

# WHO THINKS TREATIES ARE LIKE CONTRACTS? NOT JOHN MARSHALL

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## I. INTRODUCTION

Courts in the United States are fond of analogizing treaties to contracts. The U.S. Supreme Court has done so on numerous occasions,<sup>1</sup> as have nearly all federal circuit courts.<sup>2</sup> Indeed, the treaty-as-contract trope has permeated U.S. legal discourse since at least the early 1800s when Chief Justice John Marshall wrote in *Foster v. Neilson*<sup>3</sup> that “[a] treaty is in its nature a contract between two nations, not a legislative act.”<sup>4</sup>

However, in both international and U.S. practice, treaties are *not* like contracts. Whatever resonance the comparison may have had at the time of *Foster*, it is informative today only in the most superficial sense that contracts and treaties are both agreements that the parties intend to be legally binding and enforceable.<sup>5</sup> Beyond that sense, the

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1. See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (a treaty is “essentially a contract between two sovereign nations”)); *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Bond v. United States*, 572 U.S. 844, 875 (2014) (Scalia J., concurring); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 12 (2014); *Medellin v. Texas*, 552 U.S. 491, 505 (2008); *O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884); *Worcester v. Georgia*, 31 U.S. 515, 581 (1832).

2. See, e.g., *Arias Leiva v. Warden*, 928 F.3d 1281, 1291 (11th Cir. 2019); *Georges v. United Nations*, 834 F.3d 88, 93 (2d Cir. 2016); *Eshel v. Comm'r of Internal Revenue Serv.*, 831 F.3d 512, 518 (D.C. Cir. 2016); *In re Comm'r's Subpoenas*, 325 F.3d 1287, 1301 (11th Cir. 2003); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60–61 (1st Cir. 2000); *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 646 (4th Cir. 2000); *New York Chinese TV Programs, Inc. v. U.E. Enter., Inc.*, 954 F.2d 847, 852 (2d Cir. 1992); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *United States v. Reid*, 73 F.2d 153, 155 (9th Cir. 1934). On occasion, state courts have done likewise. See, e.g., *Portalp Int'l SAS v. Zuloaga*, 198 So. 3d 669, 673 (Fla. Dist. Ct. App. 2015); *Sharifi v. State*, 993 So. 2d 907, 915 (Ala. Crim. App. 2008).

3. 27 U.S. 253 (1829).

4. *Id.* at 314.

5. See Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 UNIV. CIN. L. REV. 1243, 1245 (2005) (“treaties are law but not legislation; they rest on promised exchanges but are not contracts”).

differences are significant and consequential.<sup>6</sup> Repeated comparison not only misleads but also risks distorting the understanding of treaty law in American legal discourse.<sup>7</sup>

We take issue with the treaty-as-contract analogy on two grounds: first, it is the wrong prism through which to analyze contemporary treaty law and practice today and, second, the genesis of the analogy in American law stems from a misreading of Chief Justice Marshall's opinion in *Foster*.<sup>8</sup>

In the broadest terms, contracts are typically concluded between individuals, corporations, or other institutions and governed by private (domestic) law.<sup>9</sup> In contrast, treaties<sup>10</sup> can only be “made”

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6. *Foster*, 27 U.S. at 254; see Glashausser, *supra* note 5, at 1251 (“Interpreting treaties as if they were either statutes or contracts, though, ignores what makes a treaty a treaty.”).

7. See John Norton Moore, *Treaty Interpretation, The Constitution And The Rule of Law*, 42 VA. J. INT'L L. 163, 184–88 (2001) (noting the tension between the legislative and executive branch of the United States when interpreting international treaties); see also David Sloss, *When Do Treaties Create Individually Enforceable Rights?: The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 31 (2007) (noting how “[t]here is no domestic statutory or common law that a court could consult” to determine what rights a treaty confers).

8. See Glashausser, *supra* note 5, at 1270–76 (emphasizing that treaties, while similar to contracts, are not just contracts); *Foster*, 27 U.S. at 254.

9. Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations art. 61, *opened for signature* Mar. 21, 1986, 25 ILM 543 (1986) [hereinafter V.C.L.T. between States and International Organizations]; see Irmgard Marboe & August Reinisch, *Contracts between States and Foreign Private Law Persons* § A(2)–(3), in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (updated April 2021) (explaining that “[s]ince contracts between a State and a private person are not contract between States in their capacity as subjects of public international law, they might be regarded simply as private law contracts”).

10. We use “treaty” as synonymous with “international agreement” in the sense of Article 2(1) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter V.C.L.T.]: “For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” The definition is widely accepted and may today be considered part of customary international law. See Duncan B. Hollis, *Defining Treaties*, in OXFORD GUIDE TO TREATIES 11–13 (Duncan B. Hollis ed., 2d ed. 2020). In U.S. law, treaties with Native American tribes are generally subject to different legal rules. Cf. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the*

between sovereign States (or, today, between States and international organizations possessing “international legal personality” or between international organizations), and they are instruments of (and governed by) an autonomous system of public law—more accurately, public international law.<sup>11</sup> Moreover, under the U.S. Constitution, duly-ratified treaties are part of the “supreme Law of the Land”<sup>12</sup>—that certainly cannot be said of contracts. Treaties and contracts thus operate on different “planes” of law.<sup>13</sup> Equating the

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*Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000). See also *Native American Treaties and Agreements*, FIRST PEOPLE, <https://www.firstpeople.us/FP-HTML-Treaties/Treaties.html> (last visited Mar. 30, 2022) (providing a list of Native American treaties and agreements). We also mean treaties within the scope of Article II, Section 2 and Article VI of the U.S. Constitution, to the exclusion of so-called “executive agreements,” although such agreements may well fall within the scope of the V.C.L.T. with regard to their interpretation and application. U.S. CONST. art. II, § 2; U.S. CONST. art. VI (noting that we also mean treaties within the scope of Article II, Section 2 and Article VI of the U.S. Constitution, to the exclusion of so-called “executive agreements,” although such agreements may well fall within the scope of the V.C.L.T. with regard to their interpretation and application); V.C.L.T. art. 1, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

11. As defined in V.C.L.T. Article 2(1)(a), “For the purposes of the present Convention: (a) ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Individuals and private organizations (such as corporations) cannot enter into treaties, but treaties can regulate their activities. See also *Chew Heong v. U. S.*, 112 U. S. 536, 543, 565 (1884); cf. *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (“a treaty may . . . contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country”); Sital Kalantry, *Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT’L L. 63, 94–95 (2008) (discussing how individual rights can be protected by treaties between sovereign States). For treaties between international organizations, see V.C.L.T. between States and International Organizations, *supra* note 9 (discussing treaties between international organizations).

12. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

13. *Id.*; see also Kalantry, *supra* note 11, at 89–90 (noting that unlike contracts, there is no consistent approach to determine whether a “treaty gives rise to individually enforceable rights”).

two obscures these fundamental distinctions.<sup>14</sup>

More significantly, the treaty-as-contract analogy is born of a misreading of *Foster*. Indeed, many U.S. judicial decisions—and many scholarly writings about those decisions—have relied on Marshall’s sentence in *Foster* as support for two additional propositions: that the domestic law of contracts is the proper referent for treaty interpretation,<sup>15</sup> and that, because they are not “legislative acts,” treaties are presumptively not applicable in U.S. law and cannot directly affect individual rights.<sup>16</sup> These propositions are also wrong.

This Article proceeds in two directions: one looking forward and the other looking backward. It begins with a summary of some of the significant differences between treaties (in particular contemporary treaties) and contracts in order to highlight the ways in which the treaty-as-contract analogy is inapposite today.<sup>17</sup> The Article then revisits Chief Justice Marshall’s opinions in *Foster* and *United States v. Percheman*<sup>18</sup> and discusses the Supreme Court’s treatment of

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14. We do not here deal with the very interesting effort to use contract theory (in its economic context) to illuminate the much broader questions of how and why States comply with international law. See, e.g., ROBERT SCOTT & PAUL STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 30 (2006).

15. See, e.g., *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”); *BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) (“As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract’s interpretation, a matter of determining the parties’ intent.”); Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of a Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 429 (2007) (discussing the “contractual nature of treaties”); Moore, *supra* note 7, at 165 (discussing the “contractual nature of treaties” and describing the origins of the presumption that treaties do not create individually enforceable rights).

16. See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“International treaties are not presumed to create rights that are privately enforceable”); *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (“[T]reaties as a rule do not create individual rights”); see also Sloss, *When Do Treaties Create Individually Enforceable Rights?*, *supra* note 7, 106–110 (describing the origins of the presumption that treaties do not create individually enforceable rights).

17. See discussion *infra* Part III.

18. 32 U.S. 51 (1833).

*Foster* and *Percheman* in its more recent decision in *Medellin v. Texas*.<sup>19</sup> While Chief Justice Marshall did write in *Foster* that “[a] treaty is in its nature a contract between two nations,” that phrase was obiter dictum.<sup>20</sup> Under our reading of *Foster*, the Chief Justice’s objective was to clarify the place of treaties in American law in a way that is entirely consonant with *Percheman* and *Medellin*.<sup>21</sup> To isolate the treaty-as-contract analogy from the rest of *Foster* is to misunderstand the Chief Justice’s principal argument.<sup>22</sup> Thus, the treaty-as-contract analogy is wrong in both past and present.

## II. WHY TREATIES ARE NOT LIKE CONTRACTS TODAY

The treaty-as-contract analogy has a substantial historical pedigree.<sup>23</sup> Its origins extend back several centuries, and it has long been favored by civil law systems and scholars.<sup>24</sup> In U.S. discourse, it found adherents among the Founding Fathers.<sup>25</sup> As indicated above, U.S. courts have frequently repeated the treaty-as-contract analogy, and it is a recurring heuristic in introductory international law courses in many law schools in the United States.<sup>26</sup> Yet the analogy elides the inherent distinction between treaties as instruments of public law and contracts as private agreements.<sup>27</sup>

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19. *Medellin v. Texas*, 552 U.S. 491, 505 (2008).

20. *Foster*, 27 U.S. at 254, 314.

21. *Percheman*, 32 U.S. at 52; *Medellin*, 552 U.S. at 492, 505, 538.

22. *Foster*, 27 U.S. at 254.

23. See Moore, *supra* note 7, at 165 (noting long history of United States Supreme Court decisions “treating treaties not as legislation, but as contracts or compacts among nations, and adopting the intent of the parties to a treaty as the basic standard for interpretation”); See generally MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 7 (2009) (highlighting the historical relationship between treaties and contracts).

24. See, e.g., VILLIGER, *supra* note 23, at 7.

25. The analogy was not original with Marshall; it can be traced back at least to Alexander Hamilton’s explanation that “[t]he power of making treaties . . . relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith.” See THE FEDERALIST NO. 75, at 450–51 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

26. *Medellin*, 552 U.S. at 492, 505, 538.

27. This perspective is shared by Glashausser, *supra* note 5, at 1270–76 (in the

More importantly, it confuses far more than it clarifies.<sup>28</sup> What follows are some of the principal differences between treaties and contracts—as regards (A) their nature and purpose, (B) substantive rules and principles, and (C) rules and methods of interpretation—that are blurred or obscured in the treaty-as-contract analogy.<sup>29</sup>

#### A. DIFFERENCES IN NATURE AND PURPOSE

On one level, the distinction is obvious. Contracts are paradigmatically agreements between private parties, entered into for private (mutually beneficial, frequently economic or commercial) purposes, and they are typically subject to national (domestic) law.<sup>30</sup> Treaties, on the other hand, are intergovernmental agreements, concluded for public (sovereign) purposes and governed by public (international) law—namely, the Vienna Convention on the Law of Treaties (V.C.L.T.).<sup>31</sup> It is, of course, not uncommon for governments to enter into contracts with private parties,<sup>32</sup> but private

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context of U.S. law) and Akbar Rasulov, *Theorizing Treaties: The Consequences of the Contractual Analogy*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 74–122 (in Christian J. Tams, et. al. eds., 2016) (highlighting the weaknesses in the analogy, generally).

28. A contrarian critique of the treaty-as-contract analogy was set out in EVANGELOS RAFTOPOULOS, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES* (1990), which emphasized the “relational legal character” of treaties and rejected the “scientific” construction of treaty terms based on the “objective” approach of the V.C.L.T. (as well as European efforts at legal codifications). Raftopoulos promoted a “contextual understanding of Treaty normativity,” taking into account the “time-space element of the Treaty relations,” which he termed “relational or instrumentality normativity.” *Id.* at 121, 133.

29. *See infra*.

30. RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981) (defining “contract”).

31. *See supra* note 11 and accompanying text. Treaties between States and international organizations or between international organizations are governed by their own convention. *See* V.C.L.T. Between States and Organizations, *supra* note 9.

32. Of course, governments and governmental entities can and do enter into contracts with private persons and entities, typically to procure supplies and services. In U.S. law, they are governed by different rules (such as the Federal Acquisition Regulations and similar provisions at the state and local levels). *See* generally, Marboe & Reinisch, *supra* note 9. States also enter into specialized contracts with foreign investors, and these too are increasingly governed by specialized rules. *See, e.g.*, Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WILLIAM AND MARY L. REV. 351, 354 (2016); Julian

individuals and entities cannot be parties to treaties, since treaty-making is by definition an exercise of sovereign authority.<sup>33</sup> Moreover, while contracts are merely subject to an existing system of law, international treaties are subject to existing international law and also codify and become international law.<sup>34</sup>

In the contemporary context, treaties typically serve very different purposes than contracts: because treaties establish the structures and the governing rules of the international community, their goals are often constitutive, not transactional.<sup>35</sup> Think, for instance, of the Vienna Conventions on Diplomatic and Consular Relations and the U.N. Convention on the Law of the Sea, or agreements that require States to take certain steps in regard to arms control and disarmament (such as restricting nuclear testing and promoting the peaceful use of outer space), or those that impose obligations to modify domestic law and policy (such as the ones requiring States to criminalize certain acts of terrorism, to protect refugees and asylum seekers, and to protect the environment).<sup>36</sup>

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Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 2 (2019); Francisco Orrego Vicuña, *Of Contracts and Treaties in the Global Market*, 8 MAX PLANCK Y.B. U.N. L. 341 (2004).

33. We recognize, of course, that international organizations can be both the object of (created by) and parties to treaties. While they are not “sovereign” in the same sense as “States,” they are created by States through treaties and do have “international personality,” which private individuals and entities do not.

34. See V.C.L.T., *supra* note 10.

35. Jared I. Mayer, *Treaty Interpretation Under a Covenant Paradigm*, 21 CHI. J. INT'L L. 194 (2020) (suggesting that while the “contract paradigm” (as reflected in the V.C.L.T.) works well for “ordinary” treaties, it is inappropriate for others described as “momentus” treaties, a category the author sees as including treaties promoting “critical international security and prosperity goals” and in which trust between nations necessarily plays “a significant role in securing [their] objectives”); Vienna Convention on the Law of Treaties art. 2(1), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 729 U.N.T.S. 161.

