“[I]t is one thing for the ALI to develop a Restatement in a purely common law field, or in one populated by few and scattered pieces of state or federal legislation—and quite another thing to do so where not only a broad federal statute, but more important multilateral and bilateral international conventions dominate the field.”).

anticipated magnitude of a loss,²⁵ U.S. Restatements on international topics thus involve unusual perils that one can mitigate only through the development and exercise of appropriate precautions,²⁶ including the discipline of drafting standards.

In facing the unique challenges just described, the reporters for the Draft Restatement must contend with at least two complicating factors. First, the project lacks guidance in the sense that international commercial arbitration represents virgin territory for the American Law Institute (ALI).²⁷ Second, while the need for guidance may

25. See, e.g., *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999); Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677, 704 n.124 (1985).

26. Cf. Jordan H. Leibman & Anne S. Kelly, *Accountants' Liability to Third Parties for Negligent Misrepresentation: The Search for a New Limiting Principle*, 30 AM. BUS. L.J. 345, 410 (1992) ("Thus, . . . risk is a function of probability, magnitude, and precautions. The . . . risk increases with increases in probability and magnitude and decreases with precautions.").

27. Although referred to as the Draft Restatement (*Third*) of the U.S. Law of International Commercial Arbitration, this represents the ALI's *first* foray into the topic of international commercial arbitration. The explanation for this apparent discrepancy lies in the fact that the ALI has taken up the topic of international commercial arbitration in the context of the third generation in its series of Restatements. A similar discrepancy arose in the context of foreign relations law, where the ALI first addressed the topic in the second series of Restatements. See 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 180 (remarks by Harold G. Maier); see also Stephen C. McCaffrey, *The Restatement's Treatment of Sources and Evidence of International Law*, 25 INT'L LAW. 311, 312 n.5 (1991).

Unlike the drafters of the Restatement (Third) of International Commercial Arbitration, the drafters of the Restatement (Third) of Foreign Relations could at least take the Restatement (Second) of Foreign Relations as a starting point. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, at 3 (recognizing that the volume "stands on the shoulders of the previous Restatement"); *The Draft Restatement of the Foreign Relations Law of the United States (Revised)*, 76 AM. SOC'Y INT'L L. PROC. 184, 188 (1982) [hereinafter 76 AM. SOC'Y INT'L L. PROC.] (remarks by Louis Henkin) ("Let's be clear: We have stood on the shoulders of our predecessors."). Likewise, the drafters of the Restatement (Second) of Foreign Relations "were the beneficiaries of that great work, the *Harvard Research in International Law*," which some had regarded as the equivalent of a Restatement. See 76 AM. SOC'Y INT'L L. PROC., *supra* at 186 (remarks by Covey T. Oliver); see also THE AMERICAN LAW INSTITUTE, PROJECT FOR WORK IN THE FOREIGN RELATIONS LAW OF THE UNITED STATES 63-64 (1955) [hereinafter ALI FOREIGN RELATIONS PROJECT] (quoting Sir Arnold McNair) (describing the Harvard Research publications as "Restatements"). The drafters

be filled by roughly thirty advisors, who bring an amazing depth of expertise, that group largely represents the inner core of a small community of internationalists engaged in a financially lucrative business.²⁸ For a variety of reasons, their views may not track the perspectives of U.S. legislators and judges,²⁹ who have the last word in developing and applying the law.

of the Restatement on International Commercial Arbitration have no similar foundation for their work.

28. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, at v (listing thirty-three advisers, including twenty-one in private practice, three academics with substantial arbitration practices, two in-house counsel, and just two judges). One may objectively advance three propositions without casting doubts on the integrity of practitioners involved in the field. First, international arbitration represents an increasingly lucrative field of legal practice. See Martha Neil, *Small World, Big Business: International Arbitration Has Become a Lucrative Field After Decades of Disfavor*, 88 A.B.A. J., Sept. 2002, at 28, 28 (quoting one litigation partner for the proposition that the revenues generated for his firm by international arbitration had increased tenfold over five years). Beginning in the 1980s, large firms gravitated toward the field because the damage claims, often in the hundreds of millions of dollars, could support large fees incurred by large litigation teams. *Id.*; see also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 6 (1996) (“Over the past twenty-five to thirty years, international commercial arbitration has become big legal business” involving “huge international construction projects such as the tunnel under the English Channel . . .”).

Second, U.S. firms compete fiercely for a greater share of that business. See Robert W. Gordon, *Money! Power! Ambition Gone Awry!*, LEGAL AFF., Mar.-Apr. 2006, 26, 31 (“American lawyers were competing fiercely for a share of the increasingly lucrative business of international arbitration, formerly dominated by Europeans . . .”); Neil, *supra* at 28 (“[I]ncreasing numbers of American attorneys are vying with foreign counsel for this lucrative business . . .”).

Third, the international arbitration community represents an insular and elite group that, by professional necessity, takes on a cosmopolitan mindset. See DEZALAY & GARTH, *supra* at 8 (“The work . . . is a rather glamorous and . . . well-paid activity associated with nice places, like Paris or Geneva, and a first-class lifestyle. Only a very select and elite group of individuals is able to serve as international arbitrators. They are purportedly selected for their ‘virtue’—judgment, neutrality, expertise—yet rewarded as if they are participants in international deal-making.”).

29. When compared to specialists in international commercial arbitration, U.S. legislators and judges seem more likely to be generalists, less likely to be internationalists, and less likely to have direct financial interests in the popularity of the United States as a venue for international commercial

Given the challenges already mentioned and the need to produce a text that will command respect among stakeholders for the next generation,³⁰ the Draft Restatement would benefit from a conscious elaboration of principles used to select the respective emphasis on domestic, foreign, and global perspectives. In addition, that elaboration of principles would be particularly useful for topics where large differences among the three perspectives create opportunities for progressive development of the law.³¹ Part II develops this point in light of ALI practice that evolved in the context of two Restatements on Foreign Relations.

II. ALI PRACTICE

A. *Restatement (Second) of the Foreign Relations Law of the United States*

Turning to the question of ALI practice, one should begin by observing that the drafters of the ALI's first international project recognized the tensions between domestic and global perspectives, decided to emphasize the latter, and codified that choice in a drafting standard

arbitration. See *Restating the U.S. Law of International Commercial Arbitration*, 102 AM. SOC'Y INT'L L. PROC. 161, 165 (2008) (remarks by Judge Diane Wood) ("I want to begin with a caution: judges, at least U.S. federal judges, are generalists We draw broadly on arbitration decisions of the various courts in the United States whether they come from domestic or international commercial disputes, and in some instances even if they come from labor disputes"); see also Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 34 (2008) ("[M]embers of Congress are generalists who are usually not steeped in any of the fields that they regulate.").

30. One advantage of the ALI and its series of Restatements lies in the perceived capacity to formulate texts that have a "reasonable shelf life and that will be useful for a generation or more." Traynor, *The First Restatements*, *supra* note 18, at 164; see also Falk, *supra* note 1, at 441 (indicating that Restatements have a "useful life of one generation").

31. See *The Revised Draft Restatement of the Foreign Relations Law of the United States and Customary International Law*, 79 AM. SOC'Y INT'L L. PROC. 73, 73 (1985) [hereinafter 79 AM. SOC'Y INT'L L. PROC.] (remarks by Jack Goldklang, Dep't. of Justice) ("It is fair to begin by asking what philosophy underlies a work as significant as the *Restatement (Revised)*.").

formally approved by the ALI. Expanding on these points, as early as 1955, preliminary sketches for the Restatement (Second) on Foreign Relations recognized that the subject matter consisted of (1) international law and (2) domestic laws involving matters of substantial concern to foreign relations.³² Because the domestic branch was grounded in traditional sources and seemed “badly in need of restating,”³³ some participants favored it as the exclusive focus of the Restatement.³⁴ However, the view quickly prevailed that the Restatement’s value lay in its elaboration of topics in light of international law,³⁵ which had flickered but dimly in the awareness of protagonists in then recent debates about NATO and the United States’ peace treaty with Japan.³⁶

In other words, the drafters of the Restatement (Second) of Foreign Relations sought not just to record or forecast the views of U.S. decision-makers, but to change them by introducing the global perspectives embodied in international law. To that end, Council Draft No. 1 proposed the following standard in February 1957:

32. ALI FOREIGN RELATIONS PROJECT, *supra* note 27, at 2.

33. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 1 (Tentative Draft No. 1, 1957) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Tentative Draft No. 1)]; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 1 (Council Draft No. 1, 1957) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Council Draft No. 1)].

34. RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 33, at 1 (“Consideration was given to confining the proposed Restatement to the second portion of the field, the domestic legal aspects of foreign relations.”); RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Council Draft No. 1), *supra* note 33, at 1 (same); ALI FOREIGN RELATIONS PROJECT, *supra* note 27, at 3 (“On first consideration, it would appear that the most pressing need is for a study confined to the domestic aspects of foreign relations.”).

35. RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 33, at 1-2; RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Council Draft No. 1), *supra* note 33, at 1-2; ALI FOREIGN RELATIONS PROJECT, *supra* note 27, at 4.

36. ALI FOREIGN RELATIONS PROJECT, *supra* note 27, at 4-5; *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 33, at 2; RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Council Draft No. 1), *supra* note 33, at 2.

When the term "international law" is used in this proposed Restatement, to describe a rule, therefore, it is meant to express the views of the Reportorial staff, and later, it is hoped, the American Law Institute as to the rule which would be applied by *an international tribunal, such as the International Court of Justice* if the matter were to come before it.³⁷

Two months later, the ALI adopted this perspective as its official drafting standard, which endured through adoption of the final draft in 1965:

[T]he positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support. Thus the Restatement of this Subject, in stating the rules of international law, represents the opinion of The American Law Institute as to the rules that an *international tribunal* would apply if charged with deciding a controversy in accordance with international law.³⁸

To get a sense of how the adoption of global perspectives can affect legal analysis, one need only consider the views of a Justice Department lawyer familiar with the Restatement process:

We start by recognizing that there is a difference in how these questions are treated by domestic and by international tribunals. If state A were to argue with state B that a treaty is no longer in force because it has been superseded by customary law, one would look to the law of treaties for an answer and presumably try to guess how the International Court of Justice (ICJ) would rule on the question

Suppose a U.S. citizen argues in a U.S. court that a treaty is no longer in force because it has been superseded. The approach of a domestic court is far different. The court would listen for about four minutes and inquire as to whether the treaty is still

37. RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Council Draft No. 1), *supra* note 33, at 4 (emphasis added).

38. RESTATEMENT (SECOND) OF FOREIGN RELATIONS, *supra* note 18, at XII; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 33, at 4 ("When the term 'international law' is used in this Restatement to describe a rule, therefore, it is meant to express the rule which would be applied by an international tribunal, if the matter were to come before it . . .").

considered by the executive to be in force for the United States; if the answer is yes, that would settle the matter.³⁹

While the same lawyer criticized the adoption of global perspectives as likely to produce confusion about the likely outcome of litigation in U.S. courts,⁴⁰ experience demonstrated the value of adopting a single normative starting point for consideration of all provisions. According to Monroe Leigh, a member of the advisory committee from 1958 to 1965,⁴¹ the existence of a “definite standard throughout [the] formulation” of the Restatement represented an “extremely important” contribution because it meant that reporters and ALI members were “constantly testing” provisions against a fixed yardstick, which brought focus, consistency, and discipline to the drafting process.⁴²

B. *Restatement (Third) of the Foreign Relations Law of the United States*

As a counterpoint, one may refer to the drafting of the Restatement (Third) of Foreign Relations, which began in 1977⁴³ and continued for several years without any formal

39. 79 AM. SOC'Y INT'L L. PROC., *supra* note 31, at 76 (Goldklang Remarks); *cf.* Sebastian Perry, *A Man with Many Hats*, GLOBAL ARB. REV., May 10, 2012, at 28, 30 [hereinafter Perry, *A Man with Many Hats*] (quoting George Bermann) (“At the same time as doing the restatement, I’ve been working with Emmanuel Gaillard under the auspices of UNCITRAL to compose an article-by-article guide to the New York Convention. So at the same time I’m striving to arrive at an authoritative view of the convention before US courts, I’m trying to formulate a best ‘international’ interpretation of the same instrument. There are several issues on which the two perspectives are substantially at variance . . .”).

40. *See* 79 AM. SOC'Y INT'L L. PROC., *supra* note 31, at 77 (Goldklang Remarks) (“The answers [likely to be provided by U.S. courts] are clear. We ought to be able find them in the new *Restatement*, not the confusion that now exists.”).

41. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at v (Tentative Draft No. 2, 1958) (listing members of the advisory committee); RESTATEMENT (SECOND) OF FOREIGN RELATIONS, *supra* note 18, at iv (same).

42. 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 190-91 (remarks by Monroe Leigh).

43. THE AMERICAN LAW INSTITUTE, PROPOSED REVISION AND EXPANSION OF THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1977).

drafting standard at all.⁴⁴ During that time, the project took a number of unexpected turns, including a sharp reduction

44. See 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 190-91 (remarks by Monroe Leigh) (observing that early drafts "contain no comparable statement of a standard."). During the ALI's annual meeting in 1982, Leigh pressed the chief reporter, Louis Henkin, for an articulation of the normative standard underlying work on the Restatement:

MR. MONROE LEIGH (D.C.): Mr. Chairman, my observations are really to elicit from the Reporter a statement of what it is we consider foreign relations law of the United States to be. This applies generally to everything we do in this Restatement

I understand that the standard in the old Restatement was that what we put in black letter and elsewhere in fact in the Commentary and in the Reporters' Notes constituted the judgment of the Institute . . . as to how an international tribunal—not just the International Court of Justice, but an international tribunal—would rule on the issue. So, my first question is: Am I right in assuming that continues to be one aspect of what we are doing here?

PROFESSOR HENKIN: Yes.

59 A.L.I. PROC. 188, 201 (1982). However, later at the same meeting, one of the associate reporters noted the existence of "different views about what the Restatement ought to do":

PROFESSOR VAGTS: . . . Our primary lodestar was correctly stated by Mr. Monroe Leigh and that is an attempt to predict what an international tribunal would decide. We are urged to state and we try to reflect what the Institute would think would be the best rule. When this discussion came up in 1961, Mr. Buchanan said that we should raise the standard to which a wise and honest nation would repair. And that is certainly a worthy objective. Third, the Restatement should guide or at least not mislead judges and practitioners as to what is happening there, rather inconsistent with the first. Fourth, the Restatement should be part of a dialogue with foreign lawyers, foreign courts, and foreign authorities, an attempt with reasonable, persuasive arguments to have them recognize and understand our positions. Fifth, it is urged upon us that we should parallel State Department policy, and we have been criticized for doing so grudgingly, and that is a problem.

Id. at 233-34. Given the multitude of perspectives informing the debate on controversial topics, Leigh probably felt disappointed by the fact that the reporters and, thus, the ALI did not even mention drafting standards in written work product until 1984, when the reporters submitted what they expected to be the last tranche of new material. 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 190-91 (remarks by Monroe Leigh) (criticizing the omission of any written reference of drafting standards until 1984); 61 A.L.I. PROC. 35, 59 (1984) (statement by Louis Henkin) (introducing Tentative Draft No. 5 and stating that "it is essentially our last submission of new material . . . essentially that will

in the black letter treatment of expropriation,⁴⁵ the introduction of a laudable but factually unsupported

complete any new material we have to offer you.”). In any event, the formulation of the drafting standard clearly disturbed Leigh inasmuch as it merely quoted, without endorsement, the position taken by the previous Restatement:

In respect of customary law, created by the general practice of states, as the Reporters of the previous Restatement said . . . : “[T]he positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support. Thus, the Restatement of this Subject, in stating rules of international law, represents the opinion of The American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law.” Of course, a determination of international law, or an interpretation of a U.S. treaty, by the Supreme Court of the United States is authoritative foreign relations law of the United States.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 1 (Tentative Draft No. 5, 1984) (citation omitted); *see also* 81 AM. SOC’Y INT’L L. PROC., *supra* note 18, at 191 (remarks by Monroe Leigh) (“When a standard was first laid before the ALI’s annual meeting, however, which was not until 1984 . . . the result was disappointing. The present Reporters merely quoted from the early Reporters’ preface, significantly without any personal endorsement . . .”).

One might add that the juxtaposition of an ambiguous reference to the previous Restatement’s standard against a statement recognizing the authoritative character of Supreme Court decisions created substantial room for confusion about whether the Reporters had adopted a global or a domestic perspective, or intentionally created the leeway to shift perspectives as needed. *See* 61 A.L.I. PROC., *supra* at 62-63 (statement by Professor Auerbach) (asking if the views of the Supreme Court “will be determinative for us” even if inconsistent with “what an international tribunal might decide,” and confirmed “[t]hat’s right” by Professor Louis Henkin); *id.* at 64 (statement by Professor Louis Henkin) (“The courts of the United States will decide what the international law is and they will look to authoritative international bodies.”); *id.* at 66 (statement by Monroe Leigh) (questioning if “the Institute is clearly on record as operating against the same standard in this Restatement as it did in the earlier Restatement,” and confirmed by Professor Louis Henkin).

45. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 712. Whereas the Restatement (Third) dealt with the issue of expropriation in one section, its predecessor’s treatment of the topic had covered thirteen sections. *Id.* § 712 reporters’ note 13; 76 AM. SOC’Y INT’L L. PROC., *supra* note 27, at 197 (remarks by John Houck); *see also* 62 A.L.I. PROC. at 531 (1985) (statement by Professor Louis Henkin) (“There are lots of things in black letter [in the previous Restatement] that aren’t in black letter here . . .”). In the view of many observers, the resulting compression “appeared to water down the traditional view of the United States” at a time when communist and newly independent states were calling for a New International Economic Order. 76 AM. SOC’Y INT’L L. PROC., *supra* note 27, at 198 (remarks by John Houck); *see also* 76 AM. SOC’Y

obligation of reasonableness in the exercise of prescriptive jurisdiction,⁴⁶ and the designation of custom as federal law

INT'L L. PROC., *supra* note 27, at 200 (remarks by Brice Clagett) (describing § 712 as “an unwarranted retreat from established and still valid principles of law as to expropriations” and objecting to the Restatement’s “heavy reliance on General Assembly resolutions”); *see also* 62 A.L.I. PROC. at 511 (1985) (quoting Davis Robinson) (recognizing that the “overall structure and presentation” of the previous Restatement “was stronger than the present Section 712”); *id.* at 522 (statement by Nicholas R. Doman) (“We should not abandon . . . the old American doctrine of full, adequate, in fact, even prompt compensation.”); *id.* at 524-25 (statement by Professor Myres Smith McDougal) (“[T]here is no reason on God’s earth why we should formulate the law in a way to protect the people that are trying to take the assets of our nationals.”); *id.* at 531-32 (statement by Mark B. Feldman) (“I am deeply concerned . . . this Institute will be taking a step backwards now, a very significant, substantive step backwards, from the position of the Institute in the last Restatement, and in a context where investment is more insecure . . .”).

46. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 403 (requiring moderation in the exercise of prescriptive jurisdiction). In the years running up to adoption of the Restatement, frictions arose between the United States and European trading partners regarding the United States’ so-called “exorbitant” exercise of jurisdiction over European companies based on economic effects in the United States. *See id.* § 403 reporters’ note 1; *id.* pt. IV introductory note, at 236 (“Attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law.”).

While some U.S. courts had attempted to moderate the exercise of jurisdiction through discretionary principles like comity, the Restatement sought to reduce tensions even further by requiring moderation as a matter of law. *See id.* § 403 cmt. a & reporters’ notes 2-3; *see also* 81 AM. SOC’Y INT’L L. PROC., *supra* note 18, at 188 (remarks by Cecil Olmstead) (indicating that § 403 “serves as a brake” on the exercise of jurisdiction, which brings the Restatement’s provisions on jurisdiction back “down to earth”).

Many observers regard this as an area where the Restatement went well beyond U.S. and international law. *See id.* (lauding the principles set forth in § 403, but questioning the depth of their roots in international and U.S. law); 81 AM. SOC’Y INT’L L. PROC., *supra* note 18, at 192-93 (remarks by Monroe Leigh) (indicating that the reporters “have been a bit too prone, perhaps we can say to willful to finding new customary international law”; citing § 403 as an example; and opining that neither international nor domestic jurisprudence supported the position taken by that provision); *see also* Cecil J. Olmstead, *Jurisdiction*, 14 YALE J. INT’L L. 468, 472 (1989); Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53, 53-55 (1995); David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT’L L. 419, 420-21 (1997); 62 A.L.I. PROC., *supra* note

on the same level as statutes and treaties.⁴⁷ As a consequence of the last-mentioned phenomenon, early drafts of the Restatement took the rather surprising position that judicial recognition of new customs could invalidate prior statutes and treaties,⁴⁸ as well as executive acts.⁴⁹ Faced with these developments, and deteriorating

45, at 407 (1985) (statement by Professor Karl Meessen); *id.* at 410, 412 (statement by Professor Don Wallace, Jr.); *id.* at 422 (statement by Professor Robert Armstrong Anthony); *id.* at 425 (statement by Professor Myres Smith McDougal); *id.* at 427-28, (statement by Professor Richard W. Jennings); *id.* at 431-32 (statement by Mr. David Small).

47. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 cmt. b (Tentative Draft No. 1, 1980) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS (Tentative Draft No. 1)]; 76 AM. SOC'Y INT'L L. PROC., *supra* note 27, at 189 (remarks by Louis Henkin) ("I have always thought that customary law, as law of the United States, is like any other . . . federal law [and] . . . is equal to other federal law. Just as a statute is equal to a treaty so that the later in time prevails, so customary law is equal to a treaty, is equal to a statute, and the latest in time prevails. That would make it possible, in theory, for customary law to develop and be given effect although it is inconsistent with some earlier statute."); *see also* 79 AM. SOC'Y INT'L L. PROC., *supra* note 31, at 74 (remarks of Jack Goldklang).

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 47, § 135 cmt. b; *see also* 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 193 (remarks by Monroe Leigh) (criticizing the "startling" position taken by the Restatement). To be sure, the drafters of the Restatement recognized that Congress could, in turn, override judicial determinations of custom by enacting contrary statutes. 79 AM. SOC'Y INT'L L. PROC., *supra* note 31, at 94 (discussing Louis Henkin's remarks and opining that "it was an issue of who had the last word," and observing that "if Congress did not like a given principle of customary law, it could 'repeal' it for purposes of domestic law"). However, the process for securing majorities in both houses of Congress, as well as presidential approval, represents a difficult task under any circumstances—especially given the Restatement's view that incompatibility with custom justifies the President's decision to veto such laws. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 115 cmt. a. In a period of divided government, the difficulty of building the required majorities in both houses increases exponentially. *See* Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33, 56 (2003) (opining that "the idea of any significant constraint on judicial innovation getting past the solidly Democratic House of Representatives would have seeded, in both 1980 and 1982, implausible").

49. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 47, § 132 reporters' note 1; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 112 reporters' note 1. While observing that customary

relations between U.S. officials and the reporters,⁵⁰ the Acting Secretary of State and the Attorney General personally requested the ALI to give everyone the equivalent of a time-out by delaying adoption of the Restatement for one year as of 1985.⁵¹

international law represents federal law and that the President generally has a constitutional duty to faithfully execute the law, the reporters also recognized that the President has the power to disregard rules of customary international law "when acting within his constitutional power." RESTATEMENT (THIRD) OF FOREIGN RELATIONS (Tentative Draft No. 1), *supra* note 47, § 135 reporters' note 5; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 111 cmt. c. In its final form, the Restatement (Third) of Foreign Relations criticized a lower court for upholding the Attorney General's right to violate customary norms against arbitrary detention without analysis of the specific constitutional powers being exercised. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 115 reporters' note 3. While recognizing that the President has a degree of constitutional authority to disregard customary international law, one distinguished observer explained that such authority applies only when the President exercises his constitutional prerogatives to conduct foreign affairs. 79 AM. SOC'Y INT'L L. PROC., *supra* note 31, at 86-87 (remarks by Oscar Schachter). In his view, arbitrary detention of individuals (citizen or alien) would not involve foreign relations. *Id.* at 89. In addition, while the President has wide-ranging powers in the sphere of foreign affairs, a distinguished federal judge once recognized that "not every issue related to foreign relations is constitutionally committed for resolution by the Executive." *Id.* (quoting Judge Malcolm Wilkey).

50. *See* 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 181-82 (remarks by Harold G. Maier) (referring to the "unusually vituperative controversy that accompanied the development, promulgation, and eventual adoption of the *Restatement of Foreign Relations Law (Revised)*," including "the level of distrust that had developed over the years between the Reporters and government officials," due in part to the fact that "those who were preparing the *Restatement* saw a part of their mission as being to 'set the government right'").

51. 62 A.L.I. PROC., *supra* note 45, at 374 (statement by ALI President Perkins) ("[W]e have been asked by the Acting Secretary of State and the Attorney General to postpone final adoption of the Foreign Relations Restatement for a year and to give them . . . opportunity for further review of the text These requests emanate from the highest department levels and are joined by other departments, including Treasury and Commerce."); *see also* 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 182 (remarks by Harold G. Maier) (explaining that "[i]n May 1985, the ALI delayed final promulgation of the document for a year to receive additional input from the branches of government"); McCaffrey, *supra* note 27, at 311 n.3 (explaining that the "ALI extended the Restatement (Third) project one year beyond its original schedule" to consider criticisms offered by the U.S. government).

During the ensuing period of consultations and review, the ALI adopted a drafting standard, which claimed to follow the “previous Restatement,” but then reformulated its orientation to encompass “the rules that an *impartial tribunal* would apply if charged with deciding a controversy in accordance with international law.”⁵² At the time, observers attributed the new formulation to the fact that the State Department had just lost the *Nicaragua* case and no longer viewed the ICJ as impartial.⁵³ In any event, the final version of the Restatement (Third) of Foreign Relations clarified that its standard referenced the perspective of “disinterested tribunal[s], whether of the United States or some other national state or an international tribunal.”⁵⁴

Without exaggeration, one may describe the history of drafting standards for the 1987 Restatement as a failure. According to Monroe Leigh, who also served as a member of the advisory committee for the 1987 Restatement,⁵⁵ the absence of any definite yardstick for several critical years created an atmosphere in which the reporters “felt free to embellish the development of international law with . . . their own personal preferences.”⁵⁶ Furthermore, the written standard that appeared in the final stages simply perpetuated the lack of guidance, not merely because last

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, intro. at 3 (emphasis added).

53. See 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 191 (remarks by Monroe Leigh) (“I frankly do not know the exact reasons as to why it was changed. If it was changed because the State Department had strong feelings about the results of its litigation with Nicaragua in the ICJ, that was in my opinion an unfortunate overreaction to the case.”); 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 196 (statement by Professor Vagts) (“Should we consider the ICJ an impartial tribunal? Well, The Legal Adviser has in effect said no; this is the long and short of it.”).

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, at XI.

55. *Id.* at V.

56. See 81 AM. SOC'Y INT'L L. PROC., *supra* note 18, at 191 (remarks by Monroe Leigh); see also *id.* at 192 (indicating that the drafters of the Restatement (Third) of Foreign Relations “operated without a firmly declared standard” until the end of the drafting process).

minute changes carry the potential to sow confusion.⁵⁷ Even worse, the written “standard” merely identified the perspectives of domestic, foreign, and international tribunals as the three potential yardsticks without expressing any preference,⁵⁸ thereby leaving the reporters with complete freedom of navigation.

III. DRAFT RESTATEMENT OF THE U.S. LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: MORE DOMESTIC THAN INTERNATIONAL

Turning to the Draft Restatement on International Commercial Arbitration, one should pause to emphasize that the project shows relatively few signs of weakness with respect to focus, consistency, and discipline despite the absence of formal drafting standards. Under the circumstances, one might reasonably ask whether drafting standards seem necessary for a project generally lauded within the arbitration community. In the author’s view, there are at least two strong reasons for adopting drafting standards. First, as an organization dedicated to clarification and improvement of the law,⁵⁹ the ALI should be able to formulate a position on the central challenges facing one of its most eagerly awaited projects.⁶⁰ Second,

57. *Id.* at 191 (“It is procedurally unwise and undesirable to make such a late change because it is like changing the length of the yardstick against which things are tested.”).

58. *See supra* note 44 (setting forth the text of the drafting “standard” adopted by the ALI in Tentative Draft No. 5, 1984).

59. *See supra* notes 18-19 and accompanying text (discussing the ALI’s mandate with respect to clarification and improvement of the law).

60. 79 AM. SOC’Y INT’L L. PROC., *supra* note 31, at 73 (remarks by Jack Goldklang) (“It is fair to begin by asking what philosophy underlies a work as significant as the *Restatement* . . .”). *But see* Sebastian Perry, *Atlanta: Restating the Obvious?*, GLOBAL ARB. REV., May 10, 2012, at 39, 40 [hereinafter Perry, *Atlanta*] (quoting chief reporter George Bermann) (“It is unrealistic to expect that we should have some kind of fixed philosophy as to how every particular issue that comes across the transom will be dealt with.”). Interestingly, Professor Bermann has publicly stated that the Draft Restatement is “not neutral.” *Id.* at 40. Given that observation, it seems reasonable to expect the Draft Restatement to include some textual accounting of the principles that govern its departures from neutrality.

drafting standards can affect the reception of substantive choices on controversial topics. To illustrate the point, one may begin by identifying the divisive issue of interim measures and, then, explaining how drafting standards could have been more effective in bringing the protagonists to equilibrium.

A. “*Navigating*” the Legal Status of Interim Measures

One of the earliest challenges faced by the reporters of the Draft Restatement involved the legal status of interim measures, or temporary remedies ordered by arbitral tribunals, which might include preliminary injunctions, directions to pay sums into escrow, or directions to sell perishable goods.⁶¹ Without question, the proper designation of interim measures represents a thorny topic dominated by the opposing forces of logic and practical imperative. Logically, if one starts from the proposition that awards represent a *final* determination of the *merits* regarding at least one aspect of a dispute,⁶² interim measures cannot

61. This issue caused the drafters to shift positions more than once. Compare RESTATEMENT (THIRD) OF INTERNATIONAL COMMERCIAL ARBITRATION § 1(a), (p) & cmts. a, p & reporters’ notes a, p (Council Draft No. 1, 2009) [hereinafter DRAFT RESTATEMENT (Council Draft No. 1)] (defining arbitral awards to *include* interim measures granted by tribunals), *with* RESTATEMENT (THIRD) OF INTERNATIONAL COMMERCIAL ARBITRATION § 1(a), (p) & cmts. a, p & reporters’ notes a, p (Preliminary Draft No. 3, 2010) [hereinafter DRAFT RESTATEMENT (Preliminary Draft No. 3)] (defining arbitral awards, including partial awards, to *exclude* interim measures granted by tribunals), *and* RESTATEMENT (THIRD) OF INTERNATIONAL COMMERCIAL ARBITRATION § 1(a), (p) & cmts. a, p & reporters’ notes a, p (Tentative Draft No. 1, 2010) [hereinafter DRAFT RESTATEMENT (Tentative Draft No. 1)] (emphatically classifying interim measures as awards). See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1 reporters’ note a (recognizing that the proper classification of interim measures as awards or not as awards “raises challenging questions”).

62. See RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1 (a) (“An ‘arbitral award’ is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire controversy before the tribunal.”); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2815 (2009) (“In order for an arbitral award to be recognized under contemporary international arbitration conventions and arbitration legislation, it generally must have achieved some degree of ‘finality’ or must be sufficiently ‘binding.’”);

qualify as awards because they represent temporary measures, subject to modification or withdrawal by the tribunal at any stage.⁶³ By contrast, if one starts from the

MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 179 (2008) (“Parties generally expect an arbitration to result in an award that will be final and binding.”); *see also* NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 516 (5th ed. 2009) (“In practice, the term ‘award’ should be reserved for decisions that finally determine the substantive issues with which they deal.”); JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 631 (2003) (“Any decision which finally resolves a substantive issue affecting the rights and obligations of the parties is an award.”).

In the context of defining awards, “final” means final with respect to parties *and* the *tribunal* in the sense that the decision becomes *res judicata* and, therefore, no longer subject to revision by the tribunal. *Compare* LEW ET AL., *supra* at 631 (“An award[] concludes the dispute as to the specific issue determined in the award so that it has *res judicata* effect between the parties . . .”), *with* ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* 332 (2005) (“All awards are by their nature final. Once an award is made, . . . the arbitral tribunal has no jurisdiction to review that decision . . . [T]he effect of finality is that the arbitral tribunal no longer has jurisdiction to review an earlier award.”), *and* DAVID ST. JOHN SUTTON & JUDITH GILL, *RUSSELL ON ARBITRATION* 235 (22d ed. 2003) (“The tribunal does not have power either to reopen its award at some later stage of the reference, or to make a subsequent determination of issues previously disposed of in an interim award. . . . Any adjudication in a later award on an issue already disposed of in an earlier award is therefore outside the tribunal’s jurisdiction and void.”).

63. U.N. Comm’n on Int’l Trade Law, *Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration*, ¶ 121, U.N. Doc. A/CN.9/460 (Apr. 6, 1999) (“The prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards” granting interim measures of protection); BLACKABY ET AL., *supra* note 62, at 446 (observing that “interim measures ordered by an arbitral tribunal do not, by definition, finally resolve any point in dispute” and, therefore seem “unlikely to satisfy the requirement of finality under the New York Convention”); LEW ET AL., *supra* note 62, at 635 (describing the “prevailing position” to be that interim measures granted by tribunals do not qualify as awards capable of enforcement under the New York Convention); MOSES, *supra* note 62, at 182 (“A decision designated as an ‘interim award,’ dealing with interim relief, is generally not considered a final award enforceable under the New York Convention.”); TWEEDDALE & TWEEDDALE, *supra* note 62, at 309 (“The New York Convention refers only to the enforcement of an award. On its face, therefore, it would appear than an order for an interim measure of protection cannot be enforced under the New York Convention.”); *Resort Condominiums Int’l, Inc. (USA) v. Bolwell* (Queensland S. Ct. 1993), XX Y.B. COM. ARB. 628, 642 (1995) (indicating that “the award which may be enforced must be an award

proposition that interim measures serve to prevent *irreparable harm*,⁶⁴ one quickly understands the *practical* imperatives that motivate efforts to designate them as awards capable of summary, worldwide enforcement under the New York Convention.⁶⁵

which is final and binding on the parties[;] [a]n interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it, is not 'final' and binding on the parties"); *see also* BLACKABY ET AL., *supra* note 62, at 516 n.11 (suggesting that "any decision that is not finally determinative of the issues with which it deals should not be called an 'award.'"); W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 464 (3d ed. 2000) ("[W]hile the tribunal no doubt intends to bind the parties with its decision, it is hard to conceive of the decision as finally disposing of a dispute between the parties.").

64. *See* BORN, *supra* note 62, at 1981 (indicating that "most international arbitral tribunals require showings of (a) serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits . . ."); LEW ET AL., *supra* note 62, at 604 (identifying "two widely agreed substantive requirements for the granting of interim relief by arbitration tribunals: no pre-judgment of the case, and the threat of irreparable or substantial harm which cannot be compensated for by damages."); TWEEDDALE & TWEEDDALE, *supra* note 62, at 299 (describing the objectives of "[c]onservatory measures," including the prevention of irreparable harm, maintenance of the status quo, and preservation of evidence or assets). *See also* U.N. Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, ¶ 17A(1)(a), G.A. Res 61/33, U.N. Doc. A/RES/61/33 (Dec. 4, 2006), [hereinafter UNCITRAL Model Law], *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (listing irreparable harm as one of the conditions for granting interim measures).

65. One prominent member of the arbitration bar offers the following justification for classifying interim measures as awards:

The better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards. Provisional measures are "final" in the sense that they dispose of a request for relief *pending the conclusion of the arbitration*. . . . It is also highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be able and significantly more willing to refuse to comply with provisional relief, resulting in precisely the serious harm that provisional measures were meant to foreclose.

BORN, *supra* note 62, at 2023 (emphasis added). While compelling from the perspective of practical imperative, Mr. Born's definition of finality seems unusually elastic. In any case, it bears emphasis that even under Mr. Born's analysis, interim measures have the required finality only if intended to remain in effect until completion of the arbitral process. *Id.* To the extent that the

To resolve these and other controversies, the reporters have not always followed the majority views of U.S. courts, arguing that the Draft Restatement does not represent a “popularity contest.”⁶⁶ Instead, the chief reporter has described the drafting process as an exercise in “navigation,”⁶⁷ during which the reporters “are prepared to listen, navigate, and change course”⁶⁸ in response to the views expressed during consultations with various groups of ALI stakeholders. One wonders whether that process of navigating in response to feedback incorporates the main elements of a popularity contest.⁶⁹ However, the point is that this form of “navigation” relies more on shifting winds than adherence to a deliberately charted course.

As a result of the “non-dogmatic” and “non-linear” approach just described,⁷⁰ the evolution of the Draft

tribunal retains discretion to modify interim measures before completion of the proceedings, they would not qualify as awards even under Mr. Born’s reasoning. See UNCITRAL Model Law, *supra* note 64, art. 17D (recognizing that arbitral tribunals “may modify, suspend or terminate an interim measure . . . it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative.”).

66. See Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann) (asserting that “[a] restatement need not reflect the existing or dominant view on every last issue . . .”); see also Charles H. Brower II, *Fault Lines in International Commercial Arbitration*, KLUWER ARBITRATION BLOG (Feb. 21, 2011), <http://kluwerarbitrationblog.com/blog/2011/02/21/fault-lines-in-international-commercial-arbitration/> (explaining that the reporters have rejected the clearly dominant line of U.S. authority regarding the grounds for vacatur of U.S. convention awards, due at least in part to their view that “the Restatement is not a popularity contest”).

67. See Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann) (“The only word to describe the exercise is ‘navigation.’”).

68. See Perry, *Atlanta*, *supra* note 60 (quoting George Bermann) (“We don’t take mandates from special interests but we are prepared to listen, navigate and change course.”).

69. See Brower, *supra* note 66 (discussing the possibility of determining the Draft Restatement’s content by tallying the comments of advisors and the members consultative group, but implying that such an approach would “represent[] a different kind of popularity contest”).

70. Perry, *Atlanta*, *supra* note 60, at 40 (quoting George Bermann) (“Summing up, Bermann defended the reporters’ approach as ‘non-dogmatic’ and said he doubted the ALI would wish them to have an ‘*a priori* view’ of the

Restatement's position on interim measures reflects a high degree of instability. In 2009, Council Draft No. 1 expressed the view that "certain kinds" of interim relief "may" qualify as awards.⁷¹ In 2010, Preliminary Draft No. 3 defined awards and partial awards to *exclude* interim measures,⁷² which represents the prevailing view of observers and foreign jurisdictions.⁷³ Later that same year, Tentative Draft No. 1 reversed course with a blanket assertion that interim measures "constitute" awards that "must" be enforced under the New York and Panama Conventions.⁷⁴ By the end of 2011, Council Draft No. 3 shifted positions

issues. . . . 'I'm not at all disturbed that we have proceeded in a non-linear fashion') (emphasis added).

71. See DRAFT RESTATEMENT (Council Draft No. 1), *supra* note 61, § 1(a) (asserting that an award "may consist of a grant of interim relief"); *id.* § 1(p) (asserting that partial awards "may consist in whole or in part of an award of interim relief"); *id.* cmt. a (opining that the definition of awards is "broad enough . . . to include grants of certain kinds of interim or provisional relief").

72. See DRAFT RESTATEMENT (Preliminary Draft No. 3), *supra* note 61, § 1(v) (asserting that a "partial award does not include an interim measure"); *id.* cmt. a ("A grant of interim measures by an arbitral tribunal ordinarily does not constitute an award, inasmuch as such measures, by definition, do not set forth a 'final and conclusive determination on the merits of a claim, defense, or issue.'"); *id.* cmt. p ("Measures of interim relief do not constitute awards"); *id.* reporters' note a ("[A]rbitral grants of interim relief do not constitute awards because they are generally intended to remain in effect only during the pendency of the arbitration and are typically subject to revision or withdrawal by the tribunal. They cannot therefore be readily viewed as disposing of issues finally and conclusively. The freedom that tribunals have to revisit interim measures prior to issuance of the final award makes it difficult to characterize them as awards.").

73. See *supra* note 63; see also DRAFT RESTATEMENT (Preliminary Draft No. 3), *supra* note 61, § 1 reporters' note a ("The Restatement view is . . . well supported in the literature It is also supported by foreign and domestic case law.").

74. DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, §1-1(p) ("For purposes of this Restatement, an interim measure issued by an arbitral tribunal constitutes an award."). The Draft Restatement amplifies this point in the official commentary:

[A] grant of interim measures by an arbitral tribunal constitutes an award inasmuch as such measures set forth a "final and binding determination" as to whether on the facts presented to the tribunal the requesting party is entitled to temporary relief. Accordingly, orders of interim measures must be recognized or enforced as an arbitral award.

Id. § 1-1 cmt. a.

again, retreating to the view that interim measures “presumptively” constitute partial awards.⁷⁵

As demonstrated by the Draft Restatement’s shifting positions on interim measures, the problem with “navigation” based on the preferences of ALI stakeholders is that all participants have personal reference points, except perhaps the reporters themselves.⁷⁶ In the author’s experience, the practitioners who dominate such encounters (1) systematically favor positions that maximize enforcement of tribunal decisions, and (2) see the Restatement as a Trojan horse that can slip the United Nations Commission on International Trade Law (UNCITRAL) Model Law into U.S. practice,⁷⁷ at the national

75. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 1-1(q) (Council Draft No. 3, 2011) [hereinafter DRAFT RESTATEMENT (Council Draft No. 3)].

76. See Perry, *Atlanta*, *supra* note 60 (quoting George Bermann) (“Bermann said the reporters were governed by no other ‘personal preference’ than the desire ‘to make [U.S.] arbitration law coherent and user-friendly.’”). *But see id.* (“On the other hand, the project is ‘not neutral’ . . .”).

77. In this regard, one must bear in mind that the drafters of the Restatement falsely suggest that their work goes only as far as the UNCITRAL Model Law in defining awards to include interim measures. See DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 1-1 reporters’ note p (“As under the Model Law, interim measures issued by an arbitral tribunal are considered as constituting an award.”).

To the contrary, since the amendments of 2006, the UNCITRAL Model Law establishes *parallel* and *largely congruent* enforcement mechanisms for interim measures and awards. Compare UNCITRAL Model Law, *supra* note 64, art. 17H (“[r]ecognition and enforcement” of interim measures), and art. 17I (“[g]rounds for refusing recognition or enforcement” of interim measures), with art. 35 (“[r]ecognition and enforcement” of awards), and art. 36 (“[g]rounds for refusing recognition or enforcement” of awards). Despite the general congruity, the enforcement mechanism for interim measures introduces certain refinements designed to recognize that interim measures place the parties, the tribunal, and courts into ongoing relationships having different qualities than the relationships established by awards. At an early stage, the Secretary-General of UNCITRAL emphasized that interim measures of protection differ from arbitral awards “in some important respects.” U.N. Secretary-General, *Settlement of Commercial Disputes*, TP 82, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000). These differences include the temporary nature of interim relief, the tribunal’s power to modify interim relief “as matters evolve during the arbitral proceedings,” and the possibility of *ex parte* relief. *Id.* ¶¶ 66-67, 82, 100.

level,⁷⁸ without the need for action by a reluctant and, perhaps, hostile Congress.⁷⁹ As a general matter, the author

In addition, tribunals might award forms of interim relief unknown or unavailable in the courts of enforcing states. *Id.* ¶ 96.

To control for the differences between interim measures and awards, the Secretary-General called for “special provisions on the enforcement of interim measures.” *Id.* ¶ 100. Consistent with that admonition, the provisions on enforcement of interim measures added to the UNCITRAL Model Law as of 2006 include: (1) a requirement that the party who seeks or obtains an interim measure must promptly inform the court if the tribunal terminates, suspends or modifies that measure; (2) a ground for refusing to enforce interim measures terminated or suspended by the tribunal; and (3) a ground for refusing to enforce interim measures that are “incompatible with the powers conferred upon the court.” *See* UNCITRAL Model Law, *supra* note 64, arts. 17H(2), 17I(1)(a)(iii), 17I(b)(i).

In addition, the 2006 revisions contemplate the possibility of *ex parte* relief in the form of a “preliminary order” that expires in twenty days and is not subject to judicial enforcement. *Id.* arts. 17B-17C.

78. A few states of the United States have adopted the UNCITRAL Model Law, but only Florida has adopted the 2006 revisions relating to interim measures. *See* FLA. STAT. §§ 684.0018-684.0027 (2010); U.N. COMM’N ON INT’L TRADE LAW, *Status 1985-UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Apr. 28, 2013).

79. *See* Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann) (“Crucially, a restatement doesn’t have to be voted on by Congress.”); *see also id.* (“Of course, it would be better to have a good federal statute rather than a restatement . . . but I don’t see that happening anytime soon. . . . More and more young lawyers may be finding arbitration very attractive professionally . . . but that doesn’t mean Congress regards [Federal Arbitration Act] reform on the same level as ‘Obamacare,’ legalizing marijuana, or immigration reform.”). In assessing the legitimacy of seeking legal reform without Congressional approval, one should bear in mind that the drafters of the Restatement began their work in the shadow of a Congress that seemed to teeter on the brink of hostility toward arbitration, including international arbitration. *See, e.g.,* Alicia J. Surdyk, Note, *On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Predispute Arbitration Clauses*, 54 N.Y.L. SCH. L. REV. 1131, 1148 (2009/10) (quoting the 2007 congressional testimony of a Senior Vice President of the American Arbitration Association, who complained that the draft Arbitration Fairness Act would “unnecessarily send a message of ambiguity and policy hostility to arbitration to the international . . . community”); *see also* Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, FED. LAW., May 2009, at 48, 51 (warning that “if the Arbitration Fairness Act as drafted becomes law, the United States will no longer be viewed as a friendly forum for international arbitration”).

tends to resist such efforts on principle because they seem to advance the self-interest of the arbitration bar while evading the normal channels of legal reform.⁸⁰ Turning to the level of doctrine, the author also prefers a more nuanced approach that mirrors the diversity of interim measures. Thus, while one must recognize that some interim measures (like orders to sell perishable goods) are final and constitute awards,⁸¹ others (like temporary restraining orders) are not final and do not constitute awards.⁸²

To the extent that one values party autonomy, selection of the 1976 UNCITRAL Arbitration Rules might justify the treatment of interim measures as awards, inasmuch as those rules expressly provide that “interim measures may be established in the form of an interim award.”⁸³ By contrast, the London Court of International Arbitration (LCIA) Arbitration Rules merely authorize tribunals to “order on a *provisional* basis, *subject to final determination in an award*, any relief which the [a]rbitral [t]ribunal would

80. See Perry, *Atlanta*, *supra* note 60, at 39 (quoting Charles H. Brower II).

81. It seems obvious that an order to sell perishable goods would be final in the sense that it could not be undone. U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules, art. 26(1) (1976), [hereinafter UNCITRAL Arbitration Rules (1976)], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (“At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering . . . the sale of perishable goods.”); *id.* art. 26(2) (providing that “interim measures may be established in the form of an interim award”).

82. See *supra* note 63 and accompanying text.

83. UNCITRAL Arbitration Rules, *supra* note 81, at art. 26(2). By contrast, it seems significant that the 2010 revisions to the UNCITRAL Arbitration Rules both emphasize the temporary character of interim measures and drop any reference to the possibility of providing such relief in the form of an award. See U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules, art. 26(2) (2010), [hereinafter UNCITRAL Arbitration Rules (2010)], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (defining interim measures as a “temporary measure”); *id.* art. 26(5) (emphasizing that the tribunal “may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative”).

have the power to grant *in an award*, including a provisional *order* for the payment of money”⁸⁴ As described in the foregoing provision, the *order* seems so carefully distinguished from the *award*, and the remedy seems so obviously subject to *final* determination in a *subsequent* award, that one could not reasonably describe the interim measure as having the characteristics of an award. In fact, so much depends on the nature of the remedy, the content of the arbitration rules, and the intent of the tribunal, that the author’s personal starting point would be to exclude any presumptions regarding the proper designation of interim measures.⁸⁵

In any case, one can see how the reporters’ “navigation” among the views of stakeholders can lead to a series of irreconcilable drafts that waste time, create a sense of drift, and emphasize expediency, all of which undermine the normative foundation of the ALI’s work.

B. *The Utility of Drafting Standards: Preliminary Assessment of Domestic Perspectives*

If one had approached the problem of interim measures by formulating an appropriate drafting standard, stakeholders would have to step back from personal reference points and accept a shared set of objectives, with the result that discussions would lead to a swifter convergence of views. To illustrate the point, one may begin with the reporters’ academic writings, which reflect a tendency to emphasize U.S. perspectives,⁸⁶ an orientation

84. The London Court of International Arbitration [LCIA], *Arbitration Rules*, art. 25.1(c) (Jan 1. 1998), <http://www.lcia.org//media/download.aspx?MediaId=74> (emphasis added).

85. See Perry, *Atlanta*, *supra* note 60, at 39 (quoting Charles H. Brower II). This position largely coincides with the position taken by the reporters for the Draft Restatement in Council Draft No. 1. See *supra* note 71 and accompanying text.

86. In spring 2009, the four reporters confirmed their intent to produce a “Restatement of the U.S. law of international arbitration,” which would not entail systematic reliance on foreign or international sources in the drafting process. Bermann et al. (PENN. ST.), *supra* note 6, at 1336 (emphasis added). Later that same year, the chief reporter suggested, albeit less clearly, that the

that Professor Bermann describes as simply retracing “the path charted by the Restatement of Foreign Relations Law.”⁸⁷ Despite the inaccuracy of Professor Bermann’s statement regarding the supposedly domestic orientation of previous Restatements,⁸⁸ an emphasis on domestic perspectives makes sense for *this* Restatement, which aims to increase predictability for commercial users by accurately forecasting the development of jurisprudence by U.S. courts.⁸⁹ A domestic orientation also seems desirable for a first-generation project that seeks to build credibility among U.S. courts.⁹⁰ Finally, a domestic orientation appropriately limits the influence of thirty strong-willed advisers, who represent a tight community of internationalists engaged in a financially lucrative business,⁹¹ and whose perspectives seem unlikely to track those of U.S. lawmakers and judges.⁹²

If one places the legal status of interim measures in the context of drafting standards that emphasize U.S. practice, and if one demonstrates the existence of U.S. cases treating interim measures as awards, it becomes easier to accept the Draft Restatement’s most recent position on interim measures because the justification shifts from stakeholder preferences to definite principles that both (1) mirror

draft Restatement aimed to provide “a substantive United States law position on an international law subject.” Bermann (N.Y.U.), *supra* note 6, at 183.