36. Vienna Convention on Diplomatic Relations, Apr. 24, 1964, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Mar. 19, 1967, 596 U.N.T.S. 261; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 610 U.N.T.S. 205; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197;



With the advent of the United Nations in 1945, the task of international law-making was largely assigned to codification by means of treaties, and since then there has been a proliferation of so-called “law-making treaties” establishing binding legal norms applicable to the States party to the agreements.<sup>37</sup> The U.N. Charter recognized the importance of law-making treaties in the post-War world by tasking the U.N. General Assembly with studying and making recommendations “for the purpose of . . . encouraging the progressive development of international law and its codification.”<sup>38</sup> In 1947, the U.N. General Assembly established the International Law Commission, a body of legal experts charged with the progressive drafting of multilateral agreements, among them the V.C.L.T.<sup>39</sup> Some of these law-making treaties were intended to codify, and perhaps clarify, existing rules of customary international

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Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

37. Catherine M. Brölmann, *Law-Making Treaties: Form and Function in International Law*, 74 NORDIC J. INT’L L. 383 (2005) (explaining how the upheaval of the 20<sup>th</sup> century, especially in the World Wars, led to a proliferation of these “law-making treaties”); see also Catherine Brölmann, *Typologies and the ‘Essential Juridical Character’ of Treaties*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 79–102 (Michael Bowman & Dīno Kritsiotis eds., 2018) (noting that in civil law jurisprudence a distinction has often been made between this category (*traités-lois*), which typically includes multilateral norm-setting or constitutive treaties, and transactional treaties (*traités-contract*), which generally refers to bilateral arrangements regarding trade, extradition, consular relations, defense alliances, etc.). Cf. LORD MCNAIR, LORD MCNAIR, *THE LAW OF TREATIES* 729 (1986) (“[T]he seed-bed of the traditional rules as to the formation, validity, interpretation, and discharge of treaties which swell the bulk of our text-books, too often written in slavish imitation of their predecessors, was sown at a time when the old conception of a treaty as a compact, a bargain, a *Vertrag*, was exclusively predominant and the dawn of the new multilateral treaty had not begun.”).

38. U.N. Charter art. 13, ¶ 1; see also, G.A. Res. 174 (II), art. 15 (Nov. 17, 1947) (“the expression ‘progressive development of international law’ is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, ‘codification of international law’ is used for convenience as meaning the precise formulation of rules of international law in fields where there has been extensive State practice, precedent and doctrine”).

39. G.A. Res. 174 (II) (Nov. 17, 1947). See also *supra* note 22 and accompanying text.

law.<sup>40</sup> At the same time, widespread adherence to codified norms may later cause them to be considered as expressive of customary international law, applicable to non-States parties as well.<sup>41</sup>

To be sure, not all contemporary treaties qualify as “lawmaking.”<sup>42</sup> Many bilateral treaties today may have some *quid pro quo* characteristics—consider, for example, reciprocity-based agreements that provide for trade or cultural relations, exchange tax information, settle international claims, set the conditions for extradition and mutual legal assistance in criminal cases, relax visa requirements, cooperate on scientific and technical matters, or even create defense and security relationships.<sup>43</sup> From a purely historical perspective, it is perhaps understandable that, in *Foster*, the Chief Justice might have focused on the “reciprocal benefits” aspect. By 1829, all of the (relatively few) treaties that the new Republic had concluded were bilateral, and most dealt with mutual commitments to cease hostilities, form alliances (including payments of ransom or tribute), establish boundaries and transfer territory, and establish bilateral trade (“treaties of amity and commerce”).<sup>44</sup> Nonetheless, even where a particular treaty today might be viewed as having some “bargain-and-exchange” characteristics (say, a bilateral agreement involving arms sales), given the sovereign involvement in question, the contract analogy still falls short.<sup>45</sup> All treaties, even those that may

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40. See V.C.L.T., *supra* note 10.

41. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S., Intro. Note (AM. L. INST. 2018) (noting that the Vienna Convention on the Law of Treaties (V.C.L.T.) is one such treaty that has evolved to become, in large part, expressive of customary international law. In consequence, the United States accepts as legally binding most of the V.C.L.T.’s rules of treaty interpretation and application despite the fact that the United States is not a party).

42. See Sloss, *When Do Treaties Create Individually Enforceable Rights?*, *supra* note 7, at 106–110 (explaining how treaties must be self-executing to have effects on an individual’s private rights).

43. See, e.g., Convention Implementing the Schengen Agreement of 14 June 1985, 2000 O.J. (L 239) 19; see also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

44. See *United States Treaties and International Agreements*, LIBR. OF CONG., <https://www.loc.gov/collections/united-states-treaties-and-other-international-agreements/about-this-collection> (last visited March 31, 2022) (providing a list of U.S. treaties).

45. See generally MCNAIR, *supra* note 37, at 729 (on categories of treaties).

appear “contractual” in nature, constitute the building blocks of state conduct in international relations.<sup>46</sup> Accordingly, the purpose and impact of proper compliance with those treaties extend beyond their immediate parties and may have larger implications.<sup>47</sup>

Contemporary treaties and contracts also differ with regard to the interests they serve.<sup>48</sup> Treaties today often reflect and promote not only the interests of the specific State party<sup>49</sup> but also the broader, constitutive interests of the world community.<sup>50</sup> Recall the multilateral conventions referenced above concerning the law of the sea, the resolution of private transnational commercial disputes, the activities in outer space, respect for human rights, protection of the environment, issues of world health, prohibition of slavery, torture, or genocide, even the maintenance of peace itself (e.g., non-aggression, non-proliferation, mutual defense, and the testing and use of nuclear weapons).<sup>51</sup> Such instruments formalize internationally agreed-upon principles and rules of conduct for States in general, with effects going beyond the parties to those treaties.<sup>52</sup> Some, such as human rights, criminal law, or private international law treaties, obligate State parties to incorporate the relevant norms and protections into their domestic laws and to modify their laws, policies, and practices accordingly, for instance by harmonizing legislation and adopting remedial mechanisms at the national level.<sup>53</sup>

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46. *Id.*

47. Sloss, *When Do Treaties Create Individually Enforceable Rights?*, *supra* note 7, at 31 (noting that creation of treaty rights is subject to interpretation).

48. Brölmann, *Typologies and the ‘Essential Juridical Character’ of Treaties*, *supra* note 37, at 3, 13–14 (highlighting the difference between treaties of an international character and contracts that serve individuals).

49. We acknowledge that the V.C.L.T. uses the term “contracting State” (or “contracting organization”) when referring to parties bound by the treaty. *See* V.C.L.T., *supra* note 10, art. 2(1)(f).

50. *Cf.* U.N. Charter art. 13, ¶ 1(a) (“The General Assembly shall initiate studies and make recommendations for the purposes of: (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification”).

51. *See* sources cited *supra* notes 35–36.

52. International Convention for the Suppression of the Financing of Terrorism, *supra* note 36; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 610 U.N.T.S. 205.

53. Arato, *The Private Law Critique of International Investment Law*, *supra*

To the extent that these instruments set goals for governments to achieve, they are properly considered normative if not aspirational (rather than transactional), in which case the contract paradigm is even less apt.<sup>54</sup>

That is certainly true of the treaties establishing the contemporary system of international organizations, including the United Nations and its Specialized Agencies (such as the World Health Organization, the International Labour Organization, International Civil Aviation Organization, the World Bank Group and the International Monetary Fund, and the Universal Postal Union), and those creating independent courts and regulatory bodies such as the International Tribunal for the Law of the Sea, the International Seabed Authority, and the International Criminal Court.<sup>55</sup> On a regional basis, the various treaties on which the European Union is based (and under which it operates) certainly function more like a constitutive structure than a contractual arrangement, and the same is true (to a certain extent) of the Organization of American States.<sup>56</sup>

As these examples illustrate, treaties by definition concern the undertakings and obligations of sovereign parties, individually and collectively, at the international (supra-national) level.<sup>57</sup> In that sense, by nature, they are to be considered instruments of public law.<sup>58</sup> In given instances, they may also have the effect of providing

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note 31, at 354 (providing examples international contracting to protect foreign investments that has been folded into domestic law).

54. Cf. Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1902–04 (presenting the question of whether States have moral obligations).

55. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 2 U.N.T.S. 39.

56. Treaty of Lisbon, *supra* note 43 (establishing (and amending) the organization of the European Union); Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80); Treaty of Amsterdam Amending the Treaty on the European Union, The Treaties Establishing the European Community, and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340); Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191). See Organization of American States Charter, Apr. 30, 1948, 119 U.N.T.S. 3 (establishing the Organization of American States).

57. V.C.L.T., *supra* note 10, art. 2. Not infrequently, treaties also address the rights and obligations of international organizations.

58. *What is a Treaty?*, THE UNIV. OF MELBOURNE, <https://unimelb.libguides.com/internationallaw/treaties> (last visited Feb. 24, 2022) (providing definition of a treaty).

benefits to, or imposing obligations upon, non-State entities (i.e., individuals, companies, and other non-governmental bodies) and may thus have a clear impact on areas of private law.<sup>59</sup> Think, for example, of the area of international dispute settlement, where the world community has adopted multilateral regimes benefiting the private sector in respect of international arbitration, mediation, conciliation, and—more recently—family law issues such as child custody and support arrangements and the transnational recognition and enforcement of judicial judgments.<sup>60</sup> The fact that treaties may generate obligations for, or provide benefits to, individuals and private entities does not transform them into contracts.<sup>61</sup> Those individuals and private parties had no formal role in the formation of those obligations or benefits, they are simply the subject of them.<sup>62</sup>

To be sure, the treaty-as-contract analogy has deep historical roots.<sup>63</sup> It was well-known to eighteenth-century European

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59. MARIO MENDEZ, *THE LEGAL EFFECTS OF EU AGREEMENTS* 4–5, 28–29 (2013) (“[c]ourts are variously said to be looking for the intention that the treaty ‘confer subjective rights or impose obligations on individuals’, or that it creates ‘private rights’ or ‘judicially enforceable private rights’ or ‘private rights of action’ or a ‘casue of action’”).

60. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards ¶ 5, June 10, 1958, 330 U.N.T.S. 3; Organization of American States (OAS), Inter-American Convention on International Commercial Arbitration art.1, *adopted* Jan. 30, 1975, 1438 U.N.T.S. 245; Inter-American Convention on International Commercial Arbitration art. 1, *adopted* Jan. 30, 1975, 1438 U.N.T.S. 245; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 6(b), *opened for signature* March 18, 1965, 575 U.N.T.S. 159; Convention on International Settlement Agreements Resulting from Mediation art. 1(1), May 8, 2019, U.N. Doc. (A/73/496); Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 1, July 2, 2019, Hague Conference on Private International Law; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance art. 1, Nov. 23, 2007, Hague Convention on Private International Law.

61. *See* Oliver Dörr, *Corporate Responsibility in (Public) International Law*, CONFLICT OF L. (May 12, 2020), <https://conflictoflaws.net/2020/corporate-responsibility-in-public-international-law> (“Sovereign States can, by concluding international treaties, create legal obligations for private persons, including private companies, directly under international law”).

62. V.C.L.T., *supra* note 10, art. 4.

63. *See* Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 826 (2007) (noting the long history of the United States Supreme Court stating as much); *Ware v.*

jurisprudential theory<sup>64</sup> and found early expression in U.S. law in *Ware v. Hylton*<sup>65</sup> (which may account, in part, for Marshall's reference in *Foster*).<sup>66</sup> However, the old conception of a treaty as a contract (a “bargain-and-exchange” or Vertrag) between sovereigns is no longer accurate or helpful given the fundamental changes in the international community over the past two centuries, the very different role that treaties today play in organizing and regulating the contemporary global system, and the wide adoption of the V.C.L.T.<sup>67</sup> In consequential ways, treaties today are not “like” contracts.<sup>68</sup> Invoking the analogy can actually lead the legal analysis in directions that are misguided and distort the nature and function of “treaties.”

## B. SUBSTANTIVE RULES AND PRINCIPLES

One reason the analogy persists is that both contracts and treaties are basically binding agreements between parties to do something or refrain from doing something.<sup>69</sup> Beyond that superficial similarity,

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*Hylton*, 3 U.S. 199, 219 (1796).

64. Pierre de Jean Olivi, *Traité des Contrats* (Sylvain Piron trans., Bibliothèque Scholastique, Paris: Les Belles Lettres) (2012) (noting that the idea of a treaty as a compact is reflected in writings the Franciscan theologian Pierre de Jean Olivi); George Gemistus Pléthon, *Traité de Lois, Ou, Recueil Des Fragments, En Partie Inédits, De Cet Ouvrage* (Paris: Firmin Didot Frères, Fils et Cie 1858) (noting that this idea was also popular in the nineteenth century); See, e.g., Marc Réglade, *De La Nature Juridique des Traités Internationaux et du Sens de la Distinction des Traités-lois et des Traités-contrats*, in *REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER* 505, 572–77 (1924) (noting that a treaty might have some international legal consequences evidently gained some recognition in continental writings following World War I); Paul Reuter, *Au Droit Des Traités*, (explaining that one can readily find the distinction in works by in the decades preceding the adoption of the V.C.L.T. In his Introduction, *AU DROIT DES TRAITES* (1985) at Ch.1, sec. II, Paul Reuter noted that the historical distinction (“le traité comme contrat et comme loi”) had lost its effect).

65. 3 U.S. 199 (1796).

66. *Id.* at 219.

67. Esmé Shirlow & Kiran Nasir Gore, *Celebrating 50 Years of the V.C.L.T.: An Introduction*, WOLTERS KLUWER ARB. BLOG (Dec. 2, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/12/02/celebrating-50-years-of-the-V.C.L.T.-an-introduction> (describing the history, evolution, and widespread acceptance of the V.C.L.T.)

68. *But see* Research in International Law, *Article 27. Violation of Treaty Obligations*, 29 AM. J. INT'L L. 1077, 1083 (1935) (asserting that contracts and treaties can be similar).

69. Mahoney, *supra* note 63, at 834 (quoting Chancellor Kent's view on the

however, there are significant substantive differences in the legal rules and principles governing domestic contracts and international treaties or agreements.<sup>70</sup> Overlooking these differences can lead to legally incorrect results.<sup>71</sup> We summarize a few of the important differences below.