87. See Bermann (N.Y.U.), *supra* note 6, at 184.

88. See *supra* notes 35-40, 44, 54 and accompanying text.

89. See Bermann et al. (PENN. ST.), *supra* note 6, at 1342 (“To plan effectively, . . . parties . . . need the law and judicial decisions that provide the framework for the system to be conceptually accessible and predictable. Clarifying the U.S. law of international arbitration will aid parties in this endeavor.”); see also Bermann (N.Y.U.), *supra* note 6, at 185 (explaining that “[t]he central objective of Restatements is to clarify and consolidate the law for understanding and application by U.S. courts”).

90. See Kristen David Adams, *The American Law Institute: Justice Cardozo’s Ministry of Justice?*, 32 S. ILL. U. L.J. 173, 203 (2007) (explaining that “it is important for any law-reform organization . . . to establish its credibility with relatively noncontroversial matters before taking on difficult questions of law and policy”).

91. See *supra* note 28 and accompanying text.

92. See *supra* note 29 and accompanying text.

judicial behavior and (2) limit the intrusion of professional bias.⁹³

As it turns out, the reporters' notes to Tentative Draft No. 2 cite four U.S. cases that treat interim measures as awards.⁹⁴ In one sense, the notes tend to exaggerate the weight and clarity of U.S. case law because (1) three decisions come from a single jurisdiction,⁹⁵ (2) only one decision comes from an appellate court,⁹⁶ (3) only one decision purports to address the status of interim measures under the New York or Panama Conventions,⁹⁷ and (4) three cases involved remedies likely to be final in the sense that

93. Cf. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 440-41 (2004) (“[S]ome recent criticism of the [American Law] Institute has centered on allegations that the Restatements have been captured by special interest groups. In other words, even setting aside the debate as to whether the Restatements should be descriptive or normative, there is significant concern that the Restatements have become politically biased. . . . Some courts have expressed a related concern that the Restatement process has been dominated by a few powerful, interested parties.”).

94. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1 reporters' notes a, q (citing *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Mgmt. Corp.*, 935 F.2d 1019 (9th Cir. 1991); *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362 (S.D.N.Y. 2002); *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692 (S.D.N.Y. 1985); *Sperry Int'l Trade, Inc. v. Gov't of Isr.*, 532 F. Supp. 901 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982)).

95. *Banco de Seguro del Estado*, 230 F. Supp. 2d at 362; *S. Seas Navigation Ltd.*, 606 F. Supp. at 692; *Sperry Int'l Trade, Inc.*, 532 F. Supp. at 901.

96. *Pac. Reinsurance Mgmt. Corp.*, 935 F.2d at 1019.

97. *Banco de Seguros del Estado*, 230 F. Supp. 2d at 368-70 (applying the Inter-American (Panama) Convention and enforcing an interim order directing one party to establish an irrevocable letter of credit). Interestingly, the reporters' notes give pinpoint cites for *Banco de Seguros del Estado*, but not for the other cases from the Southern District of New York. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1 reporters' notes a, q. One might attribute the lack of pinpoint cites to the fact that those cases, like *Pac. Reinsurance Mgmt. Corp.*, do not purport to apply the New York or Panama Conventions, but the domestic provisions of the Federal Arbitration Act. *Pac. Reinsurance Mgmt. Corp.*, 935 F.2d at 1022-23; *S. Seas Navigation Ltd.*, 606 F. Supp. at 695; *Sperry Int'l Trade, Inc.*, 532 F. Supp. at 905. Perhaps for that reason, the court in *Banco de Seguros del Estado* regarded the proper classification of interim measures under the Panama Convention as a question of first impression. See *Banco de Seguros del Estado*, 230 F. Supp. 2d at 368.

they involved low probabilities of alteration by the tribunal pending the final award.⁹⁸ Given these limitations, the cases probably would not sustain the *blanket statement* found in Tentative Draft No. 1 that interim measures “constitute” awards, which courts “must” enforce as a matter of international law.⁹⁹ However, while lacking clarity and uniformity in some respects, *all* four cases cited in the reporters’ notes emphasize that the failure to enforce interim measures as awards would render them meaningless and, thus, destroy the integrity of the arbitral process.¹⁰⁰ This concordant emphasis on practical imperative reasonably supports a *presumption* that other U.S. courts would feel similarly motivated to treat interim measures as awards, at least in analogous circumstances.

In short, when one shifts from stakeholder preferences,¹⁰¹ to the more closely defined arena of U.S.

98. See *Pac. Reinsurance Mgmt. Corp.*, 935 F.2d at 1022-23 (involving a direction that one party establish an escrow account, which the tribunal described as an “Interim Final Order” and which essentially segregated assets for the duration of the proceeding) (emphasis added); *Banco de Seguros del Estado*, 230 F. Supp. 2d at 364, 366, 368-70 (quoting *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986)) (involving a direction that one party establish an “irrevocable” letter of credit, which “finally and conclusively dispose[d] of [a] severable claim”); *Sperry Int’l Trade, Inc.*, 532 F. Supp. at 908-09 (involving a direction that both parties establish a joint escrow account, which the tribunal specifically designated as an “Award” ripe for “confirmation and/or enforcement” by the United States District Court for the Southern District of New York, and which the court described as a “Solomonic resolution . . . to take the money from both parties”). Tribunals are not likely to alter such measures. See BORN, *supra* note 62, at 2023 (opining that “these sorts of alterations seldom occur”). As noted above, interim measures that cannot be undone possess the finality required to qualify as awards. See *supra* note 81 and accompanying text. According to Mr. Born, the same principle applies to interim measures that the tribunal intends to keep in place “pending the conclusion of the arbitration.” See *supra* note 65.

99. See *supra* notes 61, 74 and accompanying text.

100. See *Pac. Reinsurance Mgmt. Corp.*, 935 F.2d at 1023; *Banco de Seguros del Estado*, 230 F. Supp. 2d at 369; *S. Seas Navigation Ltd.*, 606 F. Supp. at 694; *Sperry Int’l Trade, Inc.*, 532 F. Supp. at 909.

101. For different individuals, personal starting points might include abstract logic, foreign perspectives, or global perspectives. See *also supra* note 44 (quoting Prof. Detlev Vagts) (listing a menu of at least five different views expressed by participants regarding the proper orientation for the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES).

practice as the basis for “navigation,” it becomes clear that the Restatement has staked out a reasonable position on interim measures in Tentative Draft No. 2.¹⁰² More importantly, the point is that drafting standards force all stakeholders to accept common starting points for discussion of every topic. As a result, they can open the way for debates to reach convergence with fewer confusing twists and turns along the way.

IV. REFINING THE STANDARD: EMPHASIS ON THE SUPREME COURT

While helpful in some respects, adoption of domestic perspectives in the drafting process raises new questions about the weight assigned to various sources, including treaties, statutes, and decisions of courts at different levels in the judicial hierarchy.¹⁰³ Starting with treaties and statutes, it seems impossible to deny the fact that the New York Convention and Federal Arbitration Act represent aging texts that treat their topics in sparse prose.¹⁰⁴ As a result, ambiguities emerge in their application to the complexities of modern commerce. Obviously, *someone* has to interpret statutory and treaty texts, and the reporters have an important role to play. On the other hand, there remains the matter of what the reporters should adopt at their guiding star: (1) their own views of the adjustments

102. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 1-1(q).

103. *See, e.g.*, 61 A.L.I. PROC., *supra* note 44, at 60-65 (recording a discussion during which speakers suggested the inclusion of decisions of the Supreme Court, decisions of other federal courts, and statements of the U.S. government as sources that might inform the domestic perspective on international law).

104. *See* William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 76 (2002) (describing the Federal Arbitration Act as an “antiquated arbitration statute” being used as an “all-terrain vehicle” for different types of arbitration, which “ignores critical distinctions” required for “judicial supervision” of “different types of cases”). Like the Federal Arbitration Act, the New York Convention was “drafted in broad and general terms, designed for application . . . over a period of decades.” BORN, *supra* note 62, at 101. As a result, “[c]ourts of different countries have sometimes differed in their interpretation of the Convention; and the Convention itself, which was made for a simpler, less ‘global-trading’ world, is now beginning to show its age.” BLACKABY ET AL., *supra* note 62, at 73.

required “to make U.S. arbitration law coherent and user-friendly”;¹⁰⁵ (2) the prevailing views of lower courts; (3) the perspective of a hypothetical reasonable court; or (4) their best estimate of how the Supreme Court would rule, keeping in mind that *this particular Restatement* operates in a context where the Supreme Court gets the last word.

In considering the options just mentioned one must bear in mind that Restatements seek not only to record the current state of play in U.S. courts,¹⁰⁶ but also to express principles that will have a shelf life measured in decades.¹⁰⁷ Furthermore, unlike judges, who can proceed incrementally and introduce refinements every few years, the drafters of Restatements must move in one fell swoop, which necessarily requires the courage to take a certain number of bold steps.¹⁰⁸ Thus, while the predictive value of Restatements demands a general adherence to the prevailing views of lower courts, drafters should still enjoy the freedom to chart a course among splits of authority in

105. Perry, *Atlanta*, *supra* note 60 (quoting chief reporter George Bermann).

106. Falk, *supra* note 1, at 442 (describing the Restatement process as a “Faustian bargain,” in which “clarity of doctrine is achieved by taking a snapshot at a given point in time, and then freezing perceptions until the next photo opportunity, that is, the next [R]estatement”).

107. *See supra* note 30 and accompanying text; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, at 5 (recognizing that “the particular rules of law need to be reviewed, revised, and restated at least once in every generation”).

108. In order to ensure the long-term relevance of such projects, drafters must engage in prognostication about the topics that will remain important over time, as well as the likely direction of the law. *See* 76 AM. SOC’Y INT’L L. PROC., *supra* note 27, at 187 (remarks by Louis Henkin). Particularly in unsettled areas, this latter element may encourage drafters to concentrate less on what the law *is*, and more on the direction that it *should* follow.

the lower courts¹⁰⁹ and even to maneuver where the opinions of lower courts seem unified, but demonstrably wrong.¹¹⁰

However, that still leaves a question about the extent to which Supreme Court jurisprudence should limit or guide their elaboration of the law. On this score, the views of the reporters have evolved in a direction that raises the bar required for Congress or the Supreme Court to restrict their leeway for innovation. For example, in 2009, Professor Bermann indicated that the reporters would yield to statutes, treaty provisions, and Supreme Court decisions of “reasonably settled” meaning:

Yet the latitude that restaters enjoy is *limited*, because every field is populated with at least some norms that cannot, or at least are not supposed to, be violated or ignored. I referred to these earlier as “givens,” in the sense that they must be respected and accommodated, even by restaters. Historically, such privileged authorities have included (a) settled constitutional understandings, (b) legislation of *reasonably settled* meaning, (c) international agreements of *reasonably settled* meaning to which the U.S. is a party (at least those that have been statutorily implemented or are deemed to be self-executing), and (d) *reasonably settled* case law of the U.S. Supreme Court (or of state supreme courts, where state law is concerned).¹¹¹

Just three years later, Professor Bermann expressed a standard that places fewer restraints on the reporters: “We know what some of our constraints are We won’t *defy* the [U.S.] Supreme Court or Congress when they speak *unambiguously*, but that leaves *a lot of room* for discussion

109. See Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann) (“Where the case law seems divided, we’re completely liberated and can pick a side.”); see also Perlman, *supra* note 18, at 4 (“Where jurisdictions disagree on a particular point, the Restatements do not purport to count jurisdictions and adopt the majority rule. Rather, the standard is to adopt the rule that a rational court, faced with the issue for the first time, would find most persuasive.”).

110. See Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann) (“The real trick is where the case law isn’t really divided but where we think there’s something profoundly wrong. These are the instances in which the strict and liberal constructionists may part ways.”).

111. Bermann (N.Y.U.), *supra* note 6, at 191 (emphasis added).

about the degree to which improvement and innovation are warranted."¹¹²

Despite the reporters' evident shift towards autonomy, it remains my view that the Draft Restatement should accept the pull of Supreme Court jurisprudence because: (1) the Supreme Court has been almost unrelenting in pushing lower courts to narrow the gap between local doctrine and global practice when it comes to the procedures for resolving international commercial disputes;¹¹³ (2) the Supreme Court's decisions therefore "have become seminal reference points for international tribunals, commentators and even foreign courts in the development of international arbitration . . .";¹¹⁴ and (3) while the ALI should cherish its independence,¹¹⁵ there is a difference between impartiality

112. Perry, *Atlanta*, *supra* note 60 (quoting George Bermann) (emphasis added).

113. *See, e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) ("A parochial refusal by the courts of one county to enforce an international arbitration agreement would not only frustrate the[] purposes [of predictability and neutrality], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39 (1985) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)) ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity and well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration,' . . . and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.") (citation omitted).

114. Bermann et al. (PENN. ST.), *supra* note 6, at 1334 & n.1.

115. *See* ALI FOREIGN RELATIONS PROJECT, *supra* note 27, at 6-7 (emphasizing that "a private body undertaking a survey in Foreign Relations Law will have

and freedom.¹¹⁶ An overzealous assertion of the latter in relation to Supreme Court precedent seems unlikely to prove appealing to lower courts,¹¹⁷ especially when the Court's jurisprudence already represents such a progressive force in the field of international arbitration.

Where the Supreme Court has not addressed a specific topic, the question becomes the extent to which the reporters should seek to anticipate positions that the Court seems likely to take: in other words, the extent to which the reporters should try to see unresolved issues through the eyes of the Court. On the one hand, the ALI's tendency has been to view unresolved issues through the eyes of some hypothetical court, though the standard can be somewhat diffuse when dealing with decentralized legal frameworks grounded in domestic state law,¹¹⁸ or customary

an objectivity and a detachment which no official group could possess" and that the "prestige of the final result will be correspondingly raised"); *see also* Michael Traynor, *The Future of Foreign Relations Law of the United States*, 18 Sw. J. INT'L L. 5, 12 (2011) [hereinafter Traynor, *The Future*] (opining that the "ALI's independent and nongovernmental approach can introduce 'an element of stabilization'" into the system of international dispute settlement) (quoting Karl M. Meessen, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States*, 14 YALE J. INT'L L. 433, 435 (1989)).

116. *See* OXFORD COMPACT THESAURUS 448 (2d ed. 2001) (listing both "impartiality" and "freedom" as synonyms for "independence"). *Compare* COMPACT OXFORD ENGLISH DICTIONARY 558 (2d ed. 2003) (defining "impartial" and emphasizing the qualities of neutrality and even-handedness), *with id.* at 438 (defining "free" and "freedom," and emphasizing the absence of control or restraints).

117. *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 866-67 (1996) ("[T]he Restatement's influence depends on whether courts pay attention to it, which in turn depends on whether the Restatement actually reflects what is happening in the courts."); *see also* Perlman, *supra* note 18, at 4 ("A Restatement of the Law is firmly grounded in the existing case law. Thus, it is an effort to restate the governing rules in a coherent and systematic way. Proposals to adopt or impose the Institute's own views as to what the law should be are generally rejected.")

118. *See* Perlman, *supra* note 18, at 4 ("[L]et me say a few words about the Institute's official view of what [Restatements] represent. . . . Proposals to adopt or impose the Institute's own views as to what the law should be are generally rejected. . . . Rather, the standard is to adopt the rule that a rational court, faced with the issue for the first time, would find most persuasive."). To place Perlman's statement in context, one should observe that he is Chancellor of the University of Nebraska-Lincoln, a member of the Council of the American Law

international law.¹¹⁹ When dealing with topics on which the Supreme Court clearly has the last word, such as the interpretation of treaties and statutes of the United States,¹²⁰ one might expect the reporters to aim for the views reasonably likely to be embraced by the Court. On the other hand, there remain good reasons to avoid vote counting as a means of divining how narrow majorities might rule based on the particular constitution of the Court at a given time.¹²¹ This observation enjoys particular force in a context where one expects the Draft Restatement to enjoy a shelf life long enough to witness substantial turnover on the Court.¹²²

To reconcile the Supreme Court's central role with prudential concerns about speculation and vote-counting, one might propose a model in which the reporters more consciously adhere to the Supreme Court's settled approach to predicate issues (such as the rules of treaty and statutory interpretation), but having done that, enjoy the freedom to express their views on ultimate issues without attempting to predict how narrow majorities might resolve them. This

Institute, and was co-reporter for the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1994). See *Biography of Harvey S. Perlman*, U. NEB., <http://nebraska.edu/administration/chancellors-and-vice-presidents/harvey-s-perlman.html> (last visited July 15, 2013).

119. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, at XI, 3 (explaining that the volume sought to state “the rules that an *impartial tribunal* would apply if charged with deciding a controversy in accordance with international law,” meaning the views of a “disinterested tribunal, whether of the United States or some other national state or an international tribunal”) (emphasis added). But see RESTATEMENT (SECOND) OF FOREIGN RELATIONS, *supra* note 18, at XII (“Thus the Restatement of this Subject, in stating the rules of international law, represents the opinion of The American Law Institute as to the rules that an *international tribunal* would apply if charged with deciding a controversy in accordance with international law.”) (emphasis added).

120. See *supra* notes 23-24 and accompanying text.

121. See Traynor, *The Future*, *supra* note 115, at 12 (“The ALI should not subordinate its view to what could be a very narrow majority or plurality of justices at a particular time.”).

122. See *supra* notes 30, 107 and accompanying text. As of this writing, four of the nine sitting justices are over seventy years old, and three of those four are over 75. See *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 28, 2013).

model has the twin virtues of allowing the reporters some leeway while maintaining discipline and increasing the likelihood that their final product falls within a range of outcomes framed by the Court's jurisprudence on predicate issues. As explained in Parts V and VI, however, the Draft Restatement pays scant attention to the predicate issues of treaty and statutory interpretation, with the result that the foundation for provisions on *forum non conveniens* and vacatur of awards contains vast hollow spaces that arguably cannot support the ALI's black letter and commentary on these points. Perhaps for this reason, the provisions on *forum non conveniens* and vacatur both contradict the weight of lower court precedent *and* seem poorly calculated to evoke a friendly welcome by the Supreme Court.

V. TREATY INTERPRETATION, FORUM NON CONVENIENS,
AND THE NEW YORK CONVENTION

As once observed by its chief reporter, the Draft Restatement operates in a field populated by "givens," or norms that cannot be violated or ignored, including "international agreements of *reasonably settled meaning* to which the U.S. is a party."¹²³ These may include portions of the New York and Panama Conventions,¹²⁴ which "occupy a place in the international commercial arbitration field that the drafters of the early Restatements [on state-law topics] could not have imagined," thus "supply[ing] restaters with additional 'givens,'" or norms that demand respect.¹²⁵ In other words, reasonably settled treaty obligations may require the Draft Restatement to repudiate inconsistent practices not mandated by intervening U.S. statutes or the U.S. Constitution.¹²⁶ However, where treaty provisions do

123. Bermann (N.Y.U.), *supra* note 6, at 191 (emphasis added).

124. *See* New York Convention, *supra* note 15; *see also* Inter-American Convention on Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448 (1990), O.A.S. Treaty Series no. 42, *reprinted in* 14 I.L.M. 336 (1975) [hereinafter Panama Convention].

125. Bermann (N.Y.U.), *supra* note 6, at 195.

126. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 115(1)(a) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if . . . the act

not yet enjoy settled meanings, they should not be invoked to repudiate U.S. practices without first demonstrating that the position at least coincides with settled rules of treaty interpretation. As explained below, the Draft Restatement pays scant attention to this predicate issue, with the result that it incorrectly declares application of the *forum non conveniens* doctrine to be incompatible with the United States' obligations as a state party to the New York Convention.¹²⁷

A. *Treaty Interpretation*

As every international lawyer knows, the rules set forth in the Vienna Convention on the Law of Treaties call on states to interpret treaty provisions "in good faith, in accordance with the ordinary meaning to be given to the[ir] terms . . . [taken] in their context and in the light of [the treaty's] object and purpose."¹²⁸ "There shall [also] be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."¹²⁹ "A special meaning shall be given to a term if it is established that the parties so intended."¹³⁰ However, the party seeking to establish a specialized meaning faces a rather heavy burden of proof.¹³¹ In addition, one may consult supplementary means of interpretation, such as drafting history, either to confirm

and the earlier rule or provision cannot be fairly reconciled."); *id.* § 115(3) ("A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.").

127. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29(a); *id.* § 4-29 cmt. b; *id.* § 4-29 reporters' note b.

128. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

129. *Id.* art. 31(3)(b).

130. *Id.* art. 31(4).

131. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 244 (2d ed. 2007) (observing that "the burden of proof of a special meaning will rest on th[e] party" asserting it); MALCOLM N. SHAW, INTERNATIONAL LAW 938 (6th ed. 2008) (emphasizing that "the standard of proof is fairly high, since a derogation from the ordinary meaning of the term is involved").

the meaning resulting from the application of text, context, object and purpose, or to establish the meaning if those indicators “leave the meaning ambiguous” or lead to a “manifestly absurd” result.¹³²

Although the United States has not ratified the Vienna Convention,¹³³ its rules of treaty interpretation reflect customary international law,¹³⁴ binding as such on the United States.¹³⁵ While Supreme Court jurisprudence displays a somewhat greater enthusiasm for drafting history than anticipated by the Vienna Convention,¹³⁶ one should take care not to exaggerate the differences between international and U.S. practice with respect to treaty interpretation.¹³⁷ In fact, they reflect a unity of views on the three key points: both emphasize text,¹³⁸ both give due

132. VCLT, *supra* note 128, art. 32(a) & 32(b).

133. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 n.5 (2d Cir. 2000); *Aquamar v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 638 n.9 (5th Cir. 1994).

134. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 47, 109-110 (Feb. 26); *Chubb & Son, Inc.*, 214 F.3d at 308; *Aquamar S.A.*, 179 F.3d at 1296 n.40; *Kreimerman*, 22 F.3d at 638 n.9.

135. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988).

136. See, e.g., *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226-27 (1996); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 542-46 (1991); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700-02 (1988); *Air France v. Saks*, 470 U.S. 392, 400-03 (1985); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 325 reporters' note 4 (indicating that U.S. judicial practice includes a greater tendency to consult preparatory materials for purposes of treaty interpretation); Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1257 (2005) (explaining that the Supreme Court “on occasion” consults “preparatory work” in the process of treaty interpretation).

137. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 325 reporters' note 4.

138. See VCLT, *supra* note 128, art. 31(1) (calling for interpretation “in accordance with the ordinary meaning to be given to the terms of the treaty”); *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6, 22 (Feb. 3) (explaining that “[i]nterpretation must be based above all upon the text of the treaty”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 630 (7th ed. 2008) (indicating that the Vienna Convention, the International Court of Justice, the

consideration to subsequent state practice,¹³⁹ and neither favors a teleological approach that gives overriding weight to broad statements about the purpose or spirit of treaty provisions.¹⁴⁰

International Law Commission, and the Institute of International Law all emphasize *text* as the best guide to the common intention of states parties); see also *Eastern Airlines Inc.*, 499 U.S. at 534-35; *Maximov v. United States*, 373 U.S. 49, 54 (1963); Glashausser, *supra* note 136, at 1256.

139. See VCLT, *supra* note 128, art. 31(3)(b) (requiring consideration of “any subsequent practice . . . which establishes the agreement of the parties regarding its interpretation”); AUST, *supra* note 131, at 241 (opining that subsequent practice represents “a most important element in the interpretation of any treaty, and reference to practice is well established in the jurisprudence of international tribunals”); see also *Zicherman*, 516 U.S. at 227; *Eastern Airlines, Inc.*, 499 U.S. at 535; *Air France*, 470 U.S. at 403; Glashausser, *supra* note 136, at 1257.

While the concordant practice of all parties would provide the best indication of a common understanding, “[s]ubsequent practice by individual parties also has some probative value,” especially if met with tacit acceptance. See BROWNIE, *supra* note 138, at 634 (recognizing the probative value of practice by individual states); see also AUST, *supra* note 131, at 241, 243 (discussing the value of subsequent practice that “is consistent and is common to, or accepted, expressly or tacitly, by all or both parties,” but recognizing that “[i]t is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly”).

140. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 325 reporters’ note 4 (recognizing that while the Vienna Convention and U.S. judicial practice “both . . . seek to determine the intention of the parties[,] neither favors ‘teleological interpretation’ to achieve some purpose overriding that intention.”); AUST, *supra* note 131, at 235 (discussing treaty interpretation under the Vienna Convention, and explaining that “[i]n practice consideration of object and purpose is more for the purpose of confirming [a textual] interpretation”). In expressing its views on the teleological approach to treaty interpretation, the Supreme Court has opined as follows:

The drafters of the Convention and the parties to the Protocol . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose untemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions.

Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 183 (1993); Glashausser, *supra* note 136, at 1257 (“The Court also has appeared at times to embrace a teleological approach of examining a treaty’s purpose, but usually simply to add

As suggested by the foregoing discussion, when it comes to treaty interpretation, a common error involves the tendency to describe treaty obligations based on overly simplified understandings of purpose. To give a concrete example of this phenomenon, one may refer to the famous *Shrimp/Turtle* case, which involved interpretation and application of the General Agreement on Tariffs and Trade's (GATT's) general exceptions to treaty obligations:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption¹⁴¹

At the first instance, a World Trade Organization (WTO) dispute settlement panel declared that Article XX did not permit states to adopt measures that could “undermine the . . . multilateral trading system,” including

unnecessary support to its conclusions, not to serve as the foundation for them.”).

141. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, art. XX(a)-(g), 55 U.N.T.S. 194 [hereinafter GATT].

measures conditioning market access on compliance with conservation policies unilaterally adopted by importing states.¹⁴² Subsequently, the WTO's Appellate Body criticized the panel for failing to "examine the ordinary meaning" of the words actually used in Article XX,¹⁴³ for emphasizing the trade-liberalizing object and purpose of the GATT as a whole,¹⁴⁴ and for describing those goals in an "overly broad manner."¹⁴⁵ Focusing on the specific text of Article XX, the Appellate Body observed that the *validation* of unilaterally adopted, national policies represented a common thread running through the enumeration of general exceptions.¹⁴⁶ Taken as a whole, this episode illustrates: (1) a somewhat common and improper tendency to apply specific treaty obligations based on overly generalized perceptions of a treaty's broad goals; (2) a corresponding and equally improper tendency to perceive treaty violations that may not be supported by textual analysis; and (3) the proper mode of treaty interpretation, which focuses on concrete data (such as text and state practice) and often leaves states with broader leeway for action.

Another mistake sometimes made in the context of treaty practice involves a tendency to focus only on the *existence* of treaty rights without considering the possible consequences of their *wrongful exercise* in a given case. To illustrate the significance of that second step, one may again refer to the *Shrimp/Turtle* dispute. In that case, much of the controversy involved disagreements about the compliance of U.S. conservation measures with the introductory paragraph of Article XX, which prevents states from exercising certain rights in a manner that would constitute "arbitrary" or "unjustifiable" discrimination.¹⁴⁷

142. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 116, WT/DS58/AB/R (Oct. 11, 1998) [hereinafter *Shrimp/Turtle*] (quoting the panel report).

143. *Id.* ¶ 114, 115.

144. *Id.* ¶ 116.

145. *Id.*

146. *Id.* ¶ 121.

147. GATT, *supra* note 141, art. XX.

When applying that provision, the Appellate Body explained as follows:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."¹⁴⁸

As further explained by Bin Cheng, the authority quoted by the Appellate Body:

The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of the abuse of rights (*abus de droit*), recognised in principle by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights. . . .

The exercise of a right—or supposed right, since the right no longer exists—for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law. . . .

[W]henever [the] exercise [of a right] impinges on the field covered by the treaty obligation, it must be exercised bona fide, that is to say reasonably. A reasonable and bona fide exercise of a right . . . is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party . . . is unreasonable and is considered as

148. *Shrimp/Turtle*, *supra* note 142, ¶ 158 (quoting BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953)).

inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.¹⁴⁹

Finally, as clarified by Cambridge Professor H.C. Gutteridge in 1933:

To speak of an abuse of a right without attempting to determine its nature is simply to indulge in a rhetorical flourish Some definite criterion is required which will enable us to fix the circumstances in which the purported exercise of a legal right will assume a wrongful aspect. . . . *The subjective test.*—This is based on an intention to inflict harm . . . which thus becomes the criterion of the abuse of a right. An act which is done with the sole or dominant purpose of harming one's neighbour becomes abusive and therefore wrongful, even though it may be cloaked with the outward trappings of a legal right. . . .

The truth of the matter is that when we say that an act is prompted by an intention to harm we are dealing with something so impalpable and evasive that this criterion is usually of restricted value in practice. A man rarely acts with a single motive; in the majority of cases his intentions are mixed, and it often becomes impossible to disentangle from the complex of motives the one which is to be regarded as the sole or even the dominant impulse of his conduct. . . .

The objective test of intention to harm.—The breaking down in practice of intention as a subjective test compels us to go further afield in the search for a suitable criterion of an objective nature. This may be found in its simplest and least adventurous form in the adoption of the test of 'objective intention.' The attempt to 'try the thought of man' is not wholly abandoned, but the existence of an '*animus vicini nocendi*' is deduced from the circumstances generally . . . , and more particularly from the consequences of the act, as, for instance, where it is unnecessary or causes excessive damage. . . .

It is argued that certain rights are not absolute in character, but must only be utilized in pursuance of a 'legitimate motive,' *i.e.* for the purpose for which they would be exercised by a hypothetical reasonable and honest man in the particular circumstances of any given case. . . . If an objective criterion is to be aimed at, it would seem . . . to be more logical to abandon the use of a specious phrase such as 'legitimate motive' and to adopt as a test of abuse

149. CHENG, *supra* note 148, at 121.

either the ‘unreasonable’ or excessive nature of the exercise of a right¹⁵⁰

Taken as a whole, these passages illustrate the need not only to consider the interpretation of rights created by treaties, but also the possible loss of those rights through abusive or unreasonable exercise in particular cases. As demonstrated below, Supreme Court jurisprudence assigns a similar function to the *forum non conveniens* doctrine in domestic practice.¹⁵¹

B. *Forum Non Conveniens*

1. *The Forum Non Conveniens Doctrine in Broad Outline.* As known to all first-year law students in the United States, the *forum non conveniens* doctrine represents a procedural device,¹⁵² whereby courts having personal and subject matter jurisdiction may exercise their discretion to dismiss legal proceedings that visit disproportionate inconvenience on the defendant or the court, even if they satisfy all the normal venue requirements.¹⁵³ Generally speaking, application of the

150. H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 25-27 (1933).

151. See *infra* notes 152-60 and accompanying text.

152. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 n.4 (1994); *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832, 840-41 (11th Cir. 2010); *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496 (2d Cir. 2002); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 656 (9th Cir. 1996).

153. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”); *Carijano v. Occidental Petroleum Co.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (same); *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 821 F.2d 1147, 1153-54 (5th Cir. 1987) (same); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 146 (9th Cir. 1982) (same); see also *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1302 n.4 (11th Cir. 2002) (“*Forum non conveniens* is an ancient common law doctrine that permits a court to decline jurisdiction over a case, even if personal jurisdiction and venue are otherwise proper, when there is a more convenient forum for the case to be litigated.”); *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1029 (3d Cir. 1980) (“*Forum non conveniens* presupposes the existence of two judicial forums each possessing jurisdiction and venue over the action, but posits that one forum may resist

doctrine requires a three-step analysis, in which one determines: (1) the degree of deference properly accorded to the plaintiff's choice of forum; (2) the existence of an adequate alternative forum; and (3) whether the balance of public and private interest factors justifies dismissal.¹⁵⁴ In

invocation of its jurisdiction when trial of the action would more appropriately proceed in the other forum.”).

154. See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001) (en banc); see also *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835-37 (5th Cir. 1993) (applying a slightly different three-part test, focusing on (1) the existence of an adequate alternative forum, (2) the weighing of “private interest” factors, and (3) the weighing of “public interest” factors).

With respect to the plaintiff's choice of forum, courts frequently observe that the choice of a U.S. forum by non-resident aliens deserves little deference. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); *Jiali Tang v. Synutra Int'l Inc.*, 656 F.3d 242, 252 (4th Cir. 2011). By contrast, the choices of U.S. citizens and resident aliens deserve substantial deference. *Piper*, 454 U.S. at 255-56 (citizens); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1335 (11th Cir. 2011) (citizens); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 n.6 (9th Cir. 2006) (resident aliens); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000) (residents).

When applying the *forum non conveniens* doctrine, courts define the private interest factors to include “ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Piper*, 454 U.S. at 241 n.6 (quoting *Gulf Oil Corp.*, 330 U.S. at 508).

When applying the *forum non conveniens* doctrine, courts generally define the public interest factors to include the:

administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (quoting *Gilbert*, 330 U.S. at 509). In addition, courts have also considered strong substantive policies of the United States, such as providing relief to the victims of torture and extrajudicial killings. *Wiwa*, 226 F.2d at 103-06. Presumably, the strong federal policy favoring enforcement of Convention awards also requires due consideration as a public interest factor. *Cf. Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 401 (2d Cir. 2011) (Lynch, J., dissenting) (emphasizing that “courts must be cautious in applying *forum non conveniens* in the context of actions to enforce arbitration awards under the New York and Panama Conventions,” given “the text and the

applying the third step, courts must decide whether the facts “either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience . . . , or (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.”¹⁵⁵ In this sense, the doctrine represents “a supervening venue provision,”¹⁵⁶ which enables courts to resist the abusive or unjust assertion of legal rights.¹⁵⁷ So conceived, its function roughly mirrors the abuse of rights doctrine in civil law jurisdictions.¹⁵⁸ Whatever the particular label, however, the

history of the Conventions as well as the need to ensure the dependability and impartiality of international arbitration so as to promote transnational commerce”).

155. *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). This remains the standard commonly applied by the Supreme Court and lower courts. See, e.g., *Sinochem Int’l Co., Ltd. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007); *Am. Dredging Co.*, 510 U.S. at 447-48; *Figueiredo*, 665 F.3d at 402; *Zions First Nat’l Bank v. Moto Diesel Mexicana, S.A. de C.V.*, 629 F.3d 520, 525 (6th Cir. 2010); *Euophins Pharma US Holdings v. Bioalliance Pharma*, 623 F.3d 147, 160 (3d Cir. 2010); *Wilson v. Island Seas Invs., Ltd.*, 590 F.3d 1264, 1269 (11th Cir. 2009); *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 200 (4th Cir. 2009); *Clerides v. Boeing Co.*, 534 F.3d 623, 628 (7th Cir. 2008).

156. *Sinochem*, 549 U.S. at 429 (quoting *Am. Dredging Co.*, 510 U.S. at 453); see also *Zions First Nat’l Bank*, 629 F.3d at 523 n.1; *Loya v. Starwood Hotels & Resorts Worldwide*, 583 F.3d 656, 663 (9th Cir. 2009); *Yavuz*, 576 F.3d at 1172.

157. As numerous courts, have observed, the “doctrine of *forum non conveniens* rests upon a court’s inherent power to control the parties and cases before it and to prevent its process from becoming an instrument of abuse or injustice.” *In re Air Crash Disaster*, 821 F.2d at 1153-54; *Simcox v. McDermott Int’l, Inc.*, 152 F.R.D. 689, 693 (S.D. Tex. 1994) (same); see also *Baumgart*, 981 F.2d at 828 (explaining that the *forum non conveniens* doctrine “derives from the court’s inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, and oppression”) (quoting *In re Air Crash Disaster*, 821 F.2d at 1155).

158. See Ellen L. Hayes, *Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation*, 26 U. BRITISH COLUMBIA L. REV. 41, 56 (1992) (“Strictly speaking the Japanese courts do not have a doctrine of *forum non conveniens*. . . . It is submitted however that the objectives of the *forum non conveniens* doctrine have been accomplished in Japan as a result of the Supreme Court’s view that international jurisdiction should be tested on the basis of the principles of ‘justice and reasonableness’

point is that in a modern legal context where broad jurisdictional and venue statutes have become the norm,¹⁵⁹ such devices have become necessary safeguards against abuse.¹⁶⁰

2. *U.S. Jurisprudence on Forum Non Conveniens Dismissals of Convention Awards.* Because the enforcement of Convention awards involves summary proceedings and the application of internationally uniform substantive norms,¹⁶¹ they generally raise little prospect of inconvenience for respondents or U.S. courts,¹⁶² with the result that observers generally regard them as poor candidates for dismissal based on the *forum non conveniens* doctrine.¹⁶³ Consistent with these insights, U.S. courts generally have assumed that they possess the competence to

(*jori*). In addition, a similar doctrine could also be developed as an application of the prohibition on abuse of rights . . .”).

159. See *Piper*, 454 U.S. at 250 (“Jurisdiction and venue requirements are often easily satisfied.”); see also *Gilbert*, 330 U.S. at 507 (observing that venue “statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy”).

160. See *Carijano v. Occidental Petroleum Co.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (quoting *Gilbert*, 330 U.S. at 507) (“Historically, the doctrine’s purpose is to root out cases in which the ‘open door’ of broad jurisdiction and venue laws ‘may admit those who seek not simply justice but perhaps justice blended with some harassment,’ and particularly cases in which a plaintiff resorts ‘to a strategy of forcing the trial at a most inconvenient place for an adversary.’”); see also *Piper*, 454 U.S. at 249 n.15 (explaining that “dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law”).

161. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-33(a) cmt. a (emphasizing that post-award actions involving Convention and non-Convention awards “are summary proceedings”).

162. See *id.* § 4-29 reporters’ note a (“Actions of this sort seldom raise . . . significant convenience considerations.”).

163. See *id.* § 4-29 cmt. a (“Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding. . . . Thus, they are generally poor candidates for *forum non conveniens* treatment.”) (citation omitted); *id.* reporters’ note a (“As a practical matter, the prospects for international *forum non conveniens* motions in post-award actions are not great.”); *MOSES*, *supra* note 62, at 206 (opining that the *forum non conveniens* doctrine “should rarely justify a refusal to recognize or enforce a Convention award . . .”).

apply the *forum non conveniens* doctrine in proceedings to enforce Convention awards, but have concluded that the specific facts do not justify relief.¹⁶⁴ However, in 2002 and again in 2011, the United States Court of Appeals for the Second Circuit invoked the *forum non conveniens* doctrine to dismiss enforcement actions involving Convention awards,¹⁶⁵ which triggered expressions of dismay from leaders of the U.S. international arbitration community.¹⁶⁶ Read broadly, the two decisions seem to invite the dismissal of enforcement actions involving foreign parties to foreign arbitrations that relate to transactions on foreign soil,¹⁶⁷ to reframe the “public interest” factors in a manner that

164. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (citing *Venture Global Eng’g LLC v. Satyam Computer Servs.*, 233 Fed. Appx. 517, 520-22 (6th Cir. 2007); *TMR Energy, Ltd. v. State Fund of Ukr.*, 411 F.3d 296, 304 (2d Cir. 2005); *Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nig.*, 697 F. Supp. 2d 46 (D.D.C. 2010); *Higgins v. SPX Corp.*, 2006 U.S. Dist. LEXIS 20771, at *10-*13 (W.D. Mich. Apr. 18, 2006)).

165. *Figueiredo Ferraz e Engenharia de Projecto LTDA. v. Republic of Peru*, 665 F.3d 384, 393-94 (2d Cir. 2011); *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 501 (2d Cir. 2002).

166. See, e.g., William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 262 (2006) (opining that “the Second Circuit seems to have gone astray as a matter of both logic and history”); William W. Park et al., *International Commercial Dispute Resolution*, 37 INT’L LAW. 445, 450 (2003) (indicating that the Second Circuit’s decision in *Monde Re* “fundamentally misapprehend[s] the rationale of the New York Convention . . .”); George A. Bermann, *Bermann on Figueiredo Ferraz v. Republic of Peru*, CONFLICT OF LAWS.NET (Dec. 21, 2011), <http://conflictoflaws.net/2011/bermann-on-figueiredo-ferraz-v-republic-of-peru/> (describing the Second Circuit’s opinion as a “sadly misguided” and “regrettable” decision that is “inconsistent with U.S. treaty obligations”); see also BORN, *supra* note 62, at 2402 (concluding that “the refusal . . . to enforce an award on *forum non conveniens* grounds is contrary to the New York Convention”).

167. As partial justification for the *forum non conveniens* dismissal in *Monde Re*, the Second Circuit pointed out that all parties were aliens, who performed the underlying commercial transactions outside the United States and who resolved their differences through arbitration outside the United States. *Monde Re*, 311 F.3d at 500. Because these particular statements would apply to a very large range of enforcement actions under the New York and Panama Conventions, they understandably provoked concern that the decision throws open the door to *forum non conveniens* dismissal of actions to enforce foreign Convention awards.

lowers the threshold required to secure dismissal,¹⁶⁸ and to increase the scope for appellate courts to second-guess district judges who elect to retain jurisdiction over enforcement proceedings.¹⁶⁹

Read in a properly narrow context, however, each case involved unusual facts unlikely to recur in future enforcement proceedings. For example, while most people forget, *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine* “grew out of a dispute that led to elevated political tensions and raised concerns about energy security in Europe.”¹⁷⁰ According to Russia, Ukraine’s state-owned gas concern had made significant, unauthorized withdrawals from pipelines carrying natural gas from Russia to Western Europe.¹⁷¹ Accepting the allegations as true, a reinsurer (Monde Re) covered the Russian losses and then (as subrogee) brought arbitration proceedings in Moscow against Ukraine’s state-owned gas concern.¹⁷² One

168. In justifying *forum non conveniens* dismissal in *Figueiredo*, the Second Circuit focused almost exclusively on Peru’s interest in applying a domestic statute that prohibits state agencies from paying more than three percent of their annual operating budgets to satisfy any particular judgment. *Figueiredo*, 665 F.3d at 392. This departs from the tendency to focus on “public interest” factors of particular relevance to U.S. courts. See *supra* note 154 and accompanying text.

169. The Second Circuit’s decision in *Figueiredo* represented an anomaly in the sense that it reversed the district court’s decision *not* to dismiss the enforcement action on *forum non conveniens* grounds. *Figueiredo*, 665 F.3d at 386, 393-94. In so doing, the court appeared to retreat from the abuse of discretion standard that normally applies to such matters. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981) (“The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”).

170. Charles H. Brower II, *Reflection on Forum Non Conveniens: Monde Re Was Right!?!?*, KLUWER ARBITRATION BLOG (Mar. 16, 2010), <http://kluwerarbitrationblog.com/blog/2010/03/16/reflections-on-forum-non-conveniens-monde-re-was-right/>.

171. *Monde Re*, 311 F.3d at 491.

172. *Id.*

year later, the tribunal awarded Monde Re over \$88 million by majority vote.¹⁷³

In due course, Monde Re brought enforcement proceedings in New York against Ukraine's state-owned gas concern and against the Ukrainian government, which was not a party to the underlying contract, had not been joined in the arbitration proceedings, and was not named in the award.¹⁷⁴ As a result, Monde Re's enforcement action did not represent a typical, summary proceeding against the award debtor.¹⁷⁵ To the contrary, it sought to establish the Ukrainian government's responsibility based on veil-piercing theories that were asserted in a politically volatile context and required complex examination of evidence located in East European capitals.¹⁷⁶

Given the circumstances just described, the Ukrainian government sought dismissal under the *forum non conveniens* doctrine.¹⁷⁷ After consideration, the district court granted the motion, and the Second Circuit affirmed.¹⁷⁸ In so doing, the Court of Appeals emphasized that the circumstances did not contemplate summary enforcement proceedings against the award debtor.¹⁷⁹ To the contrary, the proceedings sought the extension of liability to a third party based on theories that would require a complex inquiry into politically sensitive relationships.¹⁸⁰ Furthermore, the inquiry would require consideration of evidence located in foreign states, which clearly had stronger interests in the matter.¹⁸¹ Because that particular factual matrix cried out for the exercise of discretion and does not seem prone to frequent repetition, one may regard

173. *Id.*

174. *Id.* at 492, 494, 500.

175. *Id.* at 500.

176. *Id.* at 494-95, 500.

177. *Id.* at 492.

178. *Id.* at 492, 501.

179. *Id.* at 500.

180. *Id.* at 494-95, 500.

181. *Id.* at 500-01.

Monde Re as a sensible decision easily justified under the *forum non conveniens* doctrine,¹⁸² and other legal theories.¹⁸³

Nine years later, in *Figueiredo Ferraz Consultoria e Engenharia de Projecto Ltda. v. Republic of Peru*, the alignment of parties and the procedural history called forth memories of *Monde Re*: the claimant brought an arbitration and received an award against a state-controlled program in Peru (“Water for All”), then sought enforcement in New York not only against the named counterparty, but also against the Republic of Peru based on veil-piercing arguments.¹⁸⁴ However, the similarity stopped there. Contrary to the situation in *Monde Re*, the district court held that the veil-piercing arguments could be resolved without further collection of evidence because the Peruvian Ministry of Housing, Construction and Sanitation had *itself*: (1) made partial payments of sums due under the award; (2) asserted, in intra-governmental correspondence, that the Ministry of Economy and Finance had an obligation to satisfy the award; and (3) initiated proceedings to set aside the award in Peruvian courts.¹⁸⁵

Also contrary to the situation in *Monde Re*, the case did not raise questions that would have drawn U.S. courts into explosive political controversies involving two or more

182. See MOSES, *supra* note 62, at 207 (concluding that the unusual circumstances in *Monde Re* “make it one of those rare cases where application of *forum non conveniens* may have been justified”); Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. MIAMI INTER-AM. L. REV. 23, 35 (2004) (emphasizing the “highly unusual facts” in *Monde Re* and concluding that the decision represented a “hard case” that made “good law”).

183. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (expressing the view that “the Second Circuit in *Monde Re* arguably could have reached the same result . . . by questioning the proper status of the parties.”); *id.* § 4-31(b)(1) (recognizing the discretionary power of courts to decline recognition of persons as proper defendants if “determining the status of the non-party in the post-award action would unduly complicate that action . . .”).

184. *Figueiredo Ferraz Consultoria e Engenharia de Projecto Ltda. v. Republic of Peru*, 655 F. Supp. 2d 361, 367 (S.D.N.Y. 2009), *rev’d*, 655 F3d 384 (2d Cir. 2011).

185. *Id.* at 371.

foreign states. Given the simplicity of the issues and the absence of political turbulence, the district court exercised its discretion not to dismiss the enforcement action on *forum non conveniens* grounds.¹⁸⁶

In a final contrast to *Monde Re*, the Second Circuit *reversed* the district court's denial of *forum non conveniens* dismissal, based almost exclusively on Peru's interest in applying a domestic statute that prohibits state agencies from paying more than three percent of their annual operating budgets to satisfy any particular judgment.¹⁸⁷

As in *Monde Re*, however, the case involved a set of highly unusual circumstances that drew the Second Circuit's attention, including the facts that: (1) *Peru* represented the legal seat of arbitration; (2) the arbitral tribunal rendered its decision *ex aequo et bono* and awarded the claimant more than \$21 million; (3) the Ministry requested a Peruvian court to set aside the award on the grounds that Peruvian law limits recovery to the amount of the contract for *international arbitrations* involving a non-domestic party; (4) the Peruvian court denied set-aside because the claimant "had designated itself a *Peruvian* domiciliary in the agreement and the arbitration," with the result that "the arbitration was a '*national* arbitration' involving only *domestic* parties"; (5) when seeking enforcement of the award in New York, the claimant described itself as a *Brazilian* corporation; and (6) Peru's appellate brief stridently argued that the claimant should be deemed a *Peruvian* national, given the position it had taken in the agreement, the arbitration and the set-aside proceedings.¹⁸⁸

Seizing on the facts just mentioned, the Second Circuit seemed exceedingly reluctant to allow an ostensibly *Peruvian* entity to use enforcement proceedings to avoid the

186. *Id.* at 374-77.

187. *Figueiredo*, 665 F.3d at 392.

188. *Id.* at 387 (emphasis added); Brief for Defendants-Appellants at 57-59, *Figueiredo Ferraz Consultoria e Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (No. 09-3925); Reply Brief for Defendants-Appellants at 29, *Figueiredo Ferraz Consultoria e Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (No. 09-3925).

application of Peru's statutory cap on payments when dealing with the *Peruvian* government in a contract both executed and performed in *Peru*.¹⁸⁹ Viewed from this perspective, *Figueiredo* involved relationships so squarely grounded in a single jurisdiction that the resulting arbitration could not possibly have qualified for coverage by almost any of the leading instruments on international commercial arbitration.

Going back to the early history of treaties on the topic, the 1923 Geneva Protocol on Arbitration Clauses applies only to agreements "between parties subject respectively to the jurisdiction of different Contracting States."¹⁹⁰ The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards applies only to awards "made in pursuance of an agreement . . . covered by the [1923 Geneva Protocol]," meaning an agreement between parties having diverse nationalities.¹⁹¹

Similarly, the 1961 European Convention on International Commercial Arbitration applies only to agreements and awards "arising from international trade between physical or legal persons having . . . their habitual place of residence or their seat in different Contracting States."¹⁹²

Likewise, in the preamble to the 1975 Inter-American (Panama) Convention on *International* Commercial Arbitration, states parties express their desire to "conclud[e] a convention on *international* commercial arbitration."¹⁹³ While none of the operative articles expressly limits that instrument's coverage to international commercial disputes, the limitation finds confirmation in Article 3, which provides: "[i]n the absence of an express agreement between

189. *Figueiredo*, 665 F.3d at 387, 392.