*i. Competence, Formation, and Validity*

The creation of treaty obligations is uniquely a matter of negotiation between sovereign States, either bilaterally or multilaterally in a global forum such as the United Nations (or one of its specialized agencies), a regional body (such as the E.U., the O.A.S., A.S.E.A.N. or the African Union), or a more specialized entity like the O.E.C.D., the Hague Conference on Private International Law, or UNIDROIT.<sup>72</sup> Although such negotiations will involve “give and take” on the part of the governmental delegations, the process and rules of treaty formation (and the rules governing entry into force) are highly formalized, unlike private negotiations.<sup>73</sup>

For instance, domestic law typically establishes the rules for each national jurisdiction regulating who or what can enter into contracts, typically excluding minors, individuals lacking the appropriate mental competence, and those disqualified under other principles of civil law. Under international law, sovereign states are presumed to have the competence to enter into international agreements.<sup>74</sup> The

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general obligatory and binding nature of treaties upon nations).

70. Andrew T. Guzman, *The Design of International Agreements*, 15 EUR. J. INT'L L. 584, 587 (2005) (presenting broad differences between treaties and contracts including bargaining, reliance, and dispute procedures).

71. *Id.* at 589 (indicating legal distinctions between treaties and contracts specifically in regards to reparations and damages).

72. *Definitions*, U.N. TREATY COLLECTION, <https://treaties.un.org/pages/overview.aspx?path=overview/definition/page1en.xml#agreements> (providing guidance for the proper and improper usage of the term “agreement”).

73. Expression of Consent by States to be Bound by a Treaty Analytical Report and Country Reports, Committee of Legal Advisors on Public International Law (CAHDI) 22, January 23, 2001 (recognizing formal provisions on procedures for the ratification of treaties).

74. V.C.L.T., *supra* note 10, art. 6 (maintaining that “[e]very State possesses capacity to enter into treaties” and non-state entities generally lack such capacity); V.C.L.T. between States and International Organizations, *supra* note 9, art. 6 (“The capacity of an international organization to conclude treaties is governed by the

V.C.L.T. sets forth criteria for identifying those governmental representatives who have been duly authorized to conclude the treaty through the issuance, for example, of “full powers.”<sup>75</sup> The V.C.L.T. also sets forth these criteria through the official “authentication” of the negotiated text and the formal consent of the State to be bound by the resulting text.<sup>76</sup> Private law concepts such as “privity,” “offer and acceptance,” “bargain and exchange,” *quid pro quo*, or “lawful and adequate consideration” simply do not apply on the international level as they do in the domestic context.<sup>77</sup>

At the same time, many of the specialized rules of international law and practice regarding multilateral treaties find no precise counterparts in domestic contract law, such as those concerning “capacity to conclude,”<sup>78</sup> consent by “ratification, acceptance, approval, consent or accession,”<sup>79</sup> “conditional consent” (i.e.,

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rules of that organization.”).

75. V.C.L.T., *supra* note 10, art. 2(c) (“‘full powers’ means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.”).

76. *Id.* arts. 10–17 (describing necessary procedures for a treaty to be established as “authentic and definitive” and the mechanisms through which a State can express consent to be bound by a treaty).

77. *Meaning of Offer and Acceptance: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/meaning-of-offer-and-acceptance> (last visited March 31, 2022) (providing elements to offer and acceptance); *Privity*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/privity> (last visited March 31, 2022) (“Privity is established when there is a substantive legal relationship between two or more parties.”); *Quid Pro Quo*, INVESTOPEDIA, <https://investopedia.com/terms/q/quidproquo.asp> (last visited March 31, 2022) (asserting that *quid pro quo* is “when two parties engage in a mutual agreement to exchange goods or services reciprocally”); *Adequate Consideration Law and Legal Definition*, U.S. LEGAL, INC., <https://definitions.uslegal.com/a/adequate-consideration> (last visited March 31, 2022) (“Adequate consideration refers to a price which is equal in value for an act or a thing for which it is given.”).

78. V.C.L.T., *supra* note 10, arts. 6–7, 11–14 (articulating every State’s capacity to conclude treaties and the necessary components for a person to represent a State “for the purpose of adopting or authenticating the text of a treaty”). International treaty law has no precise equivalent to the notion found in many domestic legal systems of an agent duly authorized to bind its principal.

79. *Id.* arts. 15–17 (providing elements for the establishment of consent to be bound by a treaty through multiple mechanisms).



reservations, understandings, declarations),<sup>80</sup> “entry into force,”<sup>81</sup> and “provisional application.”<sup>82</sup> While parties can conclude contracts on a conditional basis (subject to confirmation), international treaty law draws a different distinction between “signatories” to a treaty and those that may become “parties” only after completing a relevant process of domestic law confirmation (e.g., the requirement in U.S. constitutional law for the Senate’s “advice and consent to ratification” of a treaty).<sup>83</sup> Under Article 18 of the V.C.L.T., “signatories” to a treaty, in distinction to States that have become “parties” to the treaty, have only a limited obligation “not to defeat the object and purpose of a treaty prior to its entry into force” for the State concerned.<sup>84</sup> No such gradation of obligations exists in general contract law.<sup>85</sup> The V.C.L.T. also contains specialized rules on treaty amendment and modifications that differ from typical contract law.<sup>86</sup>

While treaties, like contracts, are considered binding legal obligations, the V.C.L.T. sets forth the rules in somewhat different terms: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>87</sup> As provided in Article 27, a State may not invoke the provisions of its internal law to invalidate its consent to be bound unless, pursuant to Article 46(1), “that violation [of internal law] was manifest [to other parties to the treaty] and concerned a rule of its internal law of fundamental

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80. *Id.* arts. 19–23 (establishing the mechanisms through which a State can formulate, accept, or reject reservations).

81. *Id.* art. 24 (formulating the conditions under which a treaty enters into force).

82. *Id.* arts. 24–25 (presenting the conditions under which a “treaty or part of a treaty is provisionally pending its entry into force”).

83. *Id.* art. 12 (specifying the “consent to be bound by a treaty expressed by signature”); U.S. CONST. art. VI (establish that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”). Of course, it is not unusual in domestic law for an agent’s action to be subject to approval (ratification) by its principal.

84. V.C.L.T., *supra* note 10, art. 18.

85. *Obligation of Contracts: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/obligation-of-contracts> (last visited March 31, 2022) (discussing the obligations of contracting parties).

86. V.C.L.T., *supra* note 10, arts. 39–41 (supplying specific rules on amending and modifying treaties).

87. *Id.* art. 26. As noted above, the treaty contains is requirement of “consideration” or even “bargain and exchange.”

importance.”<sup>88</sup>

*ii. Third Parties*

In general terms, the domestic law concept of “privity” means that private contracts cannot confer rights or impose obligations upon any person not party to the contract, except in limited situations involving “third party beneficiaries.”<sup>89</sup> International treaty law recognizes a somewhat similar constraint: Article 34 of the V.C.L.T. provides the general rule that “[a] treaty does not create either obligations or rights for a third State without its consent.”<sup>90</sup> However, in international practice, parties to treaties do sometimes intend to create such rights or obligations, and Articles 35 to 38 set forth rules for such situations.<sup>91</sup> More broadly, it is increasingly accepted that some treaties or treaty provisions can bind non-party States when the treaties or provisions reflect widely-accepted principles of customary international law (or *jus cogens*).<sup>92</sup> For

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88. V.C.L.T., *supra* note 10, art. 46(2) provides that “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” The V.C.L.T. does, of course, acknowledge that some circumstances, such as fraud, corruption, or coercion in the inducement to negotiate or conclude a treaty may be grounds for a State to invalidate its consent to be bound. *See generally* V.C.L.T., *supra* note 10, arts. 46–52.

89. David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982) (providing the general understanding of privity and the impact of the First Restatement of Contracts thereon).

90. V.C.L.T., *supra* note 10, art. 34.

91. V.C.L.T., *supra* note 10, arts. 35–38 (furnishing necessary conditions to rebut the general rule that “a treaty does not create either obligations or rights for a third State without its consent”).

92. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277. *The Genocide Convention Background*, U.N., <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Apr. 1, 2022) (“The Genocide Convention establishes on State Parties the obligation to take measures to prevent and to punish the crime of genocide, including by enacting relevant legislation and punishing perpetrators, ‘whether they are constitutionally responsible rulers, public officials or private individuals’ (Article IV). That obligation, in addition to the prohibition not to commit genocide, have been considered as norms of international customary law and therefore, binding on all States, whether or not they have ratified the Genocide Convention.”). The International Court of Justice (ICJ) stated that “[a]rticles 31 and 32 of the Vienna

example, this trait is true for a number of provisions of the V.C.L.T. and the Genocide Convention.<sup>93</sup> More to the point, treaties can create rights and obligations for individuals and other private non-State entities as a result of the obligation of State parties to give domestic effect to the instrument in question.<sup>94</sup> Think of treaties involving inter alia human rights, child adoption and abduction, extradition, bilateral claims settlement and investment protection, and even the Rome Statute that created the International Criminal Court.<sup>95</sup>

### *iii. Non-Performance or Breach*

The rules regarding *non-performance or breach* of treaty

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Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law.” *Guinea-Bissau v. Senegal*, 1991 I.C.J. at 70 (maintaining that the interpretation according to ordinary meaning, codified in the Vienna Convention on the Law of Treaties can be considered as existing customary international law).

93. In both instances, the United States accepts that the treaties in question reflect rules of customary international law and that those rules bind the United States even though it is party to neither treaty. Christopher Greenwood, *Sources of International Law: An Introduction* ¶ 8 (2008) (unpublished outline), [https://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) (emphasizing that the rules which possess the status of *jus cogens* are limited and the conditions to be established as such are strict).

94. Frederic L. Kirgis, *International Agreements and U.S. Law*, AM. SOC’Y OF INT’L L. (May 27, 1997), <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law> (discussing the debate and confusion over the procedures of treaty ratification and the allocation of treaty power among branches of the United States government).

95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1987, 1465 U.N.T.S. 85 (“[r]ecognizing that those rights derive from the inherent dignity of the human person.”); Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, Hague Convention on Private International Law (“[c]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child.”); Organization of American States, Inter-American Convention on Extradition art. 1, Feb. 25 1981, O.A.S.T.S. No. 34 (requiring that the States Parties surrender to other States Parties that request extradition persons who meet specific conditions under the Convention); Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1993, Senate Treaty Doc. 103–15 (“[d]esiring to promote greater economic cooperation between [the United States and Ecuador]”); Rome Statute of the International Criminal Court art. 1, *adopted*, Jul. 17, 1998, 2187 U.N.T.S. 3 (establishing the International Criminal Court and delineating its characteristics and powers).

obligations differ markedly from those in standard contract law in at least two respects.<sup>96</sup> First, in U.S. law at least, it is widely accepted that a party can voluntarily breach a contract and pay damages if the party's continued performance would result in a greater economic loss under the terms of the contract.<sup>97</sup> Under the theory of "efficient breach of contract," the law should—at least in some instances—actually encourage breaches of contract.<sup>98</sup> No analogue to this rule exists in international treaty law.<sup>99</sup> Indeed, the notion of efficient breach is fundamentally incompatible with the international legal order and the fundamental principle of *pacta sunt servanda*.<sup>100</sup> For instance, one cannot cogently argue that international law recognizes the right of a State to violate or withdraw from an international agreement simply because, in that State's estimation,

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96. *Compañía de Aguas Del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶96, (July 3, 2002) (articulating that according to the general principle that establishment of internationally wrongful conduct of a State is a matter of international law, determinations of a breach of the BIT and a breach of contract are different queries).

97. Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 948 (1982) (illustrating an example of an efficient breach of contract).

98. See, e.g., Gregory Klass, *Efficient Breach*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 367 (Gregory Klass et. al. eds., 2014); WENQING LIAO, THE APPLICATION OF THE THEORY OF EFFICIENT BREACH IN CONTRACT LAW: A COMPARATIVE LAW AND ECONOMICS PERSPECTIVE (2005) (presenting arguments for the justification of efficient breaches).

99. Chris Borgen, *Is It Unlawful to Breach a Treaty?*, OPINIO JURIS (March 9, 2005), <http://opiniojuris.org/2005/03/09/is-it-unlawful-to-breach-a-treaty> (declaring that the default rule in international law is that "the agreement shall be observed" rather than an acceptance for efficient breaches).

100. *Pacta sunt servanda* is a maxim of customary international law that treaties in force must be complied with in good faith. V.C.L.T., *supra* note 10, art. 46(2). See IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 83 (1984); Duncan B. Hollis, *Preface and Introduction to the Second Edition of the Oxford Guide to Treaties*, in THE OXFORD GUIDE TO TREATIES 1–2 (2d ed. 2020). Though to be fair, there is an analogue to *pacta sunt servanda* in contract law. U.C.C. § 1-304 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1977) ("in commercial transactions good faith is required in the performance and enforcement of all agreements or duties"); RESTATEMENT (SECOND) OF CONTS. § 205 cmt. a (AM. L. INST. 1981) ("good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.").

adherence no longer serves the State's interest.<sup>101</sup>

However, Article 60 of the V.C.L.T. does permit suspension or termination of a treaty, in whole or in part, in the event of a "material breach" of a treaty.<sup>102</sup> For our purposes, "material breach" is defined as either a repudiation of the treaty not otherwise permitted by the Convention or "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."<sup>103</sup> Such a breach may give treaty parties recourse to a self-help remedy that contract parties do not have, namely countermeasures against a State that has breached an international obligation owed to the injured State.<sup>104</sup> The purpose of countermeasures is to compel the other State to comply with its treaty obligations.<sup>105</sup> Such countermeasures could include non-performance of other international obligations owed by the injured State to the State that has breached the treaty.<sup>106</sup> To be lawful, countermeasures must meet certain requirements,<sup>107</sup> but they may be wholly *unrelated* to the treaty that has been breached.<sup>108</sup>

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101. Many (certainly not all) multilateral treaties do, of course, make provision for withdrawal or denunciation, and the V.C.L.T. sets forth general rules regarding termination, withdrawal, and suspension. *See* V.C.L.T., *supra* note 10, arts. 67–72 (providing consequences for the suspension, invalidity, or termination of a treaty); *see also* Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 60 (Sept. 25) (quoting the Vienna Convention on the Law of Treaties as to the required conditions for the termination or withdrawal from a treaty beyond a fundamental change of treaties).

102. V.C.L.T., *supra* note 10, art. 60.

103. *Id.* art. 60(3).

104. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 75 (2001).

105. Dr. Noam Zamir, *Countermeasures*, JUS MUNDI (Feb. 6, 2022), <https://jusmundi.com/en/document/wiki/en-countermeasures> ("In international law, countermeasures are measures taken by a State in response to the internationally wrongful act of another State and aimed at inducing the latter State to comply with its legal obligations."); Int'l Law Comm'n, *supra* note 104, at 129–30 (2001) (providing "objects and limits of countermeasures" including the necessity to enact countermeasures in such a way that resumption of obligations is possible).

106. Int'l Law Comm'n, *supra* note 104, at 129–30 ("Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.").

107. V.C.L.T., *supra* note 10, arts. 49–54 (providing remedial actions which States can take in response to fraud, corruption or coercion).

108. Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND

These actions do not amount to denunciation or termination of a treaty.<sup>109</sup> No analogue exists in general contract law.<sup>110</sup>

Second, like general contract law,<sup>111</sup> the V.C.L.T. recognizes a limited right of treaty parties to denounce their obligations in circumstances constituting “the supervening impossibility of performance.”<sup>112</sup> The impossibility must result from “the permanent disappearance or destruction of an object indispensable for the execution of the treaty,” unless it is “the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”<sup>113</sup> The international rule is thus somewhat narrower than the domestic rule, at least as it is interpreted and applied in U.S. law.<sup>114</sup>

Separately, a treaty party may invoke an unforeseen “fundamental change of circumstances” as a ground for termination or withdrawal when: “(a) the existence of those circumstances constituted an

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INTERNATIONAL LAW 13 (Larissa van den Herik et al. eds., 2016) (“Although countermeasures need not necessarily be related to the same (type of) obligation as the one originally breached, those that do are more likely to satisfy the proportionality requirement.”).

109. *Id.* at 13–14 (articulating that countermeasures do not relieve a State to enact or refrain from certain actions such as the use of force).

110. *Breach of Contract & Contract Termination*, PRIORI, <https://www.priorilegal.com/contracts/breach-of-contract-and-contract-termination> (last visited Apr. 8, 2022) (“Even when not specified, though, the U.S. Uniform Commercial Code provides you the opportunity to terminate a contract due to a fundamental breach—a failure to fulfill the terms of the contract so significant that it undermines the entire contract.”).

111. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981) (describing the discharge of duty to render performance upon their performance being made impracticable without their fault); U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 1977) (articulating conditions to satisfy an excuse of a party by failure of presupposed conditions).

112. V.C.L.T. between States and International Organizations, *supra* note 9, art. 61.

113. *Id.* art. 61(1)–(2).

114. RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981) (describing the discharge of duty to render performance upon their performance being made impracticable without their fault); U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 1977) (articulating conditions to satisfy an excuse of a party by failure of presupposed conditions); V.C.L.T., *supra* note 10, art. 61 (providing the requisite conditions for a party to “invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it”).

essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”<sup>115</sup> This excuse is unavailable, however, if the treaty establishes a boundary or if “the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”<sup>116</sup>

The International Court of Justice (I.C.J.) has restrictively interpreted these provisions.<sup>117</sup> In its 1997 judgment in the *Gabčíkovo-Nagymoros Dam Case*,<sup>118</sup> the Court rejected Hungary’s contention that “changed circumstances” justified its decision to suspend and subsequently abandon its part of the construction project in question.<sup>119</sup> The Court ruled that the parties were obligated to negotiate alternative arrangements in good faith, to take all necessary measures to ensure the achievement of the objectives of their original undertaking, and to compensate each other for the damage caused by their respective conduct.<sup>120</sup>

Contracts, as creatures of private law, can typically be enforced in domestic legal systems, where courts can assess damages for non-performance and order specific enforcement.<sup>121</sup> In international law, where the jurisdiction of courts over the parties typically rests on consent, the options are more limited and, in any event, specific performance is rarely sought or granted and damages awards are infrequent.<sup>122</sup> Even if an injured State secures a remedy against an

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115. V.C.L.T., *supra* note 10, art. 62.

116. *Id.* art. 62(2). Specialized rules setting out the consequences of invalidity, termination or suspension are contained in V.C.L.T. arts. 69–72.

117. Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.) (The Gabčíkovo-Nagymoros Dam Case), Judgment, 1997 I.C.J. 7 (Sept. 25).

118. *Id.*

119. *Id.* at 39.

120. *Id.* at 83.

121. See Richard R. Orsinger, *The Rise of Modern American Contract Law 4* (2015) (unpublished manuscript) (on file with author), <https://static1.squarespace.com/static/61c0fed79426ab21b8251441/t/61f1a3c53568033bfd9b21e9/1643226067825/The+Rise+of+Modern+American+Contract+Law> (describing the attributes of Modern Contract Law and the establishment of specific rules on “who can create contract rights and duties, how contract rights and duties come into being, how contracts rights can be assigned”).

122. See Frederic D. Tannenbaum, *International Contracts: Practical*

offending State, it is not guaranteed that the remedy can be successfully enforced.<sup>123</sup> In this way, a treaty breach is far more difficult to resolve fairly than a contract breach.<sup>124</sup> Many breaches of treaties do not involve damages like in contract law.<sup>125</sup> Instead, they typically deal with territorial disputes or compelling a State to comply with certain treaty obligations.<sup>126</sup>

While termination or withdrawal are potentially available remedies for a treaty dispute, they are rarely used.<sup>127</sup> Plus, while some treaties expressly allow for withdrawal,<sup>128</sup> in some instances

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*Considerations to Maximize Enforcement*, 44 PRAC. LAW. 71, 81–83 (1998) (describing “the hard part” as determining whether a party can enforce judgement or agreement to arbitrate in the defendant’s home country courts).

123. Consider, for example, the ICJ judgment secured by Nicaragua against the United States, resulting from US support of the Contras against the Sandinista government. Case Concerning the Military and Paramilitary Activities in and Against Nicaragua, (Nic. v. U.S.), Judgment, 1986 I.C.J. 14, 148–49 (June 27). The judgment was never enforced because the U.S. refused to accept the judgment and vetoed subsequent enforcement of the judgment by the U.N. Security Council.

124. *Id.*; ORSINGER, *supra* note 121, at 4 (describing the “effort to standardize and universalize contractual rights and duties” increasing the ability for parties to understand expectations and predict consequences of failures to meet obligations).

125. *E.g.*, LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, 514–516 (June 27) (finding multiple breaches of obligations but neglecting to denote specific penalties).

126. *Id.*; Case Concerning United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 44–45 (May 24).

127. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1613–29 (2005) (discussing the important differences between breach of treaty and exit/termination of treaty).

128. See, *e.g.*, The Optional Protocol to the 1989 Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 15(1), May 25, 2000, 2171 U.N.T.S. 227 (“Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.”); see also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts art. 11, May 25, 2000, 2173 U.N.T.S. 222 (“Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation



withdrawal or breach will likely have no legal effect because the substantive obligations of a treaty are arguably part of customary international law.<sup>129</sup> Some bilateral treaties may be more susceptible to dissolution by the parties in case of the withdrawal from the treaty by one party.<sup>130</sup> Automatic dissolution may occur where a treaty has a sunset provision in which, after a certain period of time, the treaty expires unless the parties renew it.<sup>131</sup>

That is not the case with regard to multilateral treaties. What we can call “constitutive” treaties—including those creating international organizations,<sup>132</sup> as well as those establishing broad international “regimes” of law for the international community as a whole—typically include restrictive provisions on the rights of

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shall not take effect before the end of the armed conflict.”); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Dec. 3, 1997, 2056 U.N.T.S. 211 (“Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal”); The Convention on the Rights of the Child art. 52, Nov. 20, 1989, 1577 U.N.T.S. 3 (“A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General”). For further examples, see U.N. Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook*, 109, U.N. Sales No. E.04.V.3 (2003), <https://treaties.un.org/doc/source/publications/FC/English.pdf> [hereinafter *Final Clauses Handbook*] (comparing treaty articles for withdrawal or denunciation, where they exist).

129. Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMPAR. & INT’L L. 1, 1–2 (2010) (discussing nations’ right of withdrawal or avoidance under numerous circumstances).

130. Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 635–36 (Duncan Hollis ed., 2012) (“For bilateral agreements, in contrast, denunciation or withdrawal by either party results in the *termination* of the treaty for both parties.”).

131. ANTONIOS KOUROUTAKIS, SUNSET CLAUSES IN INTERNATIONAL LAW AND THEIR CONSEQUENCES FOR THE EU 10–11 (2022) (“Sunset clauses provide that a treaty lapses automatically erga omnes (or for certain subjects) on (i) a fixed and precise date or (ii) after the passage of a specified, determined period of time.”).

132. U.N. Charter preamble (utilizing the representatives’ authority to establish the United Nations).

withdrawal and denunciation.<sup>133</sup> While, theoretically, State parties to a multilateral treaty could collectively agree to withdraw from the treaty and hence dissolve the treaty, it does not happen in practice because of the nature of international relations.<sup>134</sup> Bearing the above in mind, it is conceptually wrong to think of constitutive treaties as “contracts.”

### C. RULES AND METHODS OF INTERPRETATION

Beyond these differences in substantive rules, the treaty-as-contract paradigm obscures the fact that contracts and treaties are subject to different interpretive regimes.<sup>135</sup> While the relevant scholarly literature in the United States is replete with references to the treaty-as-contract proposition, one can find little understanding, much less clarity, about exactly how that comparison affects the task of interpretation.<sup>136</sup> The differences are both substantial and consequential.<sup>137</sup> Among other issues, they concern the “intent of the

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133. *Final Clauses Handbook*, *supra* note 128, at 109–111 (comparing treaty articles for withdrawal or denunciation, where they exist).

134. See Averell Schmidt, *Breach of Trust: How Treaty Withdrawal Shapes Cooperation Among States* 1–2, SOCARXIV (Jul. 22, 2021), [osf.io/preprints/socarxiv/meyau](https://osf.io/preprints/socarxiv/meyau) (elaborating that States view treaty withdrawal as a violation of an important international norm).

135. See YULIYA CHERNYKH, CONTRACT INTERPRETATION IN INVESTMENT TREATY ARBITRATION 128–29 (2022) (noting that a comparison of the V.C.L.T. rules on interpretation and national contract laws revealed “numerous rather sensitive distinctions”).

136. For an excellent analysis of the background, reasons for and consequences of the issues, see Paul R. Dubinsky, *Competing Models for Treaty Interpretation: Treaty as Contract, Treaty as Statute, Treaty as Delegation*, in SUPREME LAW OF THE LAND? DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE UNITED STATES LEGAL SYSTEM (Gregory Fox ed., 2017) (describing the stages of treaty interpretation and analysis); Glashausser, *supra* note 5, at 1244–45 (asking the question about how interpreting treaties differs from construing contracts or statutes); Mayer, *supra* note 35, at 225 (discussing the paradigm between treaty interpretation and contract interpretation and contrasts the two different interpretations).

137. See Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 FORDHAM INT'L L. J. 765, 780–82, 790 (2019) (stating that when judges are faced with easy cases in international law, they use the textual approach and that they must interpret a treaty in a way that agrees with the original intentions of the states that signed the treaty and continues to state that the approach to treaty interpretation should be subjective).

parties,” the principle of “strict construction,” the propriety of resort to extrinsic evidence, and construing ambiguity against the drafter.<sup>138</sup>

The historically-predominant approach of U.S. courts, faced with the need to interpret treaty provisions, has been to draw from the relevant domestic principles of contract interpretation.<sup>139</sup> However, some courts have instead adopted a “textualist” perspective based on rules of statutory interpretation.<sup>140</sup> A similar dichotomy can be found in the scholarly literature, with some commentators rejecting textualism in favor of interpreting treaties as contracts, while others offer composite alternatives.<sup>141</sup>

Both approaches err in ignoring the fact that treaty interpretation is properly governed by agreed-upon international rules.<sup>142</sup> As one observer has noted, the differences between the international and domestic legal orders (as well as the distinctions between different types of treaties, such as bilateral vs. multilateral) require greater nuance in the interpretive process.<sup>143</sup> As a result, analogical reasoning by reference to domestic law carries definite risks.

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138. See *id.* at 790 (describing the approach of a court that is tasked with an ambiguous treaty and states that the courts must apply the teleological approach to treaty interpretation).

139. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004).

140. *United States v. Stuart*, 489 U.S. 353, 365–66 (1989) (“The clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories’”); *Rhode Island v. Massachusetts*, 37 U.S. 657, 657–58 (1838). Cf. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text” (quoting *Medellin v. Texas*, 552 U.S. 491, 506 (2008))). We disagree with the Court’s approach in *BG Grp. PLC. v. The Republic of Argentina*, 572 U.S. 25, 26 (2014) (“A treaty is a contract, though between nations. Its interpretation normally is, like a contract’s interpretation, a matter of determining the parties’ intent.”).

141. Compare Mahoney, *supra* note 63, at 857 (describing how the proponents of “new textualism” have convinced courts to stick to written words when interpreting a statute, but that the case does not extend outside of the Article I, Section 7 context), with Glashausser, *supra* note 5, at 1294, 1345 (establishing that the interpretation of treaties should be singular because they are not dual in nature).

142. V.C.L.T., *supra* note 10, arts. 31–33.

143. See An Hertogen, *The Persuasiveness of Domestic Law Analogies in International Law*, 29 EUR. J. INT’L L. 1127, 1148 (2019) (maintaining that the identification of the source domain is a distinction between the different layers of international law and the parallels from to domestic law).

As the RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES makes clear,<sup>144</sup> the proper reference for rules of treaty interpretation, at least in the first instance, is found in international law through the V.C.L.T.<sup>145</sup> The V.C.L.T. takes a markedly different approach than domestic law provides for contracts.<sup>146</sup> The reason is readily apparent: apart from the fact that treaties reflect sovereign (not private) undertakings, national rules and principles of contract law vary significantly among different legal systems.<sup>147</sup> Trying to find common interpretive ground between the differing domestic legal regimes of sovereign treaty partners can be challenging enough in a bilateral situation; in the multilateral context, where there can be dozens of State parties, it can be virtually impossible.<sup>148</sup>

Even in the U.S. context, the interpretive task has proven

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144. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306 (AM. L. INST. 2018).

145. As noted in *id.* § 306 cmt. (a), “Although the United States has not ratified the Vienna Convention on the Law of Treaties, these articles are now generally accepted as reflecting customary international law, including by the United States.” As indicated in Reporters’ Note (3), “the Supreme Court generally has considered the same interpretive sources as those addressed in the Vienna Convention on the Law of Treaties, without necessarily invoking that Convention’s precise ordering or methodology.” See Georg Nolte, *Introduction*, in THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE 1, 2 (Helmut Philipp Aust & Georg Nolte eds., 2016) (explaining that the V.C.L.T. Articles 31–33 give the rules on interpretation of treaties, many of which now are customary international law); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 3 (2014) (noting how Vienna Convention Articles 31–33 resolve the issues that were evident in twentieth century international law literature); Richard Gardiner, *The Vienna Convention Rules of Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES 459, 460 (Duncan Hollis ed., 2020) (stating that the V.C.L.T. rules for treaty interpretation are accepted as customary international law).