190. Geneva Protocol on Arbitration Clauses, art. 1, Sept. 24, 1923, 27 L.N.T.S. 157.

191. Geneva Convention on the Execution of Foreign Arbitral Awards, art. 1, Sept. 26, 1927, 92 L.N.T.S. 301.

192. European Convention on International Commercial Arbitration, art. I(1)(a), Apr. 21, 1961, 484 U.N.T.S. 364.

193. Panama Convention, *supra* note 124, pmbl. (emphasis added).

the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission” (IACAC Rules).¹⁹⁴ It seems unlikely that states parties, such as the United States, contemplated application of the IACAC Rules to purely domestic arbitrations in which the disputing parties failed to identify a set of arbitration rules.¹⁹⁵

Finally, and most recently, the UNCITRAL Model Law on International Commercial Arbitration applies only to “international commercial arbitration,” defined to encompass situations where: (1) the parties have their places of business in different states; (2) the arbitration is seated outside the state in which the parties have their places of business; (3) a substantial place of contractual performance lies outside the state in which the parties have their places of business; or (4) “the parties have expressly agreed that the subject matter of the [dispute] relates to more than one country.”¹⁹⁶ Obviously, none of these criteria applied in *Figueiredo*.

True to its official name, the (New York) Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards applies to any award rendered on the territory of a foreign state (or, if the state of enforcement has adopted the reciprocity reservation, the Convention applies to any award rendered on the territory of a foreign state party).¹⁹⁷ Unlike almost every other leading instrument, the New York Convention does *not* require the disputing parties to have diverse nationalities or to engage in transactions that cross national borders.

194. *Id.* art. 3.

195. See H.R. Rep. No. 101-501, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 676-77 (emphasizing the Panama Convention’s role in facilitating “international commerce,” “trade,” and “foreign investment”); *cf.* John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT’L ARB. 1, 37 (2000) (“Application of the Panama Convention to *international* arbitration permeates the Convention from beginning to end.”).

196. UNCITRAL Model Law, *supra* note 64, art. 1(1), art. 1(3).

197. New York Convention, *supra* note 15, art. I(1), art I.(3).

While the New York Convention aims primarily “to facilitate arbitration in international commerce,” and while an early International Chamber of Commerce (ICC) prototype had referred to “international awards,” anxieties about a-national (stateless) awards, and the difficulties of defining international commerce, prompted delegates to the New York Convention’s 1958 drafting conference to reorient that instrument’s coverage toward foreign awards.¹⁹⁸ As a result, the New York Convention technically applies to foreign awards grounded in a single jurisdiction. Thus, for purposes of enforcement in the United States, an award falls under the Convention even if rendered in Paris between two French wine merchants under a contract for the sale of French wine.¹⁹⁹

In his seminal work on the New York Convention, Albert Jan van den Berg describes this phenomenon as a “harmless ‘side-effect’” that “scarcely occurs in practice” and had “not occurred in any of the reported cases” as of 1981.²⁰⁰ In addition, he opines that the New York Convention’s uniquely broad scope might prove useful in cases where the losing parties to domestic arbitrations possess substantial bank accounts in foreign jurisdictions.²⁰¹ While van den Berg’s assessment holds true as a general matter, one wonders if the “side-effect” remains so “harmless” when private parties exploit it to reach the assets of their own governments, thus draining the national treasury in violation of otherwise applicable national laws.²⁰²

198. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 17 (1981).

199. *Id.*

200. *Id.* at 18.

201. *Id.*

202. Confirming the potential for mischief in the circumstances just outlined, one need not search long for precedent rejecting the efforts of disgruntled national corporations to circumvent the limits of domestic redress against their own governments by invoking the machinery of international dispute settlement. *Cf. Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 223 (June 26, 2003), 7 ISCID Rep. 421 (2005) (finding it “inconceivable” that states would negotiate treaties to provide their own citizens with international avenues for redress of regulatory disputes). This holds true even in the context of the New York Convention, where the only court to address

Of course, the New York Convention's unusually broad scope should not apply to cases that, like *Figueiredo*, arise under the Panama Convention. As mentioned above and recognized by some courts, the Panama Convention does not cover foreign awards involving parties, transactions, and arbitral proceedings grounded in a single foreign jurisdiction.²⁰³ However, this clear understanding of the Panama Convention's scope reveals an anomaly in the Federal Arbitration Act. Despite the obvious differences between the respective scopes of the Panama and New York Conventions, the United States inexplicably implemented the Panama Convention through a statutory provision that incorporates by reference most of the New York Convention's implementing legislation.²⁰⁴ As a result, while the Panama Convention applies only to international commercial arbitration, the United States has extended its coverage by statute to awards grounded in a single foreign jurisdiction.²⁰⁵ While "harmless" in most cases, this little-known "side-effect" could prove to be both unexpected and aggravating to foreign governments dealing with their own citizens in domestic transactions on matters of public importance. Under these circumstances, it seems wise to preserve remedies for the particular "side-effect" just described. In some legal traditions, dismissals based on

the issue outside the Second Circuit invoked the *forum non conveniens* doctrine to dismiss an enforcement action brought by a foreign entity against its own government with respect to an arbitration involving public utilities and seated in the state of the disputing parties' nationality. *Termorio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103-04 (D.D.C. 2006).

203. See *Energy Transport, Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 199 (S.D.N.Y. 2004) ("For example, if parties sought enforcement in the United States of an award rendered in Panama, involving only Panamanian citizens conducting a domestic transaction, the New York Convention would likely apply but the Inter-American Convention would not because of the award's purely domestic character."); Bowman, *supra* note 195, at 39 ("Under the Panama Convention, . . . a foreign award rendered . . . in Uruguay, involving only Uruguayan citizens engaged in a domestic transaction, may not be enforceable.").

204. See 9 U.S.C. § 302 (2006).

205. Bowman, *supra* note 195, at 39 n.104, 75.

personal jurisdiction,²⁰⁶ or foreign sovereign immunity,²⁰⁷ might fit the bill. In other traditions, *forum non conveniens* dismissals might serve equally well.

3. *The New York Convention and Forum Non Conveniens Dismissals: The Draft Restatement's Misunderstanding of International Law.* From its earliest iterations, the black letter of the Draft Restatement has taken the position that actions "for the enforcement of . . . Convention award[s] [are] not subject to . . . dismissal on *forum non conveniens* grounds."²⁰⁸ Under the neutral veneer of that formulation, however, initial drafts of the reporters' notes elaborated the principle more stridently, emphasizing that "the Restatement *rejects* the view that *forum non conveniens* is a proper basis for . . . dismissing an action seeking recognition or enforcement of a Convention award."²⁰⁹ While more recent drafts have moderated the tone of the reporters' notes,²¹⁰ the black letter remains unchanged.²¹¹

206. See BORN, *supra* note 62, at 2400 (describing a case in which the Swiss Federal Tribunal "refused to enforce an arbitral award *made in Switzerland* against a foreign state, in a case involving non-Swiss parties, on the grounds that the award *lacked sufficient connection with Switzerland* to be enforced there") (emphasis added). According to Mr. Born, the ruling "is confined to the context of awards against foreign states." *Id.* at 2400 n.373.

207. *Id.* at 2400 (recognizing that "the context of awards against foreign states . . . raise[s] issues of state immunity"). As explained below, although the New York Convention does not address the topic of foreign sovereign immunity, it is not clear that international standards require treatment of arbitration agreements as waivers of immunity from enforcement and execution, and it is not clear that international standards affect the immunity of states in claims brought by the own nationals. See *infra* notes 259-66 and accompanying text.

208. DRAFT RESTATEMENT (Council Draft No. 1), *supra* note 61, § 22; DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 5-21.

209. DRAFT RESTATEMENT (Council Draft No. 1), *supra* note 61, § 22 reporters' note a; DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 5-21 reporters' note a.

210. As of this writing, the most recent version of the reporters' notes (1) no longer "rejects" the view that *forum non conveniens* dismissals of Convention awards can be a proper remedy, (2) describes the "dominant view" among U.S. courts as favoring the permissibility of such relief, and (3) recognizes that "courts have traditionally been willing to entertain motions to dismiss enforcement proceedings based on *forum non conveniens* . . .," but (4) nevertheless "takes the position that the doctrine is not available in actions to

The ALI's official justification for its position on *forum non conveniens* remained constant for the first seven drafts. As explained in official comments to the black letter,²¹² the ALI relied on the “*basic notion*” that the New York and Panama Conventions “impose an enforcement obligation on Contracting States” absent a “Convention defense to enforcement.”²¹³ In more recent drafts, the ALI eliminated the reference to the “*basic notion*” of the New York and Panama Conventions, and replaced it with the word “*requirement*,” so that the comments now assert: “Stay or dismissal of an action to confirm or enforce a Convention award based on *forum non conveniens* would run afoul of the Conventions’ *requirement* that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such awards.”²¹⁴ While the shift from

enforce Convention awards.” DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (emphasis added).

211. *See id.* § 4-29(a).

212. Though it is, perhaps, not widely known, the black letter and the comments contained in Restatements represent the official views of the ALI, whereas the reporters’ notes reflect only the personal views of the reporters. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, at XI; James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1149 (2001); McCaffrey, *supra* note 27, at 317; Michael Traynor, *John P. Frank: Foreword*, 35 ARIZ. ST. L.J. 219, 224 (2003).

213. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 22 cmt. a (Preliminary Draft No. 1, 2009) (emphasis added); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 22 cmt. a (Preliminary Draft No. 2, 2009) (emphasis added); DRAFT RESTATEMENT (Council Draft No. 1), *supra* note 61, § 22 cmt. a (emphasis added); DRAFT RESTATEMENT (Preliminary Draft No. 3), *supra* note 62, § 22 cmt. a (emphasis added); DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 5-21 cmt. a (emphasis added); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-21 cmt. a (Council Draft No. 2, 2010) [hereinafter DRAFT RESTATEMENT (Council Draft No. 2)] (emphasis added); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-18 Alternative A, cmt. a (Preliminary Draft No. 4, 2011) (emphasis added).

214. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29 cmt. b (Preliminary Draft No. 5, 2011) [hereinafter DRAFT RESTATEMENT (Preliminary Draft No. 5)] (emphasis added); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-29 cmt. b (emphasis added); DRAFT

“*basic notion*” to “*requirement*” suggests a greater degree of linguistic precision, the substance of the official commentary seems unchanged: the general purpose of the New York and Panama Conventions is to secure enforcement of Convention awards in the absence of seven enumerated grounds for refusal, which prevents the termination of enforcement proceedings on any other grounds, including *forum non conveniens*.

In contrast to the ALI’s official position, the reporters’ personal views on the justifications for rejecting the *forum non conveniens* doctrine have evolved substantially over time. Early drafts of the reporters’ notes relied on four themes to explain the rejection of *forum non conveniens* dismissals for actions to enforce Convention awards.²¹⁵ First, Supreme Court precedent identifies the goal of the New York Convention as securing unification of “the standards by which . . . awards are enforced in the signatory states.”²¹⁶ Second, given the New York and Panama Conventions’ enumeration of exclusive grounds for refusal to enforce awards, “it would be incompatible . . . to employ inconvenience as an additional basis” for denying enforcement of Convention awards.²¹⁷ Third, while Article III of the New York Convention permits states to enforce awards “in accordance with” their own “rules of procedure,” the use of a “national procedural device” to secure dismissal “would be inconsistent with the understanding that . . . the grounds for nonenforcement of Convention awards set out in the relevant Convention are exclusive”²¹⁸ And fourth, “since civil-law jurisdictions generally do not embrace the *forum non conveniens* doctrine, availability of the doctrine would also undermine the goal of unifying grounds for

RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 cmt. b (emphasis added).

215. See *supra* note 212 (indicating that the reporters’ notes only reflect the personal views of the reporters on any given topic).

216. DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 5-21 reporters’ note a (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

217. *Id.*

218. *Id.*

denying recognition and enforcement under the Convention.”²¹⁹

Perhaps because the early drafts of reporters’ notes lacked detailed examination of treaty text and, thus, persuasive force, subsequent iterations accord considerably more recognition to the rights of states to apply their own “rules of procedure” to enforcement actions under Article III of the New York Convention. Thus, while recognizing that the *text* of Article III “arguably permits courts to apply *forum non conveniens* to . . . Convention awards” as a procedural device, the reporters’ notes to Tentative Draft No. 2 opine that “the interpretation is not consistent with the *purpose* or *larger structure* of the Convention,” deemed to include the goal of unification and a framework that encompasses a limited number of enumerated grounds to refuse enforcement of Convention awards.²²⁰ In addition, and contrary to previous drafts,²²¹ the reporters’ notes have more recently asserted that “*forum non conveniens* is not a *purely* procedural rule.”²²² According to this newly formulated view, Article III only allows states parties to apply *purely* procedural rules that determine *how* litigation may proceed.²²³ These would include requirements that

219. *Id.* But see *supra* note 158 and accompanying text (indicating that civil law countries may use other devices, including the doctrine of abuse of rights, to perform the same basic function as the *forum non conveniens* doctrine).

220. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (emphasis added); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-29 reporters’ note b(ii) (emphasis added).

221. DRAFT RESTATEMENT (Preliminary Draft No. 1), *supra* note 213, § 22 cmt. b (recognizing that the “*forum non conveniens* doctrine is generally regarded as procedural”); DRAFT RESTATEMENT (Preliminary Draft No. 2), *supra* note 213, § 22 cmt. b (same); DRAFT RESTATEMENT (Council Draft No. 1), *supra* note 61, § 22 cmt. b (same); DRAFT RESTATEMENT (Preliminary Draft No. 3), *supra* note 61, § 22 cmt. b (same); DRAFT RESTATEMENT (Tentative Draft No. 1), *supra* note 61, § 5-21 cmt. b (same); DRAFT RESTATEMENT (Council Draft No. 2), *supra* note 213, § 5-21 cmt. b (same).

222. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (emphasis added); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-29 reporters’ note b(ii) (emphasis added).

223. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-29 reporters’ note b(ii).

govern the submissions of pleadings, the availability of pre-trial discovery, and the admissibility of evidence.²²⁴ In contrast, the reporters' notes suggest that Article III does not allow states parties to apply procedural rules that determine *whether* litigation should proceed.²²⁵ Thus, in

224. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters' note b(ii); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-29 reporters' note b(ii). Of course, the reference to "pre-trial" discovery seems puzzling because enforcement actions under the Conventions are widely regarded as summary proceedings, heard as motions as opposed to plenary actions in the United States. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 cmt. a ("Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding."); *id.* reporters' note a ("[P]ost-award actions generally are summary proceedings, requiring no witness testimony or introduction of other evidence."); *id.* § 4-33(a) ("A post-award action is ordinarily a summary proceeding, whether brought by motion or otherwise."); *id.* § 4-33 cmt. a ("Generally, post-award actions are summary proceedings . . . Motions are the usual vehicle.").

Also, one might argue pre-trial discovery has a substantive aspect and, like *forum non conveniens*, does not represent a *purely* procedural tool. See Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 998 (2011) ("In the real world, the iterative process of fact gathering is critical to legal analysis and outcomes."); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 356 (2011) ("From plaintiffs' (and perhaps defendants') perspective, it may be that something approaching full discovery is essential. Particularly when they intend to rely on expert opinions . . . to prove their cases at trial, anything less may be too risky.").

In addition, one should recognize that, compared with *forum non conveniens*, pre-trial discovery is more unique to the United States and more intensely despised in foreign legal systems. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 969-71 (5th ed. 2011) ("The broad, party-controlled character of U.S. pretrial discovery contrasts sharply with methods for obtaining evidence in many foreign countries. . . . Unilateral U.S. discovery of materials located abroad has frequently provoked vigorous foreign resistance."); James H. Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5, 5 (1979) ("The . . . virtually boundless sweep of the pre-trial procedures presently permitted by many American courts is so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created . . ."); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 442 reporters' note 1 ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

225. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters' note b(ii).

their view, Article III does not permit states to apply local doctrines that “regulate[] access to courts,”²²⁶ particularly when they invite the exercise of discretion.²²⁷

As explained below, however, the ALI and its reporters appear to have committed both of the mistakes likely to be made in the context of treaty interpretation, namely (1) overreliance on broad goals to the exclusion of text and subsequent state practice, and (2) failure to consider the consequences of abusive or unreasonable exercise of treaty rights in particular cases. As a result, they have chosen the wrong frames of reference and adopted the wrong conclusions about the compatibility of limited *forum non conveniens* dismissals with U.S. obligations under the New York and Panama Conventions.

As already seen in the context of the *Shrimp/Turtle* case, there is an inappropriate tendency to overemphasize broad goals (and to neglect text and subsequent state practice as landmarks) in the process of treaty interpretation.²²⁸ Whatever the merits of that approach in the context of human rights litigation,²²⁹ international tribunals like the WTO’s Appellate Body have rightly condemned it in the context of international agreements regulating commercial activities.²³⁰ Yet, that seems to be

226. *Id.*

227. *Id.* reporters’ note b(i).

228. See discussion *supra* Part V.A.

229. See SHAW, *supra* note 131, at 937-38 (observing that “[t]he more dynamic approach to [treaty] interpretation is . . . evident in the context of human rights treaties,” where adjudicators have adopted “a more flexible and . . . purpose-oriented method of interpretation”); see also BROWNLIE, *supra* note 138, at 636 (recounting that “[t]he work of the European Court of Human Rights has involved a tendency to an effective and ‘evolutionary’ approach in applying the European Convention on Human Rights”).

230. See *supra* notes 143-45 and accompanying text. One of the reasons for criticism is that teleological interpretation tends to open the door to judicial law-making. See SHAW, *supra* note 131, at 933 (explaining that reliance on broad statements of purpose tends to encourage “judicial law-making” because one must rely on adjudicators to define the purposes of treaties); see also BROWNLIE, *supra* note 138, at 636 (warning that teleological interpretation “may involve a judicial implementation of purposes in a fashion not contemplated in fact by the parties”).

exactly the mistake committed in the Draft Restatement's treatment of *forum non conveniens*. For example, in its official commentary, the ALI has long asserted that *forum non conveniens* dismissals contradict the "basic notion" of treaties recognizing a limited number of specified grounds for refusing to enforce awards.²³¹ Notably, the ALI did not support its conclusion with analysis of text or state practice. While the reporters' notes acknowledge that the text of Article III might be construed to permit the application of *forum non conveniens* as a rule of procedure,²³² the reporters then invoke sweeping generalizations about the treaty's "purpose" and "larger structure" to reach exactly the opposite conclusion.²³³ To the extent that the reporters' notes specifically engage Article III, they claim—without analysis of text or state practice—that the treaty provision only encompasses "purely procedural" rules that regulate the *mode* of presenting claims.²³⁴ According to this view, Article III does not permit the application of national rules that eliminate the possibility of bringing certain claims.²³⁵

As a matter of treaty interpretation, the reporters' notes fail because they seek not to construe the words "rules of procedure" according to their ordinary meaning—in which case the *forum non conveniens* doctrine clearly qualifies.²³⁶

231. See *supra* note 213 and accompanying text.

232. See *supra* note 220 and accompanying text. The full text of Article III reads as follows:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

New York Convention, *supra* note 15, art. III.

233. See *supra* note 220 and accompanying text.

234. See *supra* notes 222-23 and accompanying text.

235. See *supra* notes 225-26 and accompanying text.

236. See *supra* note 152 and accompanying text; see also DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters' note b(ii) ("To the extent that *forum non conveniens* represents a 'rule of procedure,' as the Supreme

Instead, the reporters' notes seek to modify Article III by introducing a new qualifier that narrows the scope of application to "purely" procedural rules.²³⁷ While one might possibly argue that the drafters of the New York Convention intended to give the phrase "rules of procedure" a specialized, narrow meaning in the context of Article III,²³⁸ the burden of proof lies heavily on the party seeking to establish a specialized meaning.²³⁹ In this regard, one should observe that the presumption cuts against the Draft Restatement's position, and reporters' notes include no evidence of the Contracting Parties' intent to give "procedure" a specialized meaning in the context of Article III.

In assessing the Draft Restatement's position on *forum non conveniens*, one should also examine the practice of states parties²⁴⁰ to see whether that practice supports the interpretation of Article III to exclude the application of

Court held in *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) . . . , Article III appears to *embrace* it.") (emphasis added).

237. See *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, 1952 I.C.J. 93, 145 (July 22) (Read, J., dissenting) ("It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words as actually used, give to them a meaning different from their ordinary and natural meaning, or *add words or ideas which were not used in the making of the Declaration.*") (emphasis added); see also *Pope & Talbot, Inc. v. Canada, Award in Respect of Damages ¶¶ 43-47* (May 31, 2002), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-36.pdf> (involving an effort by states parties to adopt an "interpretation" of "international law" as only referring to "customary international law," observing that none of the forty negotiating drafts contained a reference to the word "customary," noting that "international law" represents a much broader concept than "customary international law," and indicating that addition of such a narrowing qualifier would lie outside the legitimate scope of interpretation); cf. *Merrill & Ring Forestry L.P. v. Canada, Award ¶ 92* (Mar. 31, 2010), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/Merrill-09.pdf> ("As the Investor has argued, the FTC Interpretation [discussed in *Pope & Talbot, supra*] seems in some respect to be closer to an amendment of the treaty, than a strict interpretation.").

238. See *supra* note 130 and accompanying text.

239. See *supra* note 131 and accompanying text.

240. See *supra* note 129 and accompanying text.

rules that (1) combine procedural and substantive aspects, and (2) regulate access to courts.²⁴¹ Upon performing that inquiry, it becomes clear that states parties do not interpret Article III to establish a blanket prohibition on the application of such rules. As a first example, one may refer to statutes of limitations, which (1) have substantive and procedural aspects,²⁴² (2) regulate access to courts, and (3) do not represent one of the enumerated grounds to refuse enforcement of Convention awards. Yet, many states have adopted statutes of limitations for the enforcement of arbitral awards. Furthermore, the time limits vary considerably, ranging from as little as six months in China,²⁴³ to three years in the United States,²⁴⁴ to six years in England,²⁴⁵ and ten years in Italy.²⁴⁶ Most importantly, the United States' relatively short statute of limitations for Convention awards has defeated enforcement of, or other reliance on, awards.²⁴⁷ Yet, despite the adoption of these procedural rules that control access to courts, no one describes their application as incompatible with Article III

241. See *supra* notes 225-26 and accompanying text.

242. *Rick v. Wyeth, Inc.*, 662 F.3d 1067, 1070 (8th Cir. 2011) (quoting *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 750 (N.Y. 1981)); *Joseph v. Athanasopoulos*, 648 F.3d 58, 65 (2d Cir. 2011) (quoting *Smith*, 429 N.E.2d at 750); *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 414 n.7 (3d Cir. 2010) (Cabrane, J., concurring) (quoting *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 892 (2d Cir. 1995)); *In re Enter. Mortg. Acceptance Co., LLC Sec. Litig.*, 391 F.3d 401, 409 (2d Cir. 2004). Even the Draft Restatement recognizes that statutes of limitations can have distinctly substantive dimensions. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-32 reporters' note b (recognizing that "a statute of limitations may be so bound up in a substantive right as to be part and parcel of that right").

243. TWEEDDALE & TWEEDDALE, *supra* note 62, at 410 n.6.

244. BLACKABY ET AL., *supra* note 62, at 632 n.36; TWEEDDALE & TWEEDDALE, *supra* note 62, at 410 n.6.

245. TWEEDDALE & TWEEDDALE, *supra* note 62, at 410 n.6.

246. *Id.*

247. *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28, 29 (D.D.C. 1999).

of the New York Convention.²⁴⁸ To the contrary, the Draft Restatement even embraces them.²⁴⁹

As a second example, one may refer to national rules on personal jurisdiction, which also (1) have substantive aspects and procedural aspects,²⁵⁰ (2) regulate access to courts, and (3) do not represent one of the enumerated grounds to refuse enforcement of Convention awards. Yet, no one seriously doubts the authority of states to apply their own rules on personal jurisdiction to proceedings seeking the enforcement of Convention awards.²⁵¹ While the acceptance of this principle may benefit from a degree of global consensus on the general standards for personal

248. In fact, it is widely accepted that statutes of limitation represent procedural devices for purposes of enforcing foreign awards and, therefore, are governed by the laws of the forum where enforcement is sought. TWEEDDALE & TWEEDDALE, *supra* note 62, at 410.

249. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-32 cmt. a(i), (iii) (“The New York and Panama Conventions do not themselves subject a confirmation action to a limitations period. An action to confirm a U.S. Convention award under the Federal Arbitration Act is subject to the three-year limitations period specified in §§ 207 and 302 of the FAA. . . . As noted, while the Conventions do not by their terms subject enforcement of awards to a limitations period, Chapters Two and Three of the FAA do so. An action to enforce a foreign Convention award is subject to the three-year limitations period specified in §§ 207 and 302 of the FAA.”).

250. *See* Bays v. Corcell Inc., 2012 WL 1616746, at *3 (S.D. W. Va. May 8, 2012) (observing that a “Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction involves both procedural and substantive components”); *Rose v. Franchetti*, 713 F. Supp. 1203, 1212 (N.D. Ill. 1989) (“[P]ersonal jurisdiction is . . . more procedural than substantive.”); *see also* *Asahi Metal Indus. Co. v. Superior Ct. of Cal., Solano County*, 480 U.S. 102, 103 (1987) (requiring consideration of “[t]he procedural and substantive policies of other nations” in the context of a motion to dismiss for lack of personal jurisdiction) (emphasis added).

251. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-27(a) (“The adequacy of jurisdiction over the defendant in a post-award action is subject to the generally applicable statutory and constitutional standards governing the exercise of such jurisdiction.”); BORN, *supra* note 62, at 2399-00, 2403 (recognizing that national rules on personal jurisdiction “apply, at least to an extent, in the context of actions to recognize foreign arbitral awards”); LEW ET AL., *supra* note 62, at 703 (explaining that “[a]pplications to have foreign awards declared enforceable require the court to have jurisdiction over the respondent”).

jurisdiction,²⁵² one continues to encounter unusual cases that reflect the specificities of national practice.²⁵³ More importantly, the general standards for personal jurisdiction often include factors that call for the exercise of discretion,²⁵⁴ with the result that courts applying identical standards produce a multiplicity of outcomes on similar facts.²⁵⁵ In any case, this represents another situation where states have accepted as consistent with Article III the application of national procedural rules that control access to courts, produce internationally disparate outcomes, and involve the exercise of discretion.

As a third example, one may refer to the immunities of foreign states, which also (1) have substantive aspects and procedural aspects,²⁵⁶ (2) regulate access to courts, and (3) do not represent one of the enumerated grounds to refuse enforcement of Convention awards. Yet, there is little

252. See BORN, *supra* note 62, at 2400 (recognizing a “substantial argument that the Convention’s requirement that Contracting States recognize foreign arbitral awards should be interpreted in light of . . . *customary jurisdictional limitations on the judicial powers of Contracting States*”) (emphasis added).

253. See *id.* (citing an unusual case in which Swiss courts refused to enforce an award rendered in Switzerland against non-Swiss parties “on the grounds that the award lacked sufficient connection with Switzerland to be enforced there”).

254. See Walter W. Heiser, *A “Minimum Interest” Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 927 (2000) (“As a practical matter, the ‘reasonableness’ inquiry makes the due process limitation on state court assertions of personal jurisdiction a matter of discretion, akin to a constitutional doctrine of *forum non conveniens*.”).

255. Cf. Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The “But For” Test*, 82 CALIF. L. REV. 1545, 1586 (1994) (“Balancing tests, flexible standards, and discretion are indeed the correct answer in many legal contexts. However, they are not the proper approach to personal jurisdiction because the value of certainty and predictability outweighs the advantage of getting the ‘right’ answer in individual cases.”).

256. See *Republic of Austria v. Altmann*, 541 U.S. 677, 694 (2004) (asking whether the Foreign Sovereign Immunities Act (FSIA) “affects substantive rights . . . or addresses only matters of procedure,” but concluding that “the FSIA defies such categorization”); *Trout v. Sec’y of Navy*, 540 F.3d 442, 445 (D.C. Cir. 2008) (relying on *Altmann* for the proposition that the FSIA “could not be categorized as exclusively affecting either substantive rights or procedural matters”); *Combs v. Comm’r of Soc. Sec.*, 459 F.3d 640, 667 (6th Cir. 2006) (discussing *Altmann* and opining that the FSIA “defied categorization as either a substantive or procedural provision”).

reason to think that the New York Convention prohibits the application of such jurisdictional immunities in appropriate cases. To begin with, when that convention was adopted in 1958, the “absolute” doctrine of foreign sovereign immunity remained deeply entrenched in certain legal systems.²⁵⁷ Even the United States, which had just embraced the “restrictive” doctrine of sovereign immunity from *suit*, emphasized that it continued to recognize something close to absolute immunity from *execution* against the assets of foreign states.²⁵⁸ Working in the shadow of this historical

257. See Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEPT ST. BULL. 984-85 (1952) (describing the absolute and restrictive theories of sovereign immunity as “two conflicting concepts . . . , each widely held and firmly established”). According to the Tate Letter, courts of Brazil, the British Commonwealth, Chile, China, Czechoslovakia, Estonia, Hungary, Japan, Luxembourg, Norway, Poland, Portugal, and members of the Soviet bloc could be deemed to follow the absolute doctrine of immunity as of 1952. *Id.* Since the twenty-four original signatories of the New York Convention included Belarus, Bulgaria, India, Luxembourg, Pakistan, Poland, the Soviet Union, and Ukraine, one might reasonably infer that a substantial number of original signatories followed the absolute doctrine of immunity and likely would not have expected the New York Convention to require a change of policy as the Convention did not even mention the topic. See U.N. Comm’n on Trade L., Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing the original signatories of the New York Convention).

Even as of this writing, there remains “a persistent divergence between adherents of the principle of absolute immunity and that of restrictive immunity.” BROWNLIE, *supra* note 138, at 330; *see also* LEW ET AL., *supra* note 62, at 744 (“Some countries still adhere to the doctrine of absolute immunity.”).

258. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 460 reporters’ note 1 (“Even after the restrictive theory of immunity from jurisdiction was adopted by the United States Department of State and the courts, it was generally supposed that execution against state-owned property was contrary to international law.”); Denys P. Myers, *Contemporary Practice of the United States Relating to International Law*, 54 AM. J. INT’L L. 632, 641-43 (1960) (quoting a March 1959 letter from the State Department’s Legal Adviser to the Attorney General, which expressed the “Department’s view” that “under international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit”); *see also* BROWNLIE, *supra* note 138, at 330 (“Thus even those states which have accepted the restrictive principle are in general unwilling to apply it at the level of actual enforcement by means of the seizure of assets of the debtor state. In other

background, the drafters of the New York Convention did not include any textual reference to limitations on foreign sovereign immunity with the result that the instrument could not, as a matter of law, have altered the scope of immunity for purposes of enforcing Convention awards.²⁵⁹

To be sure, the United States has adopted statutory provisions restricting the scope of foreign sovereign immunity in actions relating to the confirmation and enforcement of Convention awards.²⁶⁰ However, the United States did so not when implementing the New York Convention in 1970,²⁶¹ but when amending the Foreign Sovereign Immunities Act in 1988.²⁶² Even if the New York

words, the adherents of the restrictive principle do not apply it at the more critical phase of the judicial process.”).

While it is possible to draw a distinction between enforcement of awards and execution against assets, states have often considered enforcement proceedings to be part of the execution of an award. LEW ET AL., *supra* note 62, § 27-50, at 749. Some courts have reached the same conclusion. *Id.* As explained below, the European and United Nations Conventions on State Immunity seem to follow the same basic approach. *See infra* note 263 and accompanying text.

259. *See Argentine Republic v. Amerada Hess Ship. Corp.*, 488 U.S. 428, 442 (1989) (“Nor do we see how a foreign state can waive its immunity . . . by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts”); *Regina v. Bow St. Metro. Stipendary Magistrate Ex parte Pinochet Uguarte* (No. 3), [2000] 1 A.C. 147 (H.L.) 217 (appeal taken from Eng.) (“In the light of the foregoing it appears to me to be clear that, in accordance . . . with international law . . . , a state’s waiver of its immunity by treaty must . . . always be express. Indeed, if this were not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.”).

260. *See* 28 U.S.C. § 1605(a)(6)(B) (2006) (eliminating immunity in proceedings “to confirm an award . . . if . . . the . . . award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards”); 28 U.S.C. § 1610(a), (a)(6) (2006) (eliminating immunity from execution against the “property of a foreign state . . . used for a commercial activity in the United States . . . upon a judgment entered by a court of the United States or of a State . . . if . . . the judgment is based on an order confirming an arbitral award rendered against the foreign state . . .”).

261. *See* 9 U.S.C. §§ 201-208.

262. Professor Dellapenna has elaborated the history of the amendment as follows:

and Panama Conventions have influenced U.S. attitudes toward the proper scope of sovereign immunity in enforcement proceedings, those developments have not drawn universal acceptance at the international level. Viewed from a more global perspective, one continues to find support for the propositions that consent to arbitration either (1) does not affect the immunities of foreign states from recognition and enforcement of awards even in commercial disputes,²⁶³ or (2) at most, restricts the scope of

In interpreting the waiver provision of the Immunities Act, courts split on whether to follow the congressional *dictum* in finding that an agreement to arbitrate anywhere outside the foreign state itself should be an implied waiver for proceedings in a court here. To resolve this uncertainty, Congress in 1988 amended the Immunities Act to provide explicitly for the withdrawal of immunity for . . . arbitral awards if the arbitration was to take place in the United States or in a country with which the United States has a treaty requiring enforcement of the . . . award.

JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 349-50 (2d ed. 2003).

263. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 17, U.N. Doc. A/RES59/38 (Dec. 2, 2004) [hereinafter UNCIS] (“If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the *confirmation or setting aside of the award.*”) (emphasis added). Lady Hazel Fox explains the nuances of this provision as follows:

The application of this exception is subject to a number of conditions: . . . [T]he supervisory powers of the national court from which immunity is removed cover the adjudication stage of arbitration *but stop short of enforcement of the arbitral award.* . . . From this account it will be apparent that the Convention’s formulation of the arbitration exception is made subject to a number of limitations which *do not appear in similar exceptions in US, UK and other common law jurisdictions.* . . . The second limitation, the list of the supervisory powers of the court from which immunity is removed, means that *immunity is retained in respect of proceedings in national courts for recognition and enforcement of the award.* Whilst Article 17 provides a procedure for supervision of the validity of the arbitration agreement and support for the arbitral process, *it does not extend, as do similar exceptions in US, UK, and other common law legislation, to the second stage of the recognition and enforcement of the award.* . . . The general conclusion must be that, in jurisdictions other than the US, UK, and Australia, practitioners at the

immunity only with respect to courts at the place of arbitration.²⁶⁴

Furthermore, even to the extent that some instruments would restrict the immunities of states that have consented to arbitration of commercial disputes, their scope sometimes applies only to disputes between states and foreign nationals.²⁶⁵ Under these circumstances, one can envision

present time should consider that the exception for arbitration agreements operates solely to remove state immunity from the first stage of arbitration in which national courts exercise supervisory powers.

HAZEL FOX Q.C., *THE LAW OF STATE IMMUNITY* 498-501 (2d ed. 2008) (emphasis added); *see also id.* at 496 (observing that “in France there was held to be no waiver of immunity from execution by consent to an ICC arbitration”). According to one observer, the European Convention on State Immunity likewise does not treat agreements to arbitration of commercial disputes as waivers of immunity from actions for the recognition and enforcement of awards. *See LEW ET AL.*, *supra* note 62, at 747 (discussing Article 12 of the European Convention, which provides that agreements to arbitrate commercial disputes eliminate immunity for “proceedings relating to: (a) the validity or interpretation of the arbitration agreement, (b) the arbitration procedure, [and] (c) the setting aside of the award,” and opining that Article 12 “covers only the three specified types of proceedings which do not extend to actions for the recognition and enforcement of awards”).

264. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 4, § 456 cmt. d (“A question still open under international law is whether an agreement to arbitrate waives immunity from the jurisdiction of the courts only at the place chosen as the arbitration site, or is world-wide.”); *see also* European Convention on State Immunity, art. 12, May 16, 1972, E.T.S. No. 74 (1972) (“Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State *on the territory . . . of which the arbitration has taken or will take place . . .*”) (emphasis added); LEW ET AL., *supra* note 62, § 27-42, at 747 (finding it “questionable whether by entering into an arbitration agreement a state party intends to waive its immunity for proceedings everywhere in the world”).

265. *See* UNCIS, *supra* note 263, art. 17 (“If a State enters into an agreement in writing *with a foreign natural or juridical person* to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or setting aside of the award.”) (emphasis added); *see also* FOX, *supra* note 263, at 498 (“The application of this exception is subject to a number of conditions: the arbitrations within the exception are restricted to those made .

arbitrations between states and their own nationals that could fall within the scope of the New York Convention,²⁶⁶ but not within instruments removing immunity from any sort of related judicial processes, including enforcement of awards.

In any case, the point is that statutes of limitation, personal jurisdiction, and foreign sovereign immunity all represent examples of subsequent state practice indicating that Article III of the New York Convention does not foreclose the application of national procedural rules that control access to courts, involve some exercise of discretion, and produce internationally disparate outcomes.

Turning to the second mistake likely to be made in the interpretation and application of treaties, namely the failure to consider the consequences of abusive or unreasonable exercises of treaty rights in particular cases,²⁶⁷ one finds similar problems with the Draft Restatement's treatment of *forum non conveniens*. As previously discussed, the reporters' notes interpret Article III of the New York Convention as *generally* prohibiting the application of national rules that combine substantive and procedural aspects and, thus, control access to courts.²⁶⁸ From that broad generalization, the reporters imply that application of the *forum non conveniens* doctrine would never comply with Article III.²⁶⁹ As explained below, however, one can identify at least two applications of the *forum non conveniens* doctrine that seem entirely compatible with the Draft Restatement's interpretation of Article III.

. . . with foreign persons (arbitrations with a State's own nationals are excluded) . . .").

266. See *supra* note 199 and accompanying text.

267. See *supra* notes 147-50 and accompanying text.

268. See *supra* notes 225-26 and accompanying text.

269. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29(a) ("An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds."); *id.* reporters' note b(ii) (taking the position that the *forum non conveniens* doctrine "is not available in actions to enforce Convention awards").

First, as observed by the reporters for the Draft Restatement, the legal framework established by the New York and Panama Conventions presumes the existence of the *normal* situation where courts may enforce awards in summary proceedings that do not require extensive factual inquiry.²⁷⁰ When an award creditor voluntarily takes the proceedings outside that situation by invoking veil-piercing theories to justify enforcement against parties not named in the award, disputed factual issues and difficult questions of foreign law may render it impossible to resolve the issues in the context of summary proceedings.²⁷¹ A heated political context may also render it inappropriate for courts to become drawn into something that essentially represents a

270. *Id.* cmt. a (“Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding.”).

271. As the Second Circuit once explained:

While the private interest factors might not ordinarily weigh in favor of forum non conveniens dismissal in a summary proceeding to confirm an arbitration award, this case does not lend itself to summary disposition. Here, Monde Re has brought Ukraine into the proceeding although Ukraine was not a party to the agreement providing for arbitration. As noted . . . above, there are various theories under which a non-signer of an arbitration agreement may be bound by it. However, to cast Ukraine into liability under any one of these theories requires extensive discovery and, most probably, a trial of the factual issues implicating and establishing such non-signer liability. The evidence required for inquiries of this nature is not to be found in the United States. It appears that witnesses are beyond the subpoena power of the district court, that the pertinent documents are in the Ukrainian language and that enforcement or satisfaction of the arbitral award would not be easier here than in Ukraine. . . .

The other set of factors to be applied in the analysis are the public interest factors. These factors include the administrative difficulties associated with . . . the problems implicated in the application of foreign law. . . .

Issues governed by the law of Ukraine as well as by Russian law already have been raised. Ukrainian courts are better suited than United States courts for the resolution of these legal questions. Especially important here is the application of Ukrainian law to the question of whether Ukraine is bound as a non-signer of the Naftogaz-Ukrzagzprom agreement.

In re Arbitration between Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488, 500 (2d Cir. 2002).

dispute between two foreign states about vital national interests.²⁷²

Under the circumstances just described, even the Draft Restatement accepts the existence of some leeway for courts to dismiss actions based on national rules that control access to courts. In so doing, it relies on vaguely stated principles relating to the “proper” defendant.²⁷³ According to the Draft Restatement, application of those principles may include a discretionary assessment of whether the determination of a defendant’s status would “unduly complicate” the enforcement proceedings based on (1) availability of witnesses, (2) the need to gather evidence abroad, as well as (3) language issues in presenting evidence and the like.²⁷⁴ The similarity to the *forum non conveniens* doctrine could hardly be more obvious.²⁷⁵

In any event, the point is that the reporters seem to accept the existence of situations lying so far outside the scope of summary proceedings that Article III no longer prevents the invocation of national rules of procedure controlling access to courts. However, assuming that the party seeking enforcement creates a situation that brings

272. See *supra* notes 170, 176, 180 and accompanying text.

273. As the reporters for the Draft Restatement have observed:

Courts that have ruled on *forum non conveniens* have sometimes had other bases for dismissal of the action. For example, the Second Circuit in *Monde Re* arguably could have reached the same result without relying on the *forum non conveniens* doctrine, but rather by questioning the proper status of the parties. The court observed that . . . Ukraine, one of the two defendants, did not participate in the arbitration and that neither Monegasque nor Naftogaz was a party to the main contract.

DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii).

274. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-31(b) (providing for the discretionary power of courts to decline recognition of a proper defendant if the determination of status would “unduly complicate” post-award proceedings); *id.* reporters’ note c (“Considerations relevant to the potential increase in complexity of the post-award action include the availability of witnesses, the need to gather evidence abroad, language issues in presenting evidence, and the like.”).

275. See *supra* notes 154-55, 176-81, and accompanying text.

such rules of procedure back into play, it becomes difficult to see how Article III might still foreclose the application of *forum non conveniens* to such cases.

As a second example, one may assume that the “basic notion” or general “purpose” of the New York Convention is to vest award creditors with a treaty-based right to enforcement of awards without the interposition of national rules that control access to courts.²⁷⁶ However, even at the international level, the exercise of treaty rights remains subject to the doctrine of abuse of rights.²⁷⁷ According to the WTO’s Appellate Body and other authorities, the doctrine of abuse of rights encompasses the proposition that parties have no legal entitlement to the unreasonable or abusive assertion of treaty rights.²⁷⁸ Viewed from this perspective, the application of the *forum non conveniens* doctrine makes perfect sense even in proceedings to enforce Convention awards. Consistent with the discussion above, many courts see the *forum non conveniens* doctrine not as a general inquiry into “convenience,”²⁷⁹ but as a tool for preventing the right of access to the legal process “from becoming an instrument of abuse, injustice and oppression.”²⁸⁰ Therefore,

276. See *supra* notes 213-27 and accompanying text.

277. See *supra* notes 148-50 and accompanying text.

278. See *supra* notes 148-50 and accompanying text.

279. See BORN & RUTLEDGE, *supra* note 224, at 387, 388-89 (emphasizing that the judicial standard for *forum non conveniens* dismissals involves not a mere balancing of convenience, but a showing of “oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,” and observing that the standard also goes beyond convenience to encompass “public interest factors,” as well as other “substantive assumptions”) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981)). But see DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-29 reporters’ note b(ii) (suggesting that application of the *forum non conveniens* doctrine would introduce mere “inconvenience” as a basis for dismissing enforcement actions involving Convention awards).

280. Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218 (11th Cir. 1985); see also *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1153-54 (5th Cir. 1987) (en banc) (observing that the “doctrine of forum non conveniens rests upon a court’s inherent power to control the parties and cases before it and to prevent its process from becoming an instrument of abuse or injustice”), *vacated sub nom.* Pan Am. World Airways v. Lopez, 491 U.S. 1032

they generally require a showing that the proceedings would subject the defendant to “oppressiveness and vexation . . . out of all proportion to plaintiff’s convenience.”²⁸¹ Alternatively, courts may require a showing that the proceedings would impose unreasonable burdens on the enforcing court.²⁸² Either way, the *forum non conveniens* doctrine seems easily reconciled with the general principle that the unreasonable or abusive assertion of treaty rights destroys the claim to legal entitlement, including the right to seek enforcement of Convention awards.

In short, viewed in light of the general principles of international law, proper application of the *forum non conveniens* doctrine does not frustrate the assertion of rights to enforcement of arbitral awards under the New York and Panama Conventions. To the contrary, the *forum non conveniens* doctrine prevents the abuse or unreasonable use of treaty rights.²⁸³ While conditions may rarely support the application of the *forum non conveniens* doctrine to Convention awards,²⁸⁴ they do arise.²⁸⁵ To be sure, even a narrow opening for *forum non conveniens* may result in a corresponding retreat from absolute certainty when it comes to the enforcement of Convention awards. However, as once suggested by Judge Cardozo in a different context, absolute certainty of enforcement invites abuse,²⁸⁶ and the public

(1989), *aff’d in relevant part en banc*, 883 F.2d 17 (5th Cir. 1989); *Simcox v. McDermott Int’l, Inc.*, 152 F.R.D. 689, 693 (S.D. Tex. 1994) (same).

281. *See supra* note 155 and accompanying text.

282. *See supra* note 155 and accompanying text.

283. *See supra* notes 156-60, 280-81, and accompanying text.

284. *See supra* notes 161-64 and accompanying text.

285. *See* MOSES, *supra* note 62, at 207 (recognizing that the circumstances in *Monde Re* made it “one of those rare cases where application of *forum non conveniens* may have been justified”); Neuhaus, *supra* note 182, at 35 (emphasizing the “highly unusual facts” in *Monde Re* and concluding that the decision made “good law”).

286. *See* *Maurice O’Meara Co. v. Nat’l Park Bank of N.Y.*, 146 N.E. 636, 639, 641 (N.Y. 1925) (Cardozo, J., dissenting) (involving a claim for payment under a letter of credit, dissenting from the proposition that the assurance of “prompt payment against documents” always forecloses consideration of the physical condition of underlying goods, and emphasizing that the absolute certainty of

interest in promoting certainty can be no greater than the public interest in preventing such misconduct.²⁸⁷

VI. STATUTORY INTERPRETATION, VACATUR, AND THE FEDERAL ARBITRATION ACT

As previously observed, the Draft Restatement operates in a field populated by “givens,” or norms that cannot be violated or ignored.²⁸⁸ These include “legislation of reasonably settled meaning.”²⁸⁹ Consequently, the Draft Restatement must “reconcile itself with . . . the [provisions of the Federal Arbitration Act], as they stand, with all their idiosyncrasies and shortcomings.”²⁹⁰ However, when statutory text is not clear, the Supreme Court has not spoken, and the lower courts seem divided, the reporters have substantial leeway to adopt the “best” view, even if that contradicts the majority view.²⁹¹ According to the chief reporter for the Draft Restatement, he and his associate reporters are “completely liberated” to choose sides in such cases.²⁹² As explained below, the state of complete liberation seems difficult to reconcile with ALI practice and the drafting standard proposed above.

Because Restatements often seek to guide courts,²⁹³ the “ultimate test of any Restatement is its acceptance by the

payment against documents would permit sellers to tender “rags” instead of conforming goods).

287. See *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 1000 (N.D. Ga. 1973) (observing that “there is as much public interest in discouraging fraud as in encouraging the use of letters of credit” to promote certainty).

288. See *supra* notes 111, 125, and accompanying text.

289. *Bermann* (N.Y.U.), *supra* note 6, at 191.

290. *Id.* at 193.

291. See *Perlman*, *supra* note 18, at 4 (“Where jurisdictions disagree on a particular point, the Restatements do not purport to count jurisdictions and adopt the majority rule. Rather, the standard is to adopt the rule that a rational court, faced with the issue for the first time, would find more persuasive.”).

292. *Perry, A Man with Many Hats*, *supra* note 39, at 30 (quoting George *Bermann*).

293. See *Bermann* (N.Y.U.), *supra* note 6, at 185 (“The central objective of Restatements is to clarify and consolidate the law for understanding and

courts.”²⁹⁴ Perhaps for that reason, the drafters of Restatements typically adopt as their frame of reference the anticipated views of some hypothetical court,²⁹⁵ which may be quite different from the views of the reporters or their advisers, especially in the field of international commercial arbitration.²⁹⁶ To that extent, the drafters are not “completely liberated,” but confined to a frame of reference that may not be their own.

Turning to the specific context of the Draft Restatement on International Commercial Arbitration, this article has already proposed a drafting standard based on the anticipated views of the Supreme Court, as informed by the Court’s settled jurisprudence on predicate questions such as the rules of treaty and statutory interpretation.²⁹⁷ As explained below, the Draft Restatement pays scant attention to the predicate issue of statutory interpretation, with the result that it mistakenly endorses the view that the Federal Arbitration Act fuses the grounds for (1) vacatur of U.S. Convention awards and (2) refusal to enforce awards under the New York and Panama Conventions.²⁹⁸

A. *Statutory Interpretation*

A full account of the Supreme Court’s approach to statutory interpretation lies beyond the scope of this article. However, as explained below, there is one principle that the Court has applied repeatedly when dealing with vague or outdated statutes in the international context, which lower courts previously ignored at their peril, but which lower courts have begun to accept as a fundamental limit on judicial innovation.

application by U.S. courts.”); Perry, *supra* note 39 (quoting George Bermann) (“A restatement is intended to be consulted by the judiciary.”).

294. Perlman, *supra* note 18, at 6; *see also supra* note 117 and accompanying text.

295. *See supra* notes 118-19 and accompanying text.

296. *See supra* notes 28-29 and accompanying text.

297. *See supra* text following note 122.

298. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11(a).

When interpreting the Foreign Sovereign Immunities Act,²⁹⁹ courts have struggled to apply the third clause of the commercial activities exception, which eliminates foreign sovereign immunity for claims based on the acts of foreign states outside the United States in connection with their commercial activities outside the United States, but which cause a “direct effect in the United States.”³⁰⁰ Given the ambiguity of the term and the absence of any definition in the statute or legislative history,³⁰¹ lower courts have formulated interpretive standards designed to guide development of tests to settle the contours of exactly what qualifies as a “direct effect in the United States.” For example, in *Weltover, Inc. v. Republic of Argentina*, the United States Court of Appeals for the Second Circuit (widely regarded as a leading authority in the field of international commerce)³⁰² interpreted the phrase in light of what it viewed as “the ultimate FSIA question: [w]ould Congress have wanted an American court to entertain an action such as the present one?”³⁰³ Based on that criterion,

299. 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1610 (2006).