146. See generally V.C.L.T., *supra* note 10.

147. We disagree, for instance, with Mahoney, *supra* note 63, at 857, which argues that between the two contending principles of treaty interpretation—textualism and the contract analogy—the latter should prevail since treaties are more like contracts than legislation.

148. E.g., Andrea K. Bjorklund, *The Enduring but Unwelcome Role of Party Intent in Treaty Interpretation*, 112 AJIL UNBOUND 44, 47 (2018) (stating that it is not easy for states to change or clarify treaty language so interpreters may not attribute a single meaning to the term).

challenging.<sup>149</sup> While the international canon of treaty interpretation set out in the V.C.L.T. may appear, at first reading, to share a common starting point with domestic U.S. law in its emphasis on the importance of *text* as the initial point of interpretive inquiry,<sup>150</sup> the differences between the domestic (contractual) and international (V.C.L.T.) approaches to interpretation prove to be significant.<sup>151</sup> Moreover, many of the substantive rules that apply to the interpretation and performance of private contracts under domestic law, including such issues as reference to the intent of the parties, justifiable non-performance, award of damages in the event of breach, or rights of rescission, are simply inapplicable to treaties.<sup>152</sup> A few of the most important differences are below.

*i. Basic Rule*

In U.S. law, the basic rule of contract interpretation requires courts to give effect to the intentions of the parties at the time they entered the contract, as expressed in the language of the parties' written agreement.<sup>153</sup> Thus, the guiding principle of contract law is "the meeting of the minds," requiring courts to identify what the

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149. See Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 779 (2008) (discussing the varied views on the doctrine for treaty interpretation and how none of them provide a compelling reason for the vagueness or inconsistent application).

150. Compare RESTATEMENT (SECOND) OF CONTS. § 201 cmt. a (AM. L. INST. 1981) with V.C.L.T., *supra* note 10, arts. 31–33. Cf. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833 (1964) ("What is interpretation? It is the process of endeavoring to ascertain the meaning or meanings of symbolic expressions used by the parties to a contract, or of their expressions in the formative stage of arriving at the creation of one or more legally obligatory promises.").

151. E.g., Konstantin Christie, *Treaty Claims vs. Contract Claims in ISDS*, JUS MUNDI (Feb. 6, 2022), <https://jusmundi.com/en/document/wiki/en-treaty-claims-vs-contractual-claims-in-isds> (providing insight into the differences between claims under international contracts and treaties in inter-state dispute settlements).

152. E.g., *id.* (providing insight into the differences between claims under international contracts and treaties in inter-state dispute settlements).

153. See, e.g., 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:2 (4th ed. 1993 & Supp. 1999) (stating that the primary focus of a court in interpreting a contract is to give focus to the parties' attention); see also RESTATEMENT (SECOND) OF CONTS. §§ 200–05 (AM. L. INST. 1981).

respective parties *intended* when they signed the contract.<sup>154</sup>

In contrast, the starting point for treaty interpretation is the “object and purpose” of the treaty.<sup>155</sup> Article 31(1) of the V.C.L.T. provides the following “general rule of interpretation”: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>156</sup> In this formulation, the focus of interpretation is objective rather than subjective.<sup>157</sup> Indeed, Article 31(1) makes no mention of the “intent of the parties.”<sup>158</sup> Rather, it directs that the terms of the treaty are to be interpreted according to (i) their ordinary meaning (ii) in their context and (iii) in light of the treaty’s “object and purpose.”<sup>159</sup> Thus, “the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”<sup>160</sup> The interpretive task is, therefore, to determine what the treaty was intended to accomplish as reflected in its text, as opposed to an inquiry into the self-interest of individual

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154. RESTATEMENT (SECOND) OF CONTS. § 17 (AM. L. INST. 1981). *See, e.g., Sutton Bank v. Progressive Polymers, L.L.C.*, 161 Ohio St. 3d 387, 391 (Ohio 2020) (“In all cases involving contract interpretation, we start with the primary interpretive rule that courts should give effect to the intentions of the parties as expressed in the language of their written agreement.”).

155. V.C.L.T., *supra* note 10, art. 31(1).

156. This formulation was adopted by the U.S. Supreme Court in *Sanchez-Llamas v. Oregon*, 548 U.S. 332, 346 (2006 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 325(1) (AM. L. INST. 1987)). *See also* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(1) (AM. L. INST. 2018).

157. *See* V. Crnic-Grotic, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, 7 ASIAN Y.B. INT'L L. 141, 159 (1997) (exploring the objective textualist reading of “object and purpose”).

158. V.C.L.T., *supra* note 10.

159. *See* JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 9–10 (2016) (explaining that the rules of Articles 31–33 of the V.C.L.T. show the need for interpretations based on the plain meaning of the text and that treaty interpretations is not about advancing the goals of interests of anyone other than the state parties).

160. *Report of the International Law Commission on the Work of its Eighteenth Session*, [1966] Y.B. Int'l L. Comm'n 220–21, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

State parties.<sup>161</sup>

This approach makes sense: treaties are entered into by entities (States and international organizations), and entities do not have subjective “intent” in the same sense as individuals.<sup>162</sup> Treaties are, by definition, concluded in a political context, often with the goal of overcoming differences and resolving contentious issues, many of first-order geopolitical importance.<sup>163</sup> They may embody an agreement to end an armed conflict, resolve a dispute, agree on common conduct internationally or domestically, or avoid a dangerous confrontation.<sup>164</sup> In such situations, they may well represent a political compromise, reflect the least common denominator of expectations, or embrace the “best available” solution in the estimation of all parties.<sup>165</sup> Intent can be especially difficult to demonstrate in the case of multilateral treaties negotiated and concluded by many sovereign States with markedly different legal systems and often in multiple languages.<sup>166</sup> In addition, sometimes States that did not participate in the negotiation of a treaty

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161. See SINCLAIR, *supra* note 100, at 71 (“[T]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties”); see generally See Daniel Peat & Matthew Windsor, *Playing the Game of Interpretation: On Meaning and Metaphor in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 1, 4 (Bianchi et al. eds., 2015) (describing what interpretation in international law means and the process of assigning meaning to texts and how the V.C.L.T. is the framework for correct interpretation); LINDERFALK, *supra* note 145, at 1, 4 (stating that treaty interpretation is an important issue); see ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 1 (2009) (stating that there is a need for instruments and rules that govern interpretation).

162. It can be argued, of course, that governments, like corporations or other “legal” entities, can have purpose if not subjective “intent.”

163. See *Treaties and Agreements*, ORG. AM. STATES, [https://www.oas.org/en/topics/treaties\\_agreements.asp](https://www.oas.org/en/topics/treaties_agreements.asp) (last visited Mar. 2, 2022) (explaining what a treaty and agreement is and how they are the most important tool in international law).

164. See *Treaty*, NAT’L GEOGRAPHIC SOC’Y, <https://www.nationalgeographic.org/encyclopedia/treaty> (last visited March 2, 2022) (explaining that treaties have been used to end wars, settle disputes, and establish new countries).

165. See Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT’L ORG. 587, 587 (2016) (addressing the difficulty of drafting international agreements).

166. E.g., Bjorklund, *supra* note 148, at 47 (explaining the difficulty in determining the intent of NAFTA FTC provisions where there were only three countries involved).

will later become party to it.<sup>167</sup>

By applying the “shared intent” approach of contract interpretation to international treaties, U.S. courts frequently get it wrong.<sup>168</sup> An example of a more correct approach, resting expressly on the V.C.L.T., can be found in *Logan v. Dupuis*, where the court expressly relied on Article 31(1) in discerning the intent of the parties to the treaty in question “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of [the treaty’s] object and purpose.”<sup>169</sup>

### ii. *Negotiating History vs. Subsequent Practice*

For many of the same reasons, the rules for resolving ambiguity in treaty text differ sharply from those for ordinary contracts.<sup>170</sup> The typical rule of domestic law for contractual interpretation requires a court to look *backward* in time to the relevant preparatory work in order to determine the relevant intent of the parties entering into the agreement.<sup>171</sup> By contrast, international treaty law first looks at

167. See *What is the Difference between Signing, Ratification, and Accession of UN Treaties?*, U.N. DAG HAMMERSKJOLD LIBRARY, <https://ask.un.org/faq/14594> (last visited Apr. 2, 2022) (defining accession “the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by the other states” and describes the legal effect).

168. *Parades v. Villa*, 479 F. Supp. 2d 187, 191 (D.D.C. 2007).

169. *Logan v. Dupuis*, 990 F. Supp. 26, 29 (D.D.C. 1997). Cf. *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 145–46 (D.D.C. 2015); *GE Energy Power Conversion Fr. SAS, Corp v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (“The interpretation of a treaty, like the interpretation of a statute, begins with its text”) (citing *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). In *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (citing *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890)), the Supreme Court held that “[a]s treaties are contracts between independent nations, their words are to be taken in their ordinary meaning ‘as understood in the public law of nations.’”

170. V.C.L.T., *supra* note 10, art. 31(3)(a)–32; see CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (2001), <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/html/CPRT-106SPRT66922.htm> (suggesting that treaty interpretation should be treated scientifically).

171. See Daniele Bertolini, *Unmixing the Mixed Questions: A Framework for Distinguishing between Questions of Fact and Questions of Law in Contractual Interpretation*, 52 U.B.C.L. REV. 345, 401 (2019) (stating that contract interpretation is a backward looking activity and contrasts it with the objective theory of contractual intent).



related contemporaneous agreements and then *forward* to the subsequent practice of the parties.<sup>172</sup> Recourse to preparatory materials is relegated to a subordinate position in the hierarchy.<sup>173</sup> Many U.S. courts err in applying that rule to treaty interpretation.<sup>174</sup>

Article 31(2) of the V.C.L.T. states this “contemporaneous agreements” aspect as follows:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. . . .<sup>175</sup>

The related emphasis on subsequent practice is set forth clearly in Article 31(3), which identifies the following additional elements:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.<sup>176</sup>

This latter provision reflects the fact that treaties, including their interpretation and implementation thereunder, can and do *evolve* over

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172. V.C.L.T., *supra* note 10, art. 31(3).

173. *Id.* art. 32.

174. See, e.g., *Eshel v. Comm’r*, 831 F.3d 512, 518 (D.C. Cir. 2016) (citing *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014)); *Georges v. United Nations*, 834 F.3d 88, 93–96 (2d Cir. 2016) (citing *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 533 (1987)).

175. V.C.L.T., *supra* note 10, art. 31(2).

176. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(3) and cmt. c (AM. L. INST. 2018).

time.<sup>177</sup> In such situations, the original intent of the States party may be of diminished relevance, even if discoverable.<sup>178</sup> Particularly for multilateral agreements that have a “constitutive” dimension, the subsequent, dynamic or evolutionary, practice of States party over time can be of particular importance with regard to meaning and interpretation.<sup>179</sup> As the I.C.J. has noted, “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>180</sup>

In the same vein, Article 31(3)(c) of the V.C.L.T. expands the scope of evaluation to include “any relevant rules of international law”—meaning that, in determining the meaning of the treaty provision in question, it may be appropriate to refer to rules of non-treaty law (i.e., customary international law and perhaps “general principles of law”) that are “applicable in the relations between the parties.”<sup>181</sup> Indeed, in *Navigational and Related Rights*, the I.C.J. recognized that “generic” treaty terms are particularly susceptible to evolving interpretation:

[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration,’ the parties must be presumed, as a general rule, to have intended those terms to have an *evolving*

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177. See, e.g., Eirik Bjorge & Robert Kolb, *Part V Treaty Interpretation, 20 The Interpretation of Treaties over Time*, in THE OXFORD GUIDE TO TREATIES 489, 494–95 (Duncan B. Hollis 2d ed., 2020) (stating that treaty interpretation comes from the rules of the V.C.L.T. and describes the rule of non-retroactivity).

178. See *id.* at 490–95 (asserting that different states have interpreted certain provisions of the V.C.L.T. differently and mostly subjectively).

179. See Georges Abi-Saab et al., *Evolutionary Interpretation and International Law*, 24 J. INT'L ECON. L. 203, 211–12 (2021) (concluding that the concepts of subsequent practice and subsequent agreement); see also Richard Gardiner, *Part V Treaty Interpretation, 19 Vienna Convention Rules on Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES 459, 474 (Duncan B. Hollis 2d ed., 2020) (“There is, however, a difference between examining and basing a finding upon *travaux préparatoires*, and the [International] Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text.”).

180. See Abi-Saab et al., *supra* note 179, at 205 (explaining that framework of the legal system prevailing at the time of interpretation must be used and applied to an international instrument).

181. V.C.L.T., *supra* note 10, art. 31(3)(c).

meaning.<sup>182</sup>

This feature of treaty law is unique; there is no analogue in domestic contract law.<sup>183</sup> In even sharper contrast to the ordinary rules of contract interpretation, the particular circumstances surrounding the preparation for, and conclusion of, the treaty negotiations are relegated by the V.C.L.T. to the subsidiary status of “supplementary means of interpretation.” Article 32 addresses this issue as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, *in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*<sup>184</sup>

No comparable principle or rule exists in U.S. domestic contract law.<sup>185</sup> Moreover, specialized rules may apply, depending on the type of treaty and whether international organizations are parties.<sup>186</sup>

### *iii. Differences in Authentic Languages*

Interpreting treaties that have been concluded in more than one official or authentic language—a situation encountered far more

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182. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, 243 (July 13) (emphasis added).

183. *Id.*

184. V.C.L.T., *supra* note 10, art. 32 (emphasis added); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(5) and cmt. e (AM. L. INST. 2018).

185. V.C.L.T., *supra* note 10, art. 32.

186. *Report of the International Law Commission to the General Assembly*, at 41–42, U.N. Doc. A/37/10 (1982), *reprinted in* [1982] 2 Y.B. Int'l L. Comm'n 41, U.N. Doc. A/CN.4/SER.A/1982/Add.1. For a discussion of the specialized rules of treaty interpretations related to international organizations, *see generally* Catherine Brölmann, *Specialized Rules of Treaty Interpretation: International Organizations*, in THE OXFORD GUIDE TO TREATIES (Duncan Hollis ed., 1st ed. 2020) (noting cases that exemplify where there was little attention to the intentions of the parties to a treaty). *See also* V.C.L.T., *supra* note 10, art. 5 (providing that in interpreting constituent instruments of international organizations, in addition to Articles 31–33, any relevant rules of the international organizations should also be taken into account).

often in the case of international agreements than transnational contracts—poses special challenges.<sup>187</sup> Having authentic texts in multiple languages is, in fact, quite common in contemporary multilateral or even bilateral treaty practice, although notably, this was the situation Chief Justice Marshall faced with respect to the bilateral treaty at issue in *Foster v. Neilson*.

Article 33 of the V.C.L.T. addresses this situation as follows:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.<sup>188</sup>

In the absence of a provision defining the status of the several language versions, Paragraph 1 of Article 33 states that each of the languages in which the treaty has been authenticated must be considered authoritative for purposes of interpretation.<sup>189</sup> According to Paragraph 2, other language versions are not to be deemed authentic for purposes of interpretation unless mandated by the treaty or agreed to by the parties.<sup>190</sup> Paragraph 3 protects “the unity of the treaty” via the assumption that the contents of the treaty are meant to

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187. See Edoardo Binda Zane, *The Interpretation Problems of Multilingual Treaties*, AMBIENTE DIRITTO (July 19, 2006), [https://www.ambientediritto.it/dottrina/Dottrina\\_2008/the\\_interpretation\\_bindazane.htm](https://www.ambientediritto.it/dottrina/Dottrina_2008/the_interpretation_bindazane.htm) (stating the problems with multilingual interpretation and that these issues should be considered).

188. V.C.L.T., *supra* note 10, art. 33.

189. *Id.* art. 33(1).

190. *Id.* art. 33(2).

have the same interpretation in each text.<sup>191</sup> Finally, Paragraph 4 refers to Articles 31 and 32 of the V.C.L.T. and, if recourse to these standard rules fails to resolve the difference in meaning, directs the interpreter to adopt the meaning which best reconciles the texts in light of the purpose of the treaty.<sup>192</sup> It does not, however, specify the precise method by which this meaning is to be found.<sup>193</sup>

In the realm of domestic contract law, a conflict between the authentic languages of contracts rarely arises, and there are no clear precedents in the case law.<sup>194</sup> A well-drafted contract in two authentic languages ought to include a prevailing language clause.<sup>195</sup> In the absence of a clause, a court would likely resort to parol evidence to resolve the conflict and determine the original intent of the parties.<sup>196</sup>

#### *iv. Deference in Interpretation*

Yet another reason the treaty-as-contract proposition is inapt for

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191. See Peter Germer, *Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties*, 11 HARV. INT'L L.J. 400, 402 (1970) (explaining that paragraph 3 of Article 33 of the V.C.L.T. has the presumption that the terms are intended to have the same meaning in each text when interpreting multilingual treaties); see also Shabtai Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANSNAT'L L. 205, 222 (1966) (This attracted a great deal of unfavorable comment from governments anxious that the integrity and unity of the process of interpretation should not be impaired.”).

192. V.C.L.T., *supra* note 10, art. 33(4).

193. See Germer, *supra* note 191, at 402–03 (discussing how paragraph 4 of articles 31 and 32 of the V.C.L.T. lay out the rule for the first responsibility of the interpreter in that they should look to the meaning intended by the parties by applying the standard rule for interpretation of treaties).

194. However, the UNIDROIT Principles do provide a method for resolving such language discrepancy in the case of international contracts. See INT'L INST. UNIFICATION PRIV. L., UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 147 (2016), <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf> (stating that where there are linguistic discrepancies in which each is equally authoritative, there is a preference for the interpretation according to an original drawn up version of the contract).

195. See *id.* (declaring that where there are linguistic discrepancies, sometimes the parties to the treaty will specifically indicate which version of the contract should be chosen).

196. See *id.* at 148 (citing to Article 4.8 which describes the steps to take in determining what is an appropriate term when there is an omitted term).

contemporary international treaty practice can be found in the importance given in U.S. law to the government's view of the meaning of treaties, and in particular the increasing degree of deference given to the executive branch in the twentieth century.<sup>197</sup> American courts have repeatedly emphasized the role of executive interpretation in dealing with a treaty—but no comparable deference exists in the case of private contracts.<sup>198</sup>

In *Medellin*, for instance, the U.S. Supreme Court explained that “[i]t is . . . well settled that the United States’ interpretation of a treaty is entitled to great weight.”<sup>199</sup> Similarly, in *Swarna v. Al-Awadi*,<sup>200</sup> the Second Circuit Court of Appeals referred to the “well established canon of deference with regard to Executive Branch interpretation of treaties”<sup>201</sup> and found, in *Georges v. United Nations*,<sup>202</sup> that “while the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the Executive Branch’s interpretation of a treaty is entitled to great weight.”<sup>203</sup>

The RESTATEMENT (FOURTH) articulates the current scope of the rule as follows: “Courts in the United States have final authority to interpret a treaty for purposes of applying it as law in the United States. In doing so, they ordinarily give great weight to an interpretation by the executive branch.”<sup>204</sup> There has been some

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197. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 497 (2007) (explaining what the Supreme Court has said in recent treaty interpretation cases).

198. See *id.* at 497–98 (describing that during the Rehnquist era, the Supreme Court almost always used the treaty interpretation that was favored by the executive branch).

199. *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (internal quotation marks omitted).

200. 622 F.3d 123 (2d Cir. 2010).

201. *Id.* at 136 (internal quotation marks omitted).

202. 834 F.3d 88 (2d Cir. 2016).

203. *Id.* at 93 (citing *Lozano v. Alvarez*, 697 F.3d 41, 50 (2d Cir. 2012) (internal quotation marks omitted), *aff’d sub nom. Lozano v. Alvarez*, 572 U.S. 1 (2014)).

204. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(6) (AM. L. INST. 2018). Cf. Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, in THE OXFORD GUIDE TO TREATIES 504, 515–22 (Duncan B. Hollis ed., 2d ed. 2020).

(mostly academic) criticism of, and resistance to, this rule.<sup>205</sup> In a recent article, for example, Alex Glashausser makes the case that treaty interpretation should use a combination of contractual and statutory interpretive principles, combined with a recognition of treaties as unique international instruments.<sup>206</sup> In our view, such an approach fails to consider that different rules may apply to different types or categories of treaties—tax, criminal, commercial human rights, extradition, arms control, to name only a few.<sup>207</sup>

The principles of contract interpretation may be more relevant in interpreting a treaty that has to do with delimiting (or otherwise resolving issues concerning) international boundaries because the intent of the parties is particularly important in that context.<sup>208</sup> In such a case, the court should only look beyond the treaty if the plain meaning of its language is ambiguous.<sup>209</sup> For “self-executing” treaties, in contrast, principles of statutory interpretation may be most appropriate since, as the Supreme Court has said, they are considered directly applicable and equivalent to an act of the legislature.<sup>210</sup> Still, other treaties may need a different approach altogether, one that takes into account the United States’ international obligations or the different purposes of that particular treaty.<sup>211</sup>

In instances where uniformity of interpretation and application is critical to the purpose of the undertaking, a multilateral treaty may expressly require States to conform their domestic interpretation and application to the internationally agreed “autonomous” meaning of

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205. *Id.* at 523–24.

206. Glashausser, *supra* note 5, at 1248.

207. *See generally id.*

208. *See Foster v. Neilson*, 27 U.S. 253, 307–09 (1829) (noting that a treaty regarding the boundaries of nations answers a political, not a legal, question).

209. *See id.* at 306 (discussing the ambiguous language of the treaty that resulted from the differing intentions of the parties).

210. *See id.* at 253 (explaining that a self-executing treaty is equivalent to an act of the legislature).

211. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(5)–(6) (AM. L. INST. 2018) (observing “[d]ifferent types of agreements may call for different interpretive approaches . . . “ and distinguishing *inter alia* “constitutive treaties”—such as those establishing international organizations—and human rights treaties).

one or more treaty terms.<sup>212</sup> Such provisions can be found, for instance, in the U.N. Convention on Contracts for the International Sale of Goods,<sup>213</sup> the Hague Convention on Choice of Court Agreements,<sup>214</sup> and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance,<sup>215</sup> among others.<sup>216</sup> The obligation in the Child Support Convention was incorporated into its implementing legislation and has been recognized and endorsed by the U.S. Supreme Court.<sup>217</sup>

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212. See *id.* (noting that consistency with the V.C.L.T. is important to ensure that the United States interprets its treaties in ways that are not contrary to those shared by treaty partners).

213. Convention on Contracts for the International Sale of Goods, art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG] (“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”).

214. Hague Convention on the Choice of Court Agreement, art. 23, June 30, 2005, 44 I.L.M. 1294 (“In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.”).

215. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance art. 53, Nov. 23, 2007, SEN. TREATY DOC. NO. 110-21 (“In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.”).

216. Similar clauses are found in the Convention on the Carriage of Goods by Sea, art. 3, Mar. 31, 1978, 1695 U.N.T.S. 3 (“In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity”); Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary art. 13, July 5, 2006, SEN. TREATY DOC. NO. 112-6; and, most recently, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 20, July 2, 2019, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. See generally João Ribeiro-Bidaoui, *The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations*, 67 NETH. INT'L L. REV. 139, 141 (2020) (discussing the uniform inclusion of clauses similar to Article 16 of the Hague Convention on Private International Law in many other treaties).

217. See *Monasky v. Taglieri*, 149 S. Ct. 719, 727 (2020) (“Our conclusion that a child’s habitual residence depends on the particular circumstances of each case is bolstered by the views of our treaty partners. ICARA expressly recognizes ‘the need for uniform international interpretation of the Convention.’ (citation omitted). The understanding that the opinions of our sister signatories to a treaty are due ‘considerable weight,’ this Court has said, has ‘special force’ in Hague Convention cases. (citation omitted). The ‘clear trend’ among our treaty



### III. WHAT MARSHALL MEANT: RECONCILING *FOSTER* WITH *PERCHEMAN* AND *MEDELLÍN*

As we have demonstrated, there are numerous and compelling reasons to conclude that treaties are *not* like contracts.<sup>218</sup> In fairness to Justice Marshall, his message in *Foster* has been taken out of context.<sup>219</sup> Specifically, his statement in *Foster* that “a treaty is in its nature a contract between two nations, not a legislative act” has occasionally been mistaken to mean that treaties—at least presumptively—operate only on the international plane, and are therefore inapplicable as U.S. law and cannot directly affect individual rights unless and until they are legislatively implemented.<sup>220</sup> Those propositions rest on a stark misunderstanding of Marshall’s actual point—resulting from a failure to read the opinion carefully.<sup>221</sup> In fact, the Chief Justice’s point was precisely the opposite.<sup>222</sup>

#### A. UNDERSTANDING *FOSTER V. NEILSON*

Marshall actually took some care to explain that, in the U.S. system, treaties are *not* “like contracts.”<sup>223</sup> To the contrary, under the U.S. Constitution, treaties are *federal law* and at least some treaties

partners is to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case.”). *Cf. Abbott v Abbott*, 560 U.S. 1, 5 (2010). *See also Olympic Airways v. Husain*, 540 U.S. 664, 658 (2004) (Scalia, J., dissenting) (“When we interpret a treaty, we accord the judgments of our sister signatories ‘considerable weight.’”).

218. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829) (elaborating the principle of treaties as the law of the land).

219. *Id.*

220. *Cf. Rhode Island v. Massachusetts*, 37 U.S. 657, 746–47 (1838) (interpreting *Foster* as distinguishing between an “executory treaty as a mere contract between nations” and an “executed treaty, effecting of itself the object to be accomplished” and thus “equivalent to an act of the legislature”). A discussion of the presumption is also in RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 311, Rptrs. note 1 (AM. L. INST. 2018). On legislative implementation of U.S. treaty obligations, see Samuel Eistreich, *Taking Treaty-Implementing Statutes Seriously*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT AND FUTURE OF U.S. FOREIGN RELATIONS LAW (Paul B. Stephan & Sarah H. Cleveland eds., 2020).

221. *See Foster*, 27 U.S. at 314–15.

222. *See id.*

223. *See id.*

may indeed have a direct effect and determine individual rights.<sup>224</sup> A more careful, complete reading of the second paragraph of the relevant passage clarifies the Chief Justice's point. As he wrote:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

*In the United States a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>225</sup>

Granted, the first paragraph, if read in isolation, is misleading.<sup>226</sup> But Marshall's point was to draw a distinction between (a) the then-prevailing approach under British law, in which most if not *all* treaties had to be implemented in order to have a domestic effect,<sup>227</sup> and (b) Article VI, Clause 2 of the U.S. Constitution, which, at least textually, adopts the opposite approach by giving duly-ratified treaties the status of federal law, on a par with an act of Congress.<sup>228</sup>

As the second paragraph makes clear, Marshall was making an additional distinction for purposes of U.S. law between those treaties that (i) can be directly applied as "self-executing" treaties and (ii)

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224. *See id.*

225. *Id.* at 314 (emphasis added).

226. *See id.* (stating directly that a treaty *is* in nature a contract).

227. True at the time and true today. *See* Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, in MAX PLANCK ENCYC. INT'L L. (Rüdiger Wolfrum ed., 2011) (summarizing the evolution of monist and dualist conceptions of international law).

228. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

require legislative implementation as non-self-executing” treaties.<sup>229</sup> However, it is important to emphasize that Marshall’s distinction was about the authority of the courts to give direct effect to the treaties in question; nothing in his opinion suggests that some treaties are not the “supreme Law of the Land” under Article VI, Clause 2.<sup>230</sup>

At the same time, Marshall’s analysis did not interpret the Supremacy Clause to mean that, absent legislative implementation, all treaties or treaty provisions must necessarily be considered directly applicable and judicially enforceable.<sup>231</sup> Some commentators have interpreted the opinion as establishing a presumption in favor of treaty self-execution, displaced only by an affirmative legislative implementation.<sup>232</sup> We understand Marshall’s conclusion to be more

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229. See generally RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310 (AM. L. INST. 2018). The distinction between self-executing and non-self-executing treaties has been much debated and remains controversial. Consider, for example, David Sloss, *Taming Madison’s Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. REV. 1691, 1693–94 (2016) (contending that duly-ratified treaties are part of the Supreme Law of the Land, and that in deciding whether a given treaty is (or is not) self-executing, the courts mistakenly rely on the (fictitious) “intent of the treatymakers,” in effect transferring power over treaty compliance decisions from the federal political branches to federal courts and offering several recommendations for resolving the problem). He offers several recommendations for resolving the problem. For historical background see John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 34 FORDHAM INT’L L. REV. 1209, 1322 (2008) for historical background concluding that, while no general presumption exists, treaties that create individual rights should, in general, be considered self-executing while those that do not are less likely to be.

230. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310, n. 12 (AM. L. INST. 2018) (“A treaty’s lack of judicial enforceability is not inconsistent with a status of “Law of the Land: under the Supremacy Clause.”). Noting that some of the language in *Medellin* can be read to suggest that a non-self-executing treaty is not law for any domestic purpose, the Reporters concluded that “there is no reason at present to conclude that non-self-executing provisions are, as a general matter, less than supreme law. *Id.*”

231. *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

232. Cf. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 702 (1995) (explaining that *Foster* established that the general rule that treaties are enforceable in the courts without prior legislative action may be altered through the treaty itself); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 652 (2008) (contending that the default presumption is rebuttable only by a clear declaration of non-self-execution); David Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* 110

nuanced. Because his focus was on judicial application—that is, the power of the courts to give direct effect to the treaty or provision in the context of a particular proceeding—his formulation was clear: the courts must be empowered to do so either by the treaty itself or by its implementing legislation.<sup>233</sup> That conclusion does not exclude a third possibility: that a court might lack such authority because the treaty or provision at issue, even while constituting federal law, was *neither* “self-executing” nor legislatively implemented.<sup>234</sup>

Properly read, we think, Marshall’s analysis provides no basis for concluding that, constitutionally, *all* treaties must either (i) have been legislatively implemented or (ii) be directly applicable and enforceable in private litigation.<sup>235</sup> That has never been true of federal law in general: many duly adopted statutes do not give rise to individually enforceable rights.<sup>236</sup> There is no explicit constitutional basis for according broader domestic effect to treaties than statutes.<sup>237</sup>

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(2016). Cf. Michael Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1645–55 (2015) (calling to mind the application of the Warsaw Convention and the CISG to U.S. courts). For a different view, see RESTATEMENT (FOURTH) OF THE FOREIGN RELS L. OF THE U.S. § 310, n. 3 (AM. L. INST. 2018) (noting that case law has not established a general presumption for or against self-execution of treaties).

233. *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

234. As Vázquez acknowledges, “a treaty might be unenforceable in court because it is too vague, or otherwise calls for judgments of a political nature, or is unconstitutional, just as statutes and constitutional provisions might be.” Vázquez, *Treaties as Law of the Land*, *supra* note 232, at 604.

235. See *Foster*, 27 U.S. at 253 *passim*.

236. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (recognizing that “private rights of action to enforce federal law must be created by Congress”); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (explaining that whether a statute creates a cause of action is a matter of statutory construction). There are multiple reasons why a statute may not give rise to individually enforceable rights, including questions of standing as well as ambiguity in the language of the statute or the legislative history.

237. We acknowledge, of course, the ongoing debate about whether a treaty can give the Congress or the Executive more authority than either would otherwise have under the Constitution. Compare *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (indicating that a treaty cannot be valid if it infringes on the Constitution) and *Bond v. United States*, 572 U.S. 844, 845 (2015) (noting “the duty of federal courts to be certain of Congress’s intent before finding that federal law overrides” (internal quotations and citations omitted)) with RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 312 (AM. L. INST. 2018) (“(1) The treaty power

Marshall's formulation has also been frequently misunderstood to mean that the distinction is inherently one of textual interpretation for the relevant court to make in the context of privately-initiated litigation.<sup>238</sup> In a sense, it is precisely the "treaty is a contract" analogy that opens the door for courts to assume such a responsibility.<sup>239</sup> In context, however, it seems clear that Marshall was *not* claiming that courts alone must determine whether a given treaty should be directly applicable in U.S. law.<sup>240</sup>

Granted, Marshall did not doubt that, since treaties are part of the "supreme Law of the Land," their interpretation falls within the scope of judicial review constitutionally granted to the courts, on a par with legislation.<sup>241</sup> Still, a careful reading of the opinion indicates that the Chief Justice was clearly solicitous of the roles of the Executive Branch and the Congress in treaty implementation.<sup>242</sup> Indeed, in *Foster*, Marshall actually *deferred* to the action of the executive and the legislature with regard to the dispute at issue.<sup>243</sup> In our view, the opinion cannot properly be read to mean that the courts can on their own override the considered decision of the

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conferred by Article II of the Constitution may be used to enter into treaties addressing matters that would fall outside of Congress's legislative authority in the absence of the treaty. (2) Congress has the constitutional authority to enact legislation that is necessary and proper to implement treaties, even if such legislation addresses matters that would otherwise fall outside of Congress's legislative authority.").

238. See David Bederman, *Medellin's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 533 (2008); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540 (2008).

239. See *Foster v. Neilson*, 27 U.S. 253, 254 (1829) (analogizing treaties with contracts between nations).

240. See *id.* (recognizing that treaties in the U.S. are *not* viewed as contracts).

241. *Id.* at 279.

242. See *id.* at 277–78 ("We have endeavored throughout the whole argument to show that in every step we have taken we are sustained by the executive").

243. The issue (in simple terms) was about the location of the land in question – whether it lay within the boundaries of Louisiana, as ceded in 1803, or within Florida, as ceded in 1819, and that was considered a political question. "We think, then, however individual judges might construe the treaty of St Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." *Id.* at 307. Cf. *U.S. v. Arredondo*, 31 U.S. 691, 710–11 (1832) (noting that the court must adjudicate according to the law of nations, the stipulations of any treaty, the acts of Congress in relation thereto, and the laws of the government).

constitutional treaty-makers, the President and Senate, in exercising their authority to decide the basis on which the United States will enter into or give domestic effect to treaties.<sup>244</sup>

Here, some historical context for the decision may be useful. At the time the Chief Justice was writing—long before the advent of multilateralism or the international articulation of international human rights norms—treaties were predominantly bilateral, aimed at regulating relations between the “contracting” States.<sup>245</sup> They addressed such topics as ending hostilities and establishing peaceful relations, settling claims and drawing boundaries, and establishing the rules for bilateral trade and commerce.<sup>246</sup> For example, the acquisition of the Louisiana Territory from France in 1803 had been carried out by means of a “treaty of cession.”<sup>247</sup> However, by themselves, these treaties operated at the inter-state level.<sup>248</sup> Whether and to what extent they required domestic implementation was considered an internal matter left to the respective governments.<sup>249</sup>

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244. In *Foster*, Congress had already adopted several statutes on the question, and its authority over the subject matter was incontestable: Art. IV sec. 3 cl. 2 of the Constitution gives the Congress “the Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” We believe that, since the distinction is “lawmaking,” it falls to the Congress. *Foster v. Neilson*, 27 U.S. 253, 282 (1829).

245. See Cemetery in Algiers “Resolution”, Mar. 21, 1826, available in CHARLES I. BEVANS, U.S. DEP'T OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949 1–2 (1968), for the first multilateral treaty to which the United States became a party.

246. See Edward Keene, *The Treaty-Making Revolution of the Nineteenth Century*, 34 INT'L HIST. REV. 475, 479 (2012) (recognizing the eighteenth century as the “golden age of balance-of-power politics”).

247. Louisiana Purchase Treaty, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200. Two related conventions addressed the financial aspects of the transaction.

248. See Louisiana Purchase Treaty, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200 (ceding the Louisiana Territory from France to the United States).

249. In fact, the federal government did institute a program for recording and adjudicating titles and grants in the relevant territory, inter alia voiding grants made by Spain after the Treaty of San Ildefonso. Disputes remained about whether Florida had been included in the Louisiana Purchase. That issue was resolved by the Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252 [hereinafter Adams-Onís Treaty], under which Spain ceded all of Florida and the United States assumed the claims of U.S. citizens against Spain arising from the Napoleonic Wars.

The formulation in the second clause of Article VI of the U.S. Constitution reflected a clear choice by the Framers to deviate from the British approach.<sup>250</sup> The Framers' choice was largely driven by national security concerns: the King could have repudiated the 1783 Treaty of Paris, resumed hostilities, and suppressed the Republic if states and their courts did not honor the terms of that treaty.<sup>251</sup> In drafting Article VI, Clause 2, the Framers intended precisely to give that treaty and other such agreements pre-emptive status as federal law, overriding inconsistent state laws enabled by the Articles of Confederation.<sup>252</sup>

In *Foster*, however, Marshall faced a different challenge: how to interpret the provisions of the Louisiana Purchase Treaty of 1803<sup>253</sup> in light of the fact that Congress had *already* adopted a number of legislative provisions addressing the types of claims in question.<sup>254</sup>

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

251. See Nathaniel Stewart, *Article VI of the United States Constitution*, CONSTITUTING AMERICA (2011), <https://constitutingamerica.org/may-17-2011-%E2%80%93-article-vi-of-the-united-states-constitution-%E2%80%93-guest-essayist-nathaniel-stewart-attorney> (explaining the drafters' motive for Article VI of the Constitution).

252. That aim was explicitly recognized by Chief Justice Marshall's formulation in *Foster v. Neilson*. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (recognizing explicitly the Framers' intent to give treaties preemptive status as federal law); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 308 (AM. L. INST. 2018) ("Treaties are supreme over State and local law and when there is a conflict between State or local law and a self-executing treaty provision, courts in the United States will apply the treaty provision."); *id.* § 308 cmt. (a) ("[T]reaties displace contrary State and local law . . . [and] when self-executing, can be enforced directly enforced in State and local courts."); *id.* § 308 n. 1–2 (explaining that while lower federal and state courts "have regularly enforced treaty provisions over contrary State or local law . . . the case law does not clearly support any presumption regarding preemption of State law by a treaty"); see, e.g., David Moore, *Treaties and the Presumption Against Preemption*, 2015 BYU L. REV. 1555, 1555, 1557–58 (2015) (discussing whether the presumption against displacement of traditional regulatory applied to Article II treaties).

253. Louisiana Purchase Treaty, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200. Also relevant were the (initially secret) Treaty of San Ildefonso of 1800 between France and Spain, the 1783 Treaty of Versailles, and the 1763 Treaty of Paris. See *Foster v. Neilson*, 27 U.S. 253, 259–60 (1829) (discussing the Treaty of San Ildefonso).

254. Statutes adopted in 1804 and 1805, collectively referred to as the Louisiana Land Claims Act. See Markus G. Puder, *The Adams-Onís Treaty's Bicentennial and Its Enduring Legacy for the American Doctrine of Self-Executing and Non-Self-Executing Treaties*, 27 J.S. LEGAL HIST. 79, 80–81 (2019) (discussing the

Marshall was thus required to address the resolution of Foster's claims to property in southeastern Louisiana in the face of a series of existing congressional enactments giving effect to the relevant treaty provisions through administrative processes.<sup>255</sup> From that perspective, it was quite rational to conclude that, when the legislative branch has addressed the relevant issues, courts should not find the treaty provisions to be directly applicable.<sup>256</sup> Marshall's opinion clearly emphasized this perspective:

The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think then, however individual judges might construe the treaty of St Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, *if that will has been clearly expressed*. . . . After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied.<sup>257</sup>

In other words, Marshall's decision in *Foster* rested precisely on his appreciation of the need to defer to the government's "clearly expressed" interpretation and implementation of the treaty in question, as enacted in a series of legislative provisions.<sup>258</sup>

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Louisiana Land Claims Act); Markus G. Puder, *Uncertain Land Titles in Louisiana's Formative Years: Colonial Grants, John Marshall's Foster Opinion, and Lauterpachtian Interplays Between Private Law and International Law*, 53 AM. J. LEGAL HIST. 329, 332 (2013) (discussing the Louisiana Land Claims Act).

255. See *Foster*, 27 U.S. at 278–79.

256. *Id.* at 253 (finding that the courts should follow the will of the legislature).

257. *Id.* at 307–09 (emphasis added).

258. *Id.* at 307 (“In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government.”). In contemporary terms, this



## B. THE POINT OF PERCHEMAN

Marshall's attentiveness in *Foster* to the actions of the legislature helps to illuminate his subsequent opinion in *Percheman*.<sup>259</sup> The latter decision is often misunderstood, in our view, to be diametrically opposed to the former. Some argue that *Percheman* interpreted the same provision in the Treaty of San Ildefonso (this time in its Spanish iteration) to be directly enforceable in a case brought by an individual in federal court.<sup>260</sup> In our reading, however, that conclusion rests on a misunderstanding of both the relevant facts and the Chief Justice's analysis. Properly understood, the decisions are not doctrinally inconsistent.

The facts of the case are complicated but can be described briefly. Under the Adams-Onís Treaty of 1819, the Spanish Empire gave its provinces of East and West Florida to the United States.<sup>261</sup> Spain previously made land grants out of those provinces.<sup>262</sup> The treaty provided that the United States would essentially honor Spain's land grants and "ratif[y] and confirm[]" them to the grantees.<sup>263</sup> In 1826, Congress established an administrative process for handling the grantees' claims. Congress created a "register and receiver" authorized to resolve claims with payments from the Treasury.<sup>264</sup> Percheman sought confirmation of a grant of 2,000 acres that the Spanish governor of East Florida made to him in 1815.<sup>265</sup> However, the register rejected Percheman's claim, arguing that Percheman

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statement might be characterized in terms of "political question." See generally Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INT'L L. STORIES 151 (John E. Noyes et al. eds., 2007).

259. See *United States v. Percheman*, 32 U.S. 51, 89 (1833) (discussing *Foster*).

260. Indeed, even in Supreme Court usage, *Percheman* is often cited as having overruled *Foster*. See Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, *supra* note 232, at 601 (describing *Percheman* as having "disavowed" *Foster*).

261. See *Percheman*, 32 U.S. at 72–73 (explaining that Spain ceded its territory in East and West Florida to the United States).

262. *Id.* at 58.

263. *Id.* at 52.

264. Land Claims in the District east of the Island of Orleans, ch. C, 2 Stat. 528 (1819) (creating a statute for adjusting claims to land and establishing land offices in the districts east of the island of New Orleans).

265. See *Percheman*, 32 U.S. at 51 (discussing Percheman's claim of 2000 acres of land in the Florida territory).

already conveyed his interest to someone else in 1823.<sup>266</sup>

Percheman challenged that “administrative” decision in the federal court for the district of East Florida, essentially arguing that the register and receiver had not been authorized to “adjudicate” the validity of the claim, only to “confirm” it as required by the treaty.<sup>267</sup> The district court agreed with him, and the federal government then appealed directly to the Supreme Court, arguing that the lower court lacked jurisdiction because the claim had been rejected by the register.<sup>268</sup> Percheman countered that under the relevant treaty provision, properly interpreted in light of its purpose, it was not open to the U.S. courts to question the validity of the governor’s grant, only to “confirm” that it had been made. He argued that the United States was thus obliged to accept the “concessions” that had been made by the governor and provide appropriate compensation.<sup>269</sup>

The Supreme Court agreed.<sup>270</sup> The narrow question was whether Percheman’s claim had in fact been handled in accordance with the legislation implementing the treaty.<sup>271</sup> The Court held that it had not since the register lacked the authority to exclude it.<sup>272</sup> In reaching that conclusion, Marshall looked first to the language of the treaty, in particular Article 8, which provided in its English version that the relevant Spanish grants “shall be ratified and confirmed.”<sup>273</sup> By contrast, the original Spanish document provided that the “grants

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266. *Id.*

267. *Id.* at 56–59.