300. 28 U.S.C. § 1605(a)(2); see also DELLAPENNA, *supra* note 262, at 229, 231 (“Attorneys have litigated the meaning of the third clause of section 1605(a)(2) more than any other jurisdictional provision in the Immunities Act without yet settling . . . its contours. . . . Judicial attempts to define ‘direct effect’ have produced only the unhelpful generalities.”).

301. See DELLAPENNA, *supra* note 262, at 230 (“Congress did not provide a definition of ‘direct effect’ either in the Immunities Act or in its section-by-section analysis.”).

302. See Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT’L ARB. 7, 13 (2009) (“Notably . . . , many judgments rendered by . . . the Second Circuit or by the U.S. Supreme Court are regarded in Europe as examples of a superb legal culture in international commercial matters.”).

303. *Weltover, Inc. v. Republic of Arg.*, 941 F.2d 145, 153 (2d Cir. 1991) (emphasis added), *aff’d*, 504 U.S. 607 (1992); see also *Sec. Pac. Nat’l Bank v. Derderian*, 872 F.2d 281, 286 (9th Cir. 1989) (“The dispositive question is whether the effect is sufficiently direct and sufficiently in the United States that Congress would have wanted an American court to hear the case.”) (citing *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)); *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (“Essentially, the question presented is, ‘was the effect sufficiently “direct” and sufficiently “in the United States” that Congress would have wanted an American court to hear the case?’”).

the Second Circuit concluded that Congress would want to preserve the status of New York City as a leading commercial center and, to that end, would regard the failure to make a scheduled bond payment in New York as having a “direct effect in the United States.”³⁰⁴ Although a unanimous Supreme Court affirmed the holding that the particular default qualified as a “direct effect in the United States,” it also criticized the Second Circuit’s view of the “ultimate question” in statutory construction:

The Court of Appeals concluded that the rescheduling of the [bonds] maturity dates obviously had a ‘direct effect’ on respondents. It further concluded that that effect was sufficiently ‘in the United States’ for purposes of the FSIA, in part because ‘Congress would have wanted an American court to entertain this action’ in order to preserve New York City’s status as ‘a preeminent commercial center.’ The question, however, is not what Congress ‘would have wanted’ but what Congress enacted in the FSIA.³⁰⁵

Perhaps because (1) the Supreme Court affirmed the Second Circuit’s judgment in *Weltover*, (2) the Supreme Court’s criticism might be viewed as dicta, and (3) the intensity of that criticism might be open to debate, the Second Circuit and other courts of appeal continued to use “what Congress would have wanted” as a focal point for statutory construction when trying to fill holes in aging statutes, at least in the context of international commerce. As a prime example, one may cite the extraterritorial (i.e., overseas) application of U.S. laws regulating securities fraud. Because Congress likely did not consider the topic when drafting the relevant statutes during the 1930s, their texts and legislative histories have virtually nothing to say on extraterritorial application.³⁰⁶ To fill that void in an increasingly global financial system,³⁰⁷ the Second Circuit

304. *Weltover*, 941 F.2d at 153.

305. *Weltover*, 504 U.S. at 618-19 (citation omitted).

306. *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663-64 & n.5 (7th Cir. 1998), *abrogated by* *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2870 (2010).

307. *See Robinson v. TCI/US West Cable Commc’ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (describing the court’s task of determining jurisdiction as

developed (and other courts endorsed) the so-called “conduct” and “effects” tests for extraterritorial application based on judicial perceptions of what Congress *would* have wanted *if* it had considered the problem:

Although the circuits that have confronted the matter seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, agreement appears to end at that point. Identification of those circumstances that warrant such regulation has produced a disparity of approach, to some degree doctrinal and to some degree attitudinal, as the courts have striven to implement, in Judge Friendly’s words, “what Congress would have wished if these problems had occurred to it.”

These efforts have produced two basic approaches to determining whether the transaction in question ought to be subject to American securities fraud regulation. . . . Specifically, one approach focuses on the domestic conduct in question, and the other focuses on the domestic effects resulting from the transaction at issue.³⁰⁸

By definition, speculation about “what Congress would have wished if these problems had occurred to it” involves not statutory interpretation, but policy decisions about matters that Congress never really considered.³⁰⁹

“fill[ing] the void’ created by a combination of congressional silence and the growth of international commerce since the Exchange Act was passed. . . .”

308. *Kauthar*, 149 F.3d at 665 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975)); *see also Morrison*, 130 S. Ct. at 2878-81 (recounting the development of jurisprudence among lower courts “over many decades”).

309. *See Kauthar*, 149 F.3d at 664 (observing that “some courts have admitted candidly that . . . policy considerations and the courts’ best judgment have been utilized to determine the reach of the federal securities laws”); *Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979) (recognizing that a decision regarding the extraterritorial application of U.S. securities laws was “largely based on policy considerations”), *abrogated by Morrison*, 130 S. Ct. at 2869; *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (recognizing that the exercise “in a large measure calls for a policy decision . . .”), *abrogated by Morrison*, 130 S. Ct. at 2869; *see also Morrison*, 130 S. Ct. at 2880 (describing lower court jurisprudence in terms of a “fundamental methodology of balancing interests and arriving at what seemed the best policy . . .”).

Despite roughly four decades of consistent application by lower courts,³¹⁰ the Supreme Court overruled the “conduct” and “effects” tests for extraterritorial application of U.S. securities laws in 2010.³¹¹ Along the way, it criticized the Second Circuit’s interpretive approach as lacking any grounding in textual or extratextual sources,³¹² chastised lower courts for essentially making policy determinations on issues that Congress never considered,³¹³ and condemned the effort to divine “what Congress would have wanted if it had thought of the situation” as “judicial-speculation-made-law.”³¹⁴

In short, when it comes to statutory construction, the Supreme Court has repeatedly expressed the view that courts must “give the statute the effect its language suggests, however modest that may be; [and] not . . . extend it to admirable purposes it might be used to achieve.”³¹⁵ By all indications, lower courts have taken heed.³¹⁶ However, as

310. As Justice Stevens observed:

The Second Circuit’s test became the “north star” of § 10(b) jurisprudence. With minor variations, other courts converged on the same basic approach. . . . “The longstanding acceptance by the courts, coupled with Congress’ failure to reject [its] reasonable interpretation of the wording of § 10(b), . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this Court.”

Morrison, 130 S. Ct. at 2889-91 (Stevens, J., concurring) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975) (alteration in original)).

311. *See Morrison*, 130 S. Ct. at 2883-88.

312. *See id.* at 2879 (“The Second Circuit never put forth a textual or even an extratextual basis for these tests. As early as *Bersch*, it confessed that ‘if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.’”) (quoting *Bersch*, 519 F.2d at 993).

313. *See id.* at 2880.

314. *Id.* at 2881.

315. *Id.* at 2886.

316. *See, e.g., Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012) (explaining that prior cases had “erroneously disregarded” Supreme Court jurisprudence by attempting to divine “what Congress would have wanted,” noting that the Supreme Court “unequivocally repudiated” policy-driven interpretive models not grounded in textual and extratextual sources, and concluding that “[e]very court to consider [such matters] after *Morrison* has embraced” its holding and applied it to other relevant statutes); *SEC v. Ficeto*,

explained below, the Draft Restatement omits any mention of *Weltover* or *Morrison*, pays scant attention to text and extratextual evidence of Congress's intent regarding vacatur of U.S. Convention awards, and relies almost entirely on policy arguments to achieve a better alignment between the Federal Arbitration Act and a global convergence on the standards for vacatur of Convention awards.

B. *Vacatur*

Often referred to as annulment or set-aside,³¹⁷ vacatur represents a process whereby the losing party to an arbitration applies for nullification of the award by courts at the place of arbitration.³¹⁸ According to the traditional view, each court applies its own national standards for vacatur,³¹⁹ which may vary from jurisdiction to jurisdiction.³²⁰

893 F. Supp. 2d 1101, 1109 (C.D. Cal. 2011) (emphasizing that the *Morrison* Court “repeatedly stated that it was attempting to apply the Act in a way that effectuates the purpose of the statute, as expressed in the text of the Act itself,” and that the Court was “deeply troubled by lower courts’ use of ‘judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court’”) (quoting *Morrison*, 130 S. Ct. at 2881); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6 (S.D.N.Y. Sept. 29, 2010) (relying on “*Morrison*’s admonition against ‘using congressional silence as a justification for judge-made rules’”) (quoting *Morrison*, 130 S. Ct. at 2881).

317. See MOSES, *supra* note 62, at 193; *see also* BLACKABY ET AL., *supra* note 62, at 585-86.

318. LEW ET AL., *supra* note 62, at 664, 665, 667; MOSES, *supra* note 62, at 193 & n.1; *see also* BLACKABY ET AL., *supra* note 62, at 585-86, 591; BORN, *supra* note 62, at 2337, 2676. There is “one notable exception” to the general rule that vacatur may be sought only at the place of arbitration. BLACKABY ET AL., *supra* note 62, at 591. Where the parties have exercised the “freedom to subject the arbitration to the procedural law of a country *other than* that in which the arbitration is held,” the courts of the country that supplies the procedural law may also vacate the award. *Id.* at 591-92. However, because the exercise of that freedom “seems . . . unnecessary and unhelpful for [the] parties,” most observers regard the possibility as “more theoretical than real.” *Id.* at 591; *see also* VAN DEN BERG, *supra* note 198, at 350.

319. BLACKABY ET AL., *supra* note 62, at 650; BORN, *supra* note 62, at 2568; MOSES, *supra* note 62, at 193.

320. BLACKABY ET AL., *supra* note 62, at 650-51; BORN, *supra* note 62, at 2568.

Textually, the New York Convention validates this approach in Article V(1)(e), which makes it a ground to refuse enforcement in any state party if the award already has been “set aside . . . by a competent authority of the country in which . . . that award was made.”³²¹ This provision recognizes the continuing availability of vacatur at the place of arbitration as distinct from the refusal to enforce awards under the New York Convention.³²² Likewise, because Article V(1)(e) has nothing to say about the grounds that courts should apply to set-aside actions at the place of arbitration,³²³ the universally held view is that the courts of states parties should apply their own national standards.³²⁴ In other words, the New York Convention

321. New York Convention, *supra* note 15, art. V(1)(e).

322. As explained by one observer:

Courts have sometimes confused the two actions--an action to vacate and an action to enforce. It is possible, in some instances, to bring both actions in the same court. If . . . the arbitration were held in the United States, and the losing party's assets were also in the United States, the U.S. court could hear both a motion to vacate and a motion to enforce. Normally, however, the parties will have chosen a neutral situs for the arbitration, so the losing party's assets are likely to be in a jurisdiction other than the one where the arbitration is held. Thus, the motion to vacate will take place in the court of the situs, but the motion to enforce will be in the jurisdiction where the relevant assets are located. . . .

Under the [New York] Convention, a court is only empowered to recognize or enforce an award, not to vacate it.

When a party succeeds in having an award vacated in the court where the arbitration took place, the traditional view is that such an award has no further legal force or effect, and cannot be enforced in any other jurisdiction. . . . The effect is different, however, for an award for which enforcement has been refused. When an award is not enforced, unlike a vacated award, it is not annulled. Rather, if assets of the award debtor are available in more than one jurisdiction, then the award creditor who did not succeed in enforcing the award in the first jurisdiction can pursue the award in a second jurisdiction, perhaps with better results.

MOSES, *supra* note 62, at 194, 213.

323. Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997); BLACKABY ET AL., *supra* note 62, at 650; BORN, *supra* note 62, at 2552-53, 2637; LEW ET AL., *supra* note 62, at 666.

324. *Toys “R” Us, Inc.*, 126 F.3d at 22; BLACKABY ET AL., *supra* note 62, at 650; BORN, *supra* note 62, at 2338, 2552-53, 2555-56; MOSES, *supra* note 62, at 193; see also Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT’L ARB. 45, 79-80 (2011) (conceding that

requires no international consistency of standards for vacatur, either (1) among states parties, or (2) between their laws and the New York Convention's grounds for refusing enforcement of awards. As a result, the Convention retreats from predictability in the sense that it makes vacatur on possibly eccentric national grounds a predicate for worldwide refusal under Article V(1)(e) of the New York Convention.³²⁵

In an international commercial setting that thrives on uniformity and predictability,³²⁶ the New York Convention's omission of uniform rules for vacatur may be undesirable as a matter of policy.³²⁷ Perhaps for this reason, recent decades have witnessed an informal, global convergence around a range of vacatur grounds involving procedural flaws and infringements on public policy,³²⁸ and thus, loosely tracking the grounds for refusal to enforce awards under the New

"[t]he delegates to the 1958 New York Conference necessarily recognized that the Convention did not, and could not, control the application of the law of the seat to [vacatur of] an award rendered in its territory").

325. MOSES, *supra* note 62, at 214 (describing the "large loophole" created by the "possibility that a local court will vacate an award on a ground that is not among the narrow grounds listed in Article V of the [New York] Convention," with the consequence that "most Contracting States will refuse to enforce the award, because it was vacated under the law of the country where it was rendered").

Adding another layer of unpredictability, some jurisdictions have concluded that they retain the discretion to enforce awards that have been vacated at the place of arbitration. BLACKABY ET AL., *supra* note 62, at 650; BORN, *supra* note 62, at 2553; MOSES, *supra* note 62, at 214; LEW ET AL., *supra* note 62, at 717. As a result, an award vacated at the place of arbitration might be refused enforcement in a second jurisdiction, but enforced in a third. BLACKABY ET AL., *supra* note 62, at 650. This hardly represents a satisfying state of affairs.

326. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (indicating that "orderliness and predictability" are "essential to any international business transaction"); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 77 (1992) (observing that "international business transactions require stability and predictability to be successful").

327. See LEW ET AL., *supra* note 62, at 716 (quoting Jan Paulsson, *The Case for Disregarding LSA's (Local Standard Annulments) Under the New York Convention*, 7 AM. REV. INT'L ARB. 99 (1996)) (observing that Article V(1)(e) "has been criticized as it allows for 'local standards of annulment'").

328. MOSES, *supra* note 62, at 194.

York Convention.³²⁹ Furthermore, widespread adoption of the UNCITRAL Model Law has reinforced that convergence because it supplies not just similar, but identical, standards for vacatur that have been pegged directly to the New York Convention's grounds for refusal to enforce awards.³³⁰ Thus, with every new adoption of the UNCITRAL Model Law,³³¹ the world advances toward a community in which standards for vacatur have become fused horizontally (among states) and vertically (between national standards for vacatur and international standards for refusing enforcement of awards under the New York Convention), both of which produce gains in uniformity, predictability, and the perceived suitability of states as venues for arbitration.

329. BORN, *supra* note 62, at 2552 (indicating that “most developed national arbitration regimes have adopted broadly similar approaches to the available grounds for annulment of international arbitral awards—generally, but not always, limiting such review to bases paralleling those applicable to non-recognition of awards in Article V of the New York Convention”); *id.* at 2568 (asserting that “arbitration statutes in most major trading states provide only limited grounds for seeking to annul international arbitral awards[;] [s]uch legislation typically permits [annulment] only on grounds analogous to those set out in Articles V(1) and V(2) of the New York Convention”); LEW ET AL., *supra* note 62, at 663 (observing that “[t]he grounds for challenging an award are often comparable with the grounds referred to in the New York Convention for purposes of refusing enforcement”).

330. See BLACKBAY ET AL., *supra* note 62, at 595 (noting that the Model law “has . . . been adopted into, or at the very least has inspired, national arbitration legislation around the world” and observing that its grounds for vacatur “are taken from Article V of the New York Convention”); BORN, *supra* note 63, at 2568 (explaining that “the drafters of the UNCITRAL Model Law sought to ‘mirror’ and were ‘eager to align’ the grounds for annulment of an award under . . . the Model Law with those for non-recognition of an award in Article V of the New York Convention”) (quoting *Report of the Secretary-General on the Possible Features of A Model Law of International Commercial Arbitration*, UNCITRAL, U.N. Doc. A/CN.9/207, ¶ 110, XII Y.B. UNCITRAL 75 (1981)).

331. See U.N. Comm’n on Trade L., *Status: UNCITRAL Model Law*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited May 27, 2013) (identifying sixty-six states in which the UNCITRAL Model Law has been adopted by national or sub-national governments); see also MOSES, *supra* note 62, at 193 (observing that the standards for vacatur “will be based on the UNCITRAL Model Law” in “over fifty jurisdictions”).

C. *Federal Arbitration Act*

Turning to the United States, which has not adopted the UNCITRAL Model Law at the national level, the question becomes the degree to which the Federal Arbitration Act (FAA) lags behind, or falls in step with, the global convergence of vacatur standards around the grounds for refusal to enforce awards under the New York Convention. As set forth below, plausible arguments can be made for either view, depending on how one interprets the interplay between Chapter One of the FAA (which generally applies to domestic arbitrations) and Chapters Two and Three (which implement the New York and Panama Conventions, respectively). Both arguments accept that one must begin with 9 U.S.C. §§ 207 and 208, which provide as follows:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.³³²

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.³³³

According to the first line of argument, the implementing legislation contained in 9 U.S.C. § 207 tracks the New York Convention in the sense that it only regulates the recognition and enforcement of Convention awards and has nothing to say about the standards for vacatur of Convention awards rendered in the United States.³³⁴ To fill

332. 9 U.S.C. § 207 (2006); *see also* 9 U.S.C. § 302 (2006) (incorporating this provision into the implementing legislation for the Inter-American, or Panama, Convention).

333. 9 U.S.C. § 208 (2006); *see also* 9 U.S.C. § 307 (2006) (“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.”).

334. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters’ note a(i).

the silence on vacatur grounds left by § 207 and the treaty, 9 U.S.C. § 208 further tracks the New York Convention by calling for the application of the FAA's domestic provisions on vacatur,³³⁵ namely:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³³⁶

This seems to represent the view taken by the Second, Third, Fifth, Sixth, Seventh, and D.C. Circuits,³³⁷ and

335. *Id.*

336. 9 U.S.C. § 10(a).

337. *See* Republic of Arg. v. BG Grp. PLC, 665 F.3d 1363, 1368 n. 4 (D.C. Cir. 2012); Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 295 (3d Cir. 2010); Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 709 (6th Cir. 2005), *abrogated by* Hall St. Assoc. v. Mattel, Inc., 552 U.S. 576 (2008); *see also* Karaha Bodas Co., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004) (quoting Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. 126 F.3d 15, 23 (2d Cir. 1997) for the proposition that "[t]he Convention 'mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought'" (emphasis added); Lander Co. v. MPP Invs., Inc., 107 F.3d 476, 481 (7th Cir. 1997) (rejecting the argument that "the New York Convention was intended to be exclusive within its domain" because "[n]othing in the Convention or its history, or in the implementing legislation or *its* history, suggests exclusivity," and therefore, concluding that Congress probably intended the New York Convention and the FAA's domestic provisions on vacatur to have an overlapping scope); Toys "R" Us, Inc., 126 F.3d at 23; DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iii) (attributing this view to the Second, Third, and Sixth Circuits); Hulbert, *supra* note 324, at 83-84 (attributing this view to the Second and Sixth Circuits, but also observing that the Seventh Circuit *accepted*

evidently tracks the logic of the New York Convention, which represents the customary function of implementing legislation.³³⁸

According to the second argument, 9 U.S.C. § 207 represents a blanket statement that U.S. courts must confirm U.S. Convention awards unless the resisting part establishes one of the Convention's enumerated grounds for refusal to enforce awards.³³⁹ Because those grounds include vacatur by courts at the place of arbitration, vacatur remains available as a remedy.³⁴⁰ However, because § 207 absolutely requires confirmation unless the resisting party establishes one of the grounds actually "specified" in the Convention,³⁴¹ § 208 blocks application of the grounds specified only in 9 U.S.C. §10(a).³⁴² This represents the view

the reasoning in dicta, and recognizing that Seventh Circuit jurisprudence also seems "consistent" with this view).

338. See 9 U.S.C. § 201 (2006) ("The 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."); S. REP. NO. 91-702, at 1 (1970) ("The purpose of S. 3274 . . . is to *implement* the [New York] Convention . . . The bill would create a new chapter under . . . (the Federal Arbitration Act) dealing exclusively with the recognition and enforcement of awards *pursuant to the provisions of the convention.*") (emphasis added); J. Logan Murphy, Note, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT'L L. 1535, 1552 (2008) ("In the case of the Convention, Congress enacted implementing legislation in order to make the *provisions of the Convention* enforceable in the courts of the United States.") (emphasis added); see also *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650, 655, (S.D.N.Y. 1982) (accepting "the proposition that the Congress, in the guise of ratifying or implementing the Convention, could not include provisions contrary to the express and unambiguous enactments of the latter instrument"), *aff'd*, 710 F.2d 928 (2d Cir. 1983).

339. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(i).

340. *Id.*

341. 9 U.S.C. § 207 (2006).

342. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(i) ("Under this reading, allowing U.S. courts to vacate U.S. Convention awards is consistent with FAA Chapters Two and Three, but allowing use of the grounds set out in FAA Chapter One is not, since it is inconsistent with Section 207's requirement that Convention awards be 'confirmed' unless a New York Convention ground is established.").

of the Eleventh Circuit.³⁴³ However, that court obviously misinterpreted the authorities on which it relied in the sense that they involved enforcement of foreign awards, as opposed to vacatur of U.S. Convention awards.³⁴⁴ Also, the argument evidently does not track the logic of the New York Convention as drafted in 1958,³⁴⁵ but the normative desire for the global convergence of vacatur standards that developed in subsequent decades.³⁴⁶

Starting with Preliminary Draft No. 5, the Draft Restatement has openly aligned itself with the Eleventh Circuit's assertion that U.S. courts may vacate U.S. Convention awards only on the same grounds set forth in Article V of the New York Convention,³⁴⁷ even though that instrument does not, in fact, purport to regulate vacatur.³⁴⁸ In so doing, the reporters either have not consulted, or have not followed, many of the sources normally applied by the Supreme Court to statutory interpretation. For example, in their first exposition of the topic, the reporters elaborated a textual basis for each of the arguments regarding the proper interpretation of 9 U.S.C. §§ 207 and 208,³⁴⁹ but did not even weigh the relative strengths of either view. In subsequent drafts, the reporters amended their work to recognize that "both interpretations of § 207 are plausible," but declared that the Draft Restatement "adopts the [Eleventh Circuit's] interpretation as more consistent with FAA Chapter 2 as

343. See *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441-42, 1446 (11th Cir. 1998); DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iii).

344. See DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iii) ("It should be noted that both of the cases cited by the Eleventh Circuit as authority appear to have involved *foreign* Convention awards, not Convention awards *made in the United States.*") (emphasis added).

345. See *supra* note 338 and accompanying text.

346. See *supra* note 328 and accompanying text.

347. See DRAFT RESTATEMENT (Preliminary Draft No. 5), *supra* note 214, § 4-11(a); *id.* cmt. a; *id.* reporters' note a.

348. See *supra* note 323 and accompanying text.

349. DRAFT RESTATEMENT (Preliminary Draft No. 5), *supra* note 214, § 4-11 reporters' note a(i).

whole.”³⁵⁰ Departing from the Supreme Court’s approach to statutory interpretation in *Morrison*, however, the reporters still did not identify specific textual or contextual bases for preferring the Eleventh Circuit’s view. Had they closely examined text and context, the reporters should have concluded that § 207 does not affect the grounds for vacatur of U.S. Convention awards because the text of that provision (1) makes no reference to standards for vacatur³⁵¹ and (2) implements a treaty provision that does not regulate standards for vacatur.³⁵²

Turning to extratextual sources, such as legislative history, one should pause to recall that the reporters once described their task as determining “what Congress intended in enacting” 9 U.S.C. § 207.³⁵³ At that stage, however, the Draft Restatement curiously omitted any reference to the drafting history for § 207, which repeatedly emphasizes that Chapter 2 of the FAA deals “exclusively” with “*recognition and enforcement* [as opposed to vacatur] of awards,”³⁵⁴ including the inextricably related topics of jurisdiction,³⁵⁵ venue,³⁵⁶ and removal in enforcement proceedings,³⁵⁷ as well as the implementation of the New York Convention’s express provisions on enforcement of arbitration agreements.³⁵⁸ Likewise, the drafting history for

350. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters’ note a(i); DRAFT RESTATEMENT (Council Draft No. 3, 2011), *supra* note 75, § 4-11 reporters’ note a(i).

351. *See* 9 U.S.C. § 207.

352. *See supra* notes 323, 334 and accompanying text.

353. DRAFT RESTATEMENT (Preliminary Draft No. 5), *supra* note 214, § 4-11 reporters’ note a(iii).

354. H.R. REP. NO. 91-1181, at 1 (1970) (emphasis added), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602; S. REP. NO. 91-702, at 1 (1970) (emphasis added).

355. 9 U.S.C. § 203 (2006); *see also* H.R. REP. NO. 91-1181, at 2, *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602; S. REP. NO. 91-702, at 2.

356. 9 U.S.C. § 204 (2006); *see also* H.R. REP. NO. 91-1181, at 2, *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602; S. REP. NO. 91-702, at 2.

357. 9 U.S.C. § 205 (2006); *see also* H.R. REP. NO. 91-1181, at 2, *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602; S. REP. NO. 91-702, at 2.

358. 9 U.S.C. § 206 (2006); *see also* New York Convention, *supra* note 15, art. II(3) (requiring states parties to refer parties to arbitration).

§ 207 emphasizes that it “deals with two problems relating to the *enforcement of foreign* arbitral awards”: a three-year statute of limitations and incorporation of specific grounds to refuse enforcement of Convention awards.³⁵⁹

Following correspondence between the author and the reporters relating to the omission of drafting history, subsequent versions of the Draft Restatement have addressed the topic and have even recognized that the drafting history “might be construed as indicating that Chapter 2 does not address the grounds for vacating (rather than recognizing and enforcing) awards.”³⁶⁰ Nevertheless, the Draft Restatement rejects that view based on the proposition that the drafting history simply “does not address the grounds for vacating U.S. Convention awards,”³⁶¹ perhaps meaning that the reporters regard silence as a neutral factor. Following the Supreme Court’s reasoning in *Morrison*, however, the absence of any reference to vacatur in § 207 (or in any provision of FAA Chapter 2), plus the absence of any reference to vacatur in the drafting history (despite the fact that the United States had a committee of experts working on the implementing legislation for about a year),³⁶² seems dispositive on the fact that Congress never contemplated special standards for vacatur of U.S. Convention awards.³⁶³ Given the complete absence of grounding in textual or extratextual sources, it seems fanciful to suggest that Congress historically intended to provide special regulations for vacatur of U.S.

359. See S. REP. NO. 91-702, Appendix at 5, 8 (Hearing Held Before the Comm. on Foreign Relations on Feb. 9, 1970) (Statement of Richard D. Kearney) [hereinafter Kearney Statement of 1970].

360. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters’ note a(ii); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters’ note a(ii).

361. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters’ note a(ii); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters’ note a(ii).

362. Kearney Statement of 1970, *supra* note 359, at 9-10.

363. See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2878-79 (2010) (criticizing statutory interpretation not grounded in textual or extratextual sources, and rejecting the lower courts’ treatment of silence as an invitation to construe statutes based almost solely on judicial perceptions of desirable policy).

Convention awards. Perhaps for this reason, subsequent iterations of the Draft Restatement quietly dropped the express aspiration of trying to determine what "Congress intended in enacting" § 207.³⁶⁴

Given the almost complete lack of support in textual and extratextual sources, the reporters rely heavily on policy arguments to justify their construction of 9 U.S.C. § 207 as mandating the fusion of the grounds for vacatur with the grounds for refusing to enforce U.S. Convention awards.³⁶⁵ For example, they contend:

Using the Convention grounds for vacatur of U.S. Convention awards would unify the grounds for vacatur with the grounds for denying confirmation of these awards Such uniformity would benefit foreign parties arbitrating in the United States, who would be facing a regime for review of arbitral awards with which they are familiar and which is simpler, thus enhancing the attractiveness of the U.S. as an arbitral forum.³⁶⁶

While perhaps compelling from a normative perspective, and helpful in the sense of improving the alignment between the Federal Arbitration Act and the UNCITRAL Model Law (which also fuses the grounds for vacatur and

364. Compare DRAFT RESTATEMENT (Preliminary Draft No. 5), *supra* note 214, § 4-11 reporters' note a(iii) ("The issue . . . is what Congress intended in enacting Section 207."), with DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv) ("The issue here, however, is not how to construe the New York and Panama Conventions but instead how to construe § 207. Congress certainly was free to go beyond the Conventions and to revise the grounds for vacating Convention awards made in the United States when implementing the Conventions, even if the Conventions themselves did not require it to do so. For the [policy] reasons stated above, the Restatement takes the position that, under § 207, the grounds for vacating U.S. Convention awards are the Convention grounds rather than the FAA § 10 grounds."), and DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv) (same).

365. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv).

366. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv).

refusal to enforce awards),³⁶⁷ this statement seems puzzling on at least three levels.

First, when viewed from the perspective of the Supreme Court's views on statutory construction, the emphasis on building the United States' reputation as an arbitral venue seems no more defensible than the Second Circuit's emphasis on preserving New York City's reputation as a "preeminent commercial center,"³⁶⁸ a policy-oriented approach toward statutory construction that the Supreme Court rejected in *Weltover*.³⁶⁹ Furthermore, to the extent that one views the historical intention of Congress as the overriding criterion in statutory construction,³⁷⁰ one should bear in mind not only the lack of grounding in traditional sources,³⁷¹ but also the absurdity of implying that a Congress historically slow to embrace the New York Convention due to concerns about unintended changes to U.S. arbitration law³⁷² would have leapt to the forefront of

367. See *supra* notes 330-31 and accompanying text.

368. *Weltover, Inc. v. Republic of Arg.*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

369. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

370. See *id.* ("The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA."); see also *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2880 (2010) ("[R]ather than courts' 'divining what 'Congress would have wished' if it had addressed the problem[, a] more natural inquiry might be what jurisdiction Congress actually thought about and conferred.") (quoting with approval *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)).

371. See *Morrison*, 130 S. Ct. at 2879 (lamenting the fact that the "Second Circuit never put forward a textual or even extratextual basis" for the development of jurisprudence regarding the extraterritorial effect of U.S. statutes prohibiting securities fraud).

372. See S. EXEC. REP. NO. 90-10 (Convention on Foreign Arbitral Awards), Appendix at 4 (Hearing Before the Comm. on Foreign Relations on Sept. 20, 1968) (Statement of Richard D. Kearney) [hereinafter *Kearney Statement of 1968*] ("Although the United States participated in the Conference, the delegation recommended against signature of the convention. The delegation referred in its report to the common law hostility to arbitration and to the lack of widespread support among the business community for the convention."); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 576 (7th Cir. 2007) ("A United States delegation participated in the 1958 negotiations; however, that delegation recommended against the United States becoming an original signatory to the Convention. In part, the delegation was

global convergence by anticipating, in 1970, the Model Law's fusion of standards for vacatur and refusal, in 1985, without even mentioning that gigantic leap forward.³⁷³

Second, even if one could still construe statutes based on speculation about how Congress might invest its time today, it seems unlikely that a Congress recently described as hostile to arbitration³⁷⁴ would consider refinement of the FAA to mirror the UNCITRAL Model Law as a worthy use

concerned that the Convention would 'override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.'") (quoting U.S. DEL. REP. 22, at 2).

Tellingly, while members of the internationally minded legal elite pushed for adoption of the New York Convention since the early 1960s, the Senate did not give its advice and consent until 1968. *See* Kearney Statement of 1968, *supra* at 4 ("The House of Delegates of the American Bar Association recommended accession on September 1, 1960. The Board of Directors of the American Arbitration Association in 1966 strongly endorsed the convention and pressed for its submission for Senate advice and consent.").

Even after that, the United States did not submit its instrument of ratification until after Congress enacted implementing legislation in 1970. *See* Kearney Statement of 1970, *supra* note 359, at 5 ("During the hearing before the Foreign Relations Committee on United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards the question if [sic] implementing legislation was discussed and it was made clear that the United States would not deposit its instrument of accession until the necessary implementing legislation had been enacted. The bill which is presently before you sets up the legal structure that is required to implement the Convention."); *see also* Kearney Statement of 1968, *supra* at 2 ("Changes in the Federal Arbitration Act . . . will be required before the United States becomes party to the convention. Accordingly, the President's letter of transmittal states that U.S. accession . . . will be executed 'only after the necessary legislation is enacted.'"). Significantly, one may attribute the delay to the preoccupation with drafting an entirely new chapter of the Federal Arbitration Act to reduce the likelihood of unintended changes to domestic arbitration law. *See* Kearney Statement of 1970, *supra* note 359, at 5; *see also* H.G. Torbert, Jr., Acting Asst. Sec'y for Cong. Relations, Dep't of State, Letter to Hon. John. W. McCormack, Speaker, House of Reps. (Dec. 3, 1969), *reprinted in* 1970 U.S.C.C.A.N at 3603 ("The consensus . . . was that rather than amending a series of sections of the Federal Arbitration Act it would be preferable to enact a new chapter dealing *exclusively* with *recognition* and *enforcement* of awards falling under the Convention. This approach would *leave unchanged* the largely settled interpretation of the Federal Arbitration Act [for proceedings] not [falling] under the Convention.") (emphasis added).

373. *See supra* notes 330-31 and accompanying text.

374. *See supra* note 79 and accompanying text.

of time. Even the chief reporter for the Draft Restatement recently conceded as much:

That our work takes the form of a restatement rather than a legislative text is not accident. . . . Crucially, a restatement doesn't need to be voted on by Congress. . . . The FAA certainly needs to be revised. No one can defend it as written. . . . Of course, it would be better to have a good federal statute rather than a restatement based upon a lousy old federal statute, but I don't see that as happening anytime soon. Frankly, there's no constituency for a new and comprehensive legislative framework for international arbitration, and there's no guarantee that what would emerge from the U.S. legislative process would be a satisfactory text. More and more young lawyers may be finding arbitration very attractive professionally for a number of reasons, but that doesn't mean Congress regards FAA reform on the same level as "Obamacare," legalizing marijuana, or immigration reform. No one is going to get elected because he or she sponsored the "Federal Arbitration Revision Act of 2012." So, at least for now, we're stuck, at best, with a restatement.³⁷⁵

Third, the emphasis on "enhancing the attractiveness of the U.S. as an arbitral forum"³⁷⁶ seems difficult to square with the reporters' previous writings, which declared that "[t]he purpose of the Restatement is *not* to promote the United States as a seat of international arbitration"³⁷⁷ One wonders how they have come to embrace a goal once previously described as off limits.

Anyhow, the point is that when it comes to the proposed fusion of grounds for vacatur and refusal, the Draft Restatement relies almost entirely on the sort of policy justifications already rejected by the Supreme Court as a foundation for statutory construction. In the process, it illustrates the perils of speculation that the Supreme Court sought to avoid by emphasizing objectively verifiable sources of, or at least stable presumptions regarding,

375. Perry, *A Man with Many Hats*, *supra* note 39, at 30 (quoting George Bermann).

376. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv).

377. Bermann et al. (PENN. ST.), *supra* note 6, at 1341 (emphasis added).

congressional intent.³⁷⁸ As a result, the Draft Restatement invites judicial repudiation of its proposed fusion of grounds for vacatur and refusal of U.S. Convention awards, not because it pursues inappropriate policies, but because it inappropriately substitutes policymaking for genuine statutory construction.³⁷⁹

Lacking textual and extratextual support for their interpretation of 9 U.S.C. § 207, the Draft Restatement's reporters fall back on contextual observations about its interplay with 9 U.S.C. § 202, which extends the Convention's scope beyond "foreign awards" to include international awards rendered in the United States that arise out of legal relationships having reasonable connections to foreign jurisdictions.³⁸⁰ According to their view:

More *generally*, it *seems* anomalous for the U.S. to have by legislation accepted the Conventions' invitation to Contracting States to treat awards made on its territory as Convention awards, and then withhold from them application of the grounds for denial of recognition and enforcement that represent the Conventions' centerpiece."³⁸¹

But however things may *seem* from an overly *general* perspective, the observation bears little resemblance to the truth following close examination of §§ 202 and 207. Turning first to § 202, the Draft Restatement's discussion of policy seems to regard statutory extension of the

378. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

379. *Id.* at 2880-81; *Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

380. The New York Convention applies both to foreign awards (being those rendered outside the jurisdiction where enforcement is sought) and to non-domestic awards (being those rendered in the enforcement forum, but still considered non-domestic in that forum). New York Convention, *supra* note 15, art. I(1). The U.S. implementing legislation for that provision defines Convention awards to include those arising out of commercial relationships involving at least one foreign party or some other reasonable relationship to foreign jurisdictions. See 9 U.S.C. § 202 (2006). In other words, the United States has by statute extended the Convention's scope to many awards rendered in the United States. See *id.*

381. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv) (emphasis added); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv) (emphasis added).

Convention's scope as logically indicative of Congress's intent to alter the grounds for vacating U.S. Convention awards in a manner likely to increase the nation's attraction as an arbitration venue.³⁸² Even if it has a degree of superficial plausibility, the argument fails to acknowledge that § 202 does not mention vacatur and only purports to define the universe of awards that "*fall[] under the Convention,*"³⁸³ which itself does not regulate vacatur and leaves that topic to specification by domestic law.³⁸⁴ Under these circumstances it seems difficult to understand how the statutory extension of the Convention's scope might restrict, even indirectly, the grounds for vacatur of U.S. Convention awards.

In addition, proponents of the Draft Restatement's treatment of 9 U.S.C. § 202 seem to rely on the assumption that Congress adopted a *broad* statutory definition of Convention awards and,³⁸⁵ therefore, must have intended to *maximize* application of Convention standards in judicial supervision of U.S. Convention awards, including vacatur proceedings not actually regulated by the Convention.³⁸⁶ However, the drafting history for § 202 clearly illustrates that Congress intended its formulation to have a *narrowing* effect, in the sense of *limiting* the Convention's scope to situations involving foreign commerce and *excluding* situations only involving interstate commerce.³⁸⁷ To give one

382. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv).

383. 9 U.S.C. § 202 (emphasis added).

384. *See supra* note 323-25 and accompanying text.

385. *See, e.g.*, Hulbert, *supra* note 324, at 59-62 (discussing 9 U.S.C. § 202 and emphasizing similarities with other examples of implementing legislation, which "broadly" define the categories of international awards).

386. *See, e.g., id.* at 81 (expressing disbelief at the "proposition that a country's decision to place non-domestic awards under the Convention, as contemplated by Article I, is without consequence for the[ir] legal status" in proceedings seeking the vacatur of U.S. Convention awards).

387. As stated by Ambassador Richard D. Kearney in testimony before the Senate Committee on Foreign Relations:

[W]e were faced with the problem that section 1 of the [Federal Arbitration] [A]ct, which defines commerce, specifically includes both

illustration of potential concerns, the U.S. delegation to the 1958 drafting conference strongly urged the United States not to adopt the New York Convention, in part because “[t]he application of the convention to awards ‘not considered as domestic awards’ in the enforcing country . . . appear[ed] to raise difficulties.”³⁸⁸ Specifically, under the U.S. federal system:

[T]he courts of a given State tend to regard all out-of-State awards as ‘foreign,’ regardless of whether they were rendered in another State or in a foreign country. Thus, for example, awards rendered in New York ‘are not considered as domestic awards’ in Pennsylvania. On the basis of the wording of Article I, paragraph 1, [of the New York Convention], there appears to be a possibility that awards rendered in any State would be foreign awards and thus entitled to the benefits of the convention in the other States of the Union. These benefits might be substantial in States where the judiciary tends to take a restrictive view of arbitration. The Conference undoubtedly had no intention of using the convention to attain any such result, and the courts probably would hold to that effect. None the less there is nothing squarely on point in the Conference records, and the language of the provision would not preclude such an interpretation. Should such an interpretation prove valid . . . the objections are obvious. The treatment by any State of awards handed down in other States of the Union is a domestic matter. Hence, the convention would represent employment of the treaty power, under the guise of a legitimate foreign policy objective . . . to achieve a domestic result.³⁸⁹

interstate and foreign commerce, while the implementation of the Convention should be concerned only with foreign commerce. Consequently it was necessary to modify the definition of commerce to make it quite clear that arbitration arising out of relationships in *interstate commerce* remains under the original Arbitration Act and is *excluded from the operation of the proposed chapter 2*.

To achieve this result, we have included *in section 202* a requirement that any case concerning an agreement or award solely between U.S. citizens is *excluded* unless there is some important foreign element involved

Kearney Statement of 1970, *supra* note 359, at 6 (emphasis added).

388. See W.T.M. BEALE, JR., OFFICIAL REPORT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION 2, 18, 22 (1958).

389. *Id.* at 18-19.

It, thus, seems evident that the drafters of the Convention's implementing legislation framed § 202 not to *establish* a broad new class of "non-domestic awards," but to *prevent* courts from entertaining unduly broad understandings of that concept. In other words, the historical emphasis seems to be on limiting, rather than maximizing, the Convention's effect on U.S. practice.

As a matter of fact, the legislative histories for advice and consent to the New York Convention and adoption of its implementing legislation show (1) virtually no intent to change U.S. practice and (2) a heavy preoccupation with protecting the interests of U.S. nationals in foreign jurisdictions. With respect to the first point, during the Senate hearings that led to advice and consent, the State Department's representative opined that the New York Convention did not even "go as far as the Federal law we have on the books,"³⁹⁰ thus indicating an expectation that ratification would entail no substantial changes to U.S. law. Likewise, in hearings relating to adoption of the New York Convention's implementing legislation, the same person deemed it "very likely that many of the arbitration agreements falling under the Convention will provide for arbitration outside the United States."³⁹¹ Consistent with

390. Kearney Statement of 1968, *supra* note 372, at 8; *see also id.* at 5 ("These agreements to arbitrate and foreign arbitral awards made thereunder would be generally recognized and enforced in the United States today. Certainly under the Federal Arbitration Act as presently drafted these agreements would be enforced if the jurisdictional amount and venue requirements were met.").

391. Kearney Statement of 1970, *supra* note 359, at 7. During hearings relating to advice and consent, Ambassador Kearney also emphasized the point:

The frequency with which American businessmen provide for arbitration in contracts dealing with international transactions is perhaps not widely appreciated. The location of goods and documents involved in international sales transactions tends to make the natural forum for adjudication of sales disputes the country in which the buyer resides. Because of his lack of familiarity with foreign judicial procedure and his desire for prompt resolution of any dispute, the American exporter frequently inserts in his sales contracts a provision that such disputes will be settled by arbitration either in the country of the buyer or elsewhere by a private arbitral group—such as the Corn Exchange of London—which has specialized expertise in dealing with the subject matter of the contract.

that assessment, he previously described the Convention's chief benefit for U.S. commercial interests in the following terms:

The convention protects the American businessman by ensuring that agreements to arbitrate and arbitral awards will be enforced in the *other countries* party to the convention. Our failure to become a party to the convention has resulted in difficulties for American businessmen seeking to enforce arbitral awards against parties located in *foreign countries*. . . .

Indeed, among the developments which impelled us to decide that we should propose our accession is the fact that our failure to be a party has caused our businessmen trouble in trying to obtain enforcement of arbitration awards in *foreign countries* which are parties to the convention and which rely on the reciprocity declaration [to deny enforcement of awards rendered in states not party to the convention].³⁹²

Thus, while it might be possible to *speculate* that Congress drafted 9 U.S.C. § 202 with an eye toward introducing legal reforms designed to improve New York's reputation as an arbitral venue,³⁹³ the legislative history provides no affirmative support for that view.

Turning next to 9 U.S.C. § 207, the fact is that provision indisputably secures the New York Convention's "centerpiece,"³⁹⁴ namely *recognition and enforcement* of U.S. Convention awards under the standards set forth in the New York Convention. While § 207 may not immunize U.S. Convention awards from *vacatur* on other grounds, the arrangement conforms precisely to the New York Convention, which (contrary to the UNCITRAL Model Law)

Kearney Statement of 1968, *supra* note 372, at 5.

392. Kearney Statement of 1968, *supra* note 372, at 5-6 (emphasis added).

393. See *Lander Co. v. MPP Invs., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) (hypothesizing that "Congress may have believed that confining enforcement under the Convention to awards rendered abroad would drive away international arbitration business from New York."); cf. DRAFT RESTATEMENT (Tentative Draft No. 2), *supra* note 5, § 4-11 reporters' note a(iv) (justifying its interpretation of another provision on the grounds that it would enhance "the attractiveness of the United States as an arbitral forum"); DRAFT RESTATEMENT (Council Draft No. 3), *supra* note 75, § 4-11 reporters' note a(iv) (same).

394. See *supra* note 381 and accompanying text.

not only excludes *vacatur* from its centerpiece, but affirmatively leaves that topic outside the scope of treaty regulation.³⁹⁵ Under these circumstances, it seems evident that the reporters aim not so much to interpret the Federal Arbitration Act, but to redirect that statute toward the shores of the Model Law under the sail of the New York Convention, a mash-up of sources that represents, perhaps, the most anomalous aspect of their work.

In this context, one should finally bear in mind that Congress had good reasons to extend the New York Convention's scope to the enforcement of U.S. Convention awards, even if that did not exclude the possibility of *vacatur* under 9 U.S.C. § 10(a). Among other things, the extension of coverage means that proceedings relating to U.S. Convention awards enjoy federal question jurisdiction,³⁹⁶ more favorable rules on venue,³⁹⁷ greater leeway to remove cases from state to federal court,³⁹⁸ and a much longer statute of limitations for the enforcement of awards.³⁹⁹ These are hardly trifling benefits. Even standing by itself, the enlarged statute of limitations represents a critical adjustment to the complexities of multi-jurisdictional enforcement proceedings.⁴⁰⁰

395. See *supra* notes 321-25 and accompanying text.

396. 9 U.S.C. § 203 ("The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.").

397. 9 U.S.C. § 204.

398. 9 U.S.C. § 205.

399. Compare 9 U.S.C. §207 (three years), with 9 U.S.C. § 9 (one year).

400. In testifying before the Senate Foreign Relations Committee on the topic of legislation designed to implement the New York Convention, the State Department's representative explained as follows:

Section 207 deals with two problems relating to the enforcement of foreign arbitral awards. The Uniform Arbitration Act has a time period of 1 year within which an application may be made for an order confirming an award. The Arbitration Convention does not contain any specific provision on this point. However, all of the experts on arbitration who worked with us considered that a 1-year period for the enforcement of foreign arbitral awards was much too short. In many cases enforcement would normally be sought outside the United States as a first step. An action would be filed here only after efforts to obtain

In short, while there may be a rhetorical flourish in protesting against the “anomaly” of establishing a category of U.S. Convention awards and then depriving that category of legal significance,⁴⁰¹ the position seems less than accurate. The fact is that a diligent parsing of text reveals several benefits that explicitly accrue to U.S. Convention awards under Chapter 2 of the Federal Arbitration Act. Nothing in the statutory text or its drafting history indicates that Congress expected those benefits to include immunity from vacatur under the standards set forth in 9 U.S.C. § 10(a). According to the Supreme Court’s decisions in *Morrison* and *Weltover*, statutory interpretation should stop there.⁴⁰² Applying Chapter 2 of the FAA, the overwhelming accumulation of lower court jurisprudence goes no farther.⁴⁰³ While the Draft Restatement’s effort to “innovate” on this front may seem attractive to arbitration specialists on policy grounds relating to global convergence and our nation’s appeal as an arbitration venue,⁴⁰⁴ the generalist judges who decide cases seem much more likely to emphasize the predicate rules of statutory interpretation,⁴⁰⁵ which render overreliance on policy justifications a truly perilous act.

enforcement in a foreign country had failed. It was, therefore, essential to allow time for these initial enforcement efforts outside the United States and the consensus was that 3 years is a reasonable period in these circumstances.

See Kearney Statement of 1970, *supra* note 359, at 8; see also Charles H. Brower II, *Arbitration and Antitrust: Navigating the Contours of Mandatory Law*, 59 BUFF. L. REV. 1127, 1140 (2011) (observing that “the New York Convention and the rise of a global economy have increased the relevance of multi-jurisdictional enforcement strategies”); Alan Scott Rau, *The Arbitrator and “Mandatory Rules of Law,”* in MANDATORY RULES IN INTERNATIONAL ARBITRATION 77, 118 (George A. Bermann & Loukas A. Mistelis eds., 2011) (recognizing “the transitory nature of ‘assets’ in an electronic world,” which logically increases the likelihood of seeking enforcement of awards in multiple jurisdictions).

401. See *supra* note 381 and accompanying text.

402. See *supra* notes 310-15 and accompanying text.

403. See *supra* note 337 and accompanying text.

404. See *supra* notes 365-67, 376-77 and accompanying text.

405. See *supra* notes 310-15 and accompanying text.

CONCLUSION

In conclusion, most debates about the Draft Restatement have focused on the merits of individual provisions, a context in which possibilities seem wide open, the perspectives of the U.S. arbitration bar seem ascendant, and in which one may easily resolve differences of opinion on the theory that reasonable people can disagree. Until now, participants have not considered the role that drafting standards have played, and should play, as fixed yardsticks for measuring the provisions of U.S. Restatements on international topics. As indicated throughout, drafting standards represent structural elements, and their omission throws an element of doubt on the integrity of controversial choices made in the Draft Restatement. To remedy this defect, this article has proposed a drafting standard based on the Supreme Court's likely views, not on the ultimate policy questions, but on the predicate issues of treaty and statutory interpretation. As demonstrated above, the Draft Restatement gives scant attention to such issues, with the result that its provisions on *forum non conveniens* and vacatur of U.S. Convention awards lack a proper foundation and, to this author, seem almost certainly wrong. One hopes that the reporters and advisors will redress these deficiencies, or that courts will have the courage to do so when passing judgment on their work.