268. *Id.* at 59

269. *Id.* at 53 (“The act of 26th May 1830, entitled ‘an act to provide for the final settlement of land-claims in Florida,’ contains the action of congress on the report of the commissioners of 14<sup>th</sup> January 1830, in which is the rejection of the claim of the petitioner in this case; . . . no claim was finally acted upon, until it had been acted upon by Congress; and it is equally apparent, that the action of Congress, in the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed upon those which were rejected; they were, of consequence, expressly submitted to the court.”).

270. *Id.* at 86–97.

271. *Id.* at 86, 91–92.

272. *Id.* at 94–95.

273. *Id.* at 69; see David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135, 148 n.65, 157-60 (2012) (explaining Marshall’s textual analysis).

shall remain ratified and confirmed.”<sup>274</sup> The question, then, was about the difference between “shall be” and “shall remain.”<sup>275</sup>

In Marshall’s view, while the English version contained “words of contract, stipulating for some future legislation confirming the grant,” they could also be understood to mean “that the grant should be ratified and confirmed by virtue of the instrument itself” (meaning the 1819 Treaty).<sup>276</sup> The Spanish version “shall remain ratified and confirmed,” Marshall said, could only have been intended “to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require would seem to be admissible.”<sup>277</sup>

The United States had undertaken a treaty obligation to accept claims based on royal grants, not to second-guess their validity.<sup>278</sup> Accordingly, Marshall said, “[t]his understanding of the article must enter into our construction of the acts of Congress on the subject.”<sup>279</sup>

From this review of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to Congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term ‘rejected,’ or in any other manner, is not to be considered as a final judicial decision on the claim, binding the title of the party; but as a rejection for the purposes of the act.<sup>280</sup>

From this perspective, it is clear that Marshall was *not* directly applying the treaty to resolve Percheman’s claim. He instead assessed the adequacy of the relevant implementing mechanism in light of the obligations imposed by the treaty.<sup>281</sup> Because Percheman’s claim had not been “ascertained” and “recommended for confirmation” by the “register and receiver,” as required by the treaty and its implementing legislation, it had been wrongly excluded

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274. *Percheman*, 32 U.S. at 69.

275. *Id.* at 88–89.

276. *Id.*

277. *Id.* at 88.

278. *Id.* at 91–92.

279. *Id.* at 89.

280. *Id.* at 91–92.

281. *Id.*

from the legislatively mandated settlement mechanism:<sup>282</sup>

The language of these acts, and among others that of the Act of 1828, would indicate that the mind of Congress was directed solely to the confirmation of claims, not to their annulment. . . . It is apparent that no claim was finally acted upon until it had been acted upon by Congress; and it is equally apparent that the action of Congress in the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed on those which were rejected. They were, of consequence, expressly submitted to the court.<sup>283</sup>

The result of the decision was to put Percheman's claim into the same category as those which had been "confirmed" and recommended by the register and receiver so that they could be satisfied on the same basis under the relevant legislation.<sup>284</sup>

Marshall's opinion in *Percheman* is frequently considered to have overruled *Foster*.<sup>285</sup> In our view, however, there is in fact a substantial degree of consistency in Marshall's approach in the two opinions.<sup>286</sup> Both decisions addressed the adequacy of treaty implementation by legislation; neither decision directly enforced the claim at issue or displaced the implementing legislation or the lower court's interpretation or application of that legislation.<sup>287</sup> True, in *Foster*, the Court deferred to the legislation while in *Percheman* it found the administrative mechanism to have been inadequate under the legislation, interpreted in light of the object and purpose of the relevant treaty provisions.<sup>288</sup> In both, however, the focus was on faithful legislative implementation of the relevant treaty provision.<sup>289</sup>

In both, Marshall clearly appreciated that the treaty in question

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282. *Id.* at 94–95.

283. *Id.* at 94.

284. *Id.* at 96–97.

285. See, e.g., *Medellín v. Texas*, 552 U.S. 491 at 504–05 (quoting *Foster v. Neilson*, 27 U.S. 253, 254 (1829), overruled by *United States v. Percheman*, 32 U.S. 51 (1833)) ("a treaty is 'equivalent to an act of the legislature,' and hence self-executing, when it 'operates of itself without the aid of any legislative provision'").

286. Sloss, *Executing Foster v. Neilson*, *supra* note 273, at 157–58.

287. *Percheman*, 32 U.S. at 96–97; *Foster v. Neilson*, 27 U.S. 253, 315 (1829).

288. *Foster*, 27 U.S. at 315; *Percheman*, 32 U.S. at 94–95.

289. *Percheman*, 32 U.S. at 94–95.

was a binding commitment owed by the United States to its treaty party.<sup>290</sup> His decision in *Percheman* gave effect to the treaty obligation by placing the claim back into the congressionally mandated mechanism for compensation.<sup>291</sup> In our view, that is less a clear instance of direct judicial application of the treaty to resolve Percheman's claim (i.e., "self-execution") as much as an instruction to the government to apply the treaty correctly—and thus much more in line with the "interpretive" approach taken in *Foster*.<sup>292</sup>

Nonetheless, there is no disputing that, over time, the distinction that the Chief Justice made in these two decisions has troubled and confused both courts and commentators alike, as they try to parse the rules regarding the choice between (i) those treaties that can, or must, be considered directly incorporated into federal law and therefore capable of direct application ("self-execution") and (ii) those that can, or must, be legislatively implemented ("non-self-execution").<sup>293</sup>

We believe it is an error to read *Foster v. Neilson* ("treaties are not legislative acts") as establishing a presumption against self-execution, or *Percheman*, (with its emphasis on the "shall remain ratified and confirmed" language) as establishing the opposite presumption. Neither can Marshall's statement properly be understood to say that the decision is to be made, exclusively or principally, by the courts solely on the basis of the treaty language.<sup>294</sup> Carefully read, neither *Foster* nor *Percheman* supports any of those propositions.<sup>295</sup> To the contrary, they reflect solicitous regard for the actions of the constitutional "treaty makers," and specifically the

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290. Cf. THE FEDERALIST NO. 75, *supra* note 25, at 191 ("They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.").

291. *Percheman*, 32 U.S. at 94–95.

292. Sloss, *Executing Foster v. Neilson*, *supra* note 273, at 160.

293. See Bradley, *supra* note 238, at 540 (explaining the confusion that U.S. courts now face because of the *Foster v. Neilson* 1829 decision).

294. See Lucy Reed & Ilmi Granhoff, *Treaties in US Domestic Law: Medellin v. Texas in Context*, 8 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS: A PRACTITIONER'S JOURNAL 1, 6, 19 (2009) (explaining some of the tensions since *Foster* and *Percheman*).

295. See Carlos Manuel Vazquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, BYU L. REV. 1747, 1792–94, 1796–98 (2015) (explaining the difficulties in interpreting language the Supreme Court has faced when trying to articulate a test for non-self-execution).

actions of Congress in adopting implementing legislation.<sup>296</sup>

### C. THE MEANING OF MEDELLÍN

Nonetheless, in *Medellín v. Texas*, the U.S. Supreme Court relied directly on *Foster* to draw a somewhat clearer distinction between “self-executing” and “non-self-executing treaties,” in the sense that the former “automatically have effect as domestic law” while the latter, “while they constitute international law commitments . . . do not by themselves function as binding federal law.”<sup>297</sup> On this view, treaty obligations and commitments are not directly enforceable in domestic courts unless Congress has so provided by enacting implementing statutes or unless “the treaty itself conveys an intention that it be ‘self-executing’ and is ratified” on that basis.<sup>298</sup>

We understand the Court’s use of “binding federal law” in this context to mean federal law that can be applied directly by courts in resolving private disputes, but certainly not to suggest that “non-self-executing treaties,” or treaty provisions, are not federal law at all.<sup>299</sup> While there is some dispute about this point, we know of no definitive decision to the effect that the latter category of treaties does not fall within the scope of Article VI, Clause 2 of the Constitution.<sup>300</sup>

Of particular relevance here is the Court’s emphasis in *Medellín* on the constitutional role of the domestic “treaty makers” (i.e., the executive and the Senate) in making the distinction.<sup>301</sup> The internal effect and implementation of a treaty is a matter for domestic

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296. *Foster v. Neilson*, 27 U.S. 253, 315 (1829); *Percheman*, 32 U.S. at 94–95.

297. *Medellín v. Texas*, 552 U.S. 491, 504–06 n.3 (2008).

298. *Id.* at 505 (citing *Igartua–De La Rosa v. United States*, 417 F.3d 145, 150 (C.A.1 2005) (en banc) (Boudin, C. J.)). The opinion also quoted *Whitney v. Robertson*, 124 U.S. 190 (1888). *Medellín*, 552 U.S. at 505 (quoting 124 U.S. at 194) (“When, in contrast, [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.”). In other words, without implementing legislation, a treaty that is not self-executing is “a compact between independent nations.” *Head Money Cases*, 112 U.S. 580, 598 (1884).

299. *Medellín*, 552 U.S. at 506 n.3.

300. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310 cmt. a (AM. L. INST. 2018) (“Treaties duly ratified by, and in force for, the United States thus form part of U.S. domestic law.”).

301. *Medellín*, 552 U.S. at 506 n.3.

decision; it cannot be imposed by treaty partner(s).<sup>302</sup> Moreover, in the U.S. system, the decision about whether a treaty has direct applicability (for instance, whether it provides a private cause of action) is a “law-making” one in the hands of the constitutional treaty-makers.<sup>303</sup> In the first instance (i.e., in respect of ratification), the decision rests with the President and the Senate; legislative implementation of a non-self-executing treaty necessarily involves the House of Representatives.<sup>304</sup>

We believe Chief Justice Marshall would be in complete agreement.<sup>305</sup> In the U.S. system, at least as a matter of constitutional principle, the courts do not make the law; rather, they interpret and apply it.<sup>306</sup> When the President and Senate have definitively resolved the issue of the domestic legal effect of a duly ratified treaty, the courts must accept that decision.<sup>307</sup> When they have not, it is appropriate for the courts to look to the language of the treaty, as federal law, to give effect to the international obligations assumed by

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302. *Id.* at 505.

303. Put otherwise, we do not believe either Marshall or the Founding Fathers understood that the question of the domestic legal effect of a given treaty (bilateral or multilateral) is properly (much less necessarily) to be decided by the foreign state party (or parties) to the treaty, or by the international community more generally. For a discussion of this issue, see Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, *supra* note 232, at 638 (concluding, with evident hesitation, that the treaty-makers do have the power to limit the domestic effects of treaties through declarations of non-self-execution). We acknowledge that the RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310, cmt b (AM. L. INST. 2018), is less than clear on this point, observing somewhat tenuously that “[a]lthough the question of self-execution, as it arises in litigation, is one for judicial resolution, the President and Senate may provide critical and potentially authoritative guidance regarding the self-executing or non-self-executing status of a treaty or treaty provision.” See *id.*, Rprtrs. note 13.

304. See David L. Sloss, *United States*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 506–07, 509 (David L. Sloss ed., 2009) (describing the status of treaties in the U.S. legal system).

305. *United States v. Percheman*, 32 U.S. 51, 94–95 (1833).

306. See Sloss, *United States*, *supra* note 304, at 507–08 (explaining the constitutional framework of treaty interpretation in the U.S. legal system).

307. *Id.* (explaining that under the Constitutional framework, federal courts can adjudicate cases “arising under” treaties while state courts have a duty to enforce treaties).

the United States under the treaty in question.<sup>308</sup> In either case, the international obligations of the United States remain binding as a matter of international law.<sup>309</sup>

#### IV. CONCLUSION

The problem with the treaty-as-contract proposition is not merely that it is antiquated, superficial, and fails to account for the evolution in the nature and types of treaties or the roles they play in the international system today. More importantly, it is wrong: treaties are not like contracts and to infer such a doctrinal conclusion from Justice Marshall's opinions is to misplace and undermine his point of emphasis.

In contemporary practice, international treaties are not contracts—or even “like” contracts in meaningful ways. The interpretation and enforcement of a contract no longer depends merely “on the interest and the honor of the governments which are parties to it.”<sup>310</sup> In both domestic and international law, treaties are binding agreements, the interpretation and enforcement of which are governed by distinct legal rules and principles, both domestic and international.<sup>311</sup> The “treaty-as-contract” proposition is a false analogy that drives courts toward an erroneous interpretation of treaty obligations, inconsistent with accepted principles of contemporary international law.<sup>312</sup>

Treaties today increasingly bridge the gap between very different domestic legal systems and traditions.<sup>313</sup> Their substantive

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308. *Id.*

309. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310(1) (AM. L. INST. 2018) (“Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law.”).

310. *Edye v. Robertson*, 112 U.S. 580, 598 (1884).

311. See Klaus Ferdinand Garditz, *Treaty Override*, 110 AM. J. INT'L L. 339, 339–41, 345 (2016) (explaining that the Constitution ranks international treaties as equal to federal statutory law and a breach of international treaty obligation by later-enacted statutory law is a violation of the Constitution).

312. See V.C.L.T., *supra* note 10, arts. 31(1)–(2), (listing the general rules of treaty interpretation); Mahoney, *supra* note 63, at 824–25 (explaining that an interpreter's task in the construction of contracts and statutes is different because their primary interests don't coincide).

313. See Christina J. Tams, *The Role of Treaties as Contracts: Textualism*,



obligations must be understood and interpreted in light of their role as international instruments.<sup>314</sup> When courts decide issues of international law based on superficial comparisons between treaties and contracts in the context of domestic practice, they are looking in the wrong direction.<sup>315</sup> Their attention should be towards the accepted international law principles reflected in the Vienna Convention on the Law of Treaties.<sup>316</sup>

Finally, at a conceptual level, the treaty-as-contract analogy reinforces the notion that treaties are motivated by the *realpolitik* of “bargain-and-exchange” between siloed States parties.<sup>317</sup> That is no longer the world we live in.<sup>318</sup> The world is increasingly globalized and kaleidoscopic, with multiple, interconnected layers of international, State and non-State actors shaping and, in turn, being shaped by the international rules-based order.<sup>319</sup> Furthermore, the most consequential treaties of today are designed to advance communal interests—such as protecting human rights, mitigating climate change, or fairly resolving transnational commercial

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*Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 824–25 (2007) (explaining how the Charter has facilitated international cooperation when dealing with treaty interpretation).

314. V.C.L.T., *supra* note 10, arts. 27, 31(1)–(2) (listing the rules of treaty interpretation).

315. See Garditz, *supra* note 311, at 339–41, 345 (“the constitutional option to violate international law by nationally valid legislation becomes the final argument for reinstating democratic self-determination and allowing the democratic process enough air to breathe”).

316. See V.C.L.T., *supra* note 10, arts. 27, 31(1)–(2) (listing the rules of treaty interpretation).

317. See Shirley Scott, *Is There Room for International Law in Realpolitik?: Accounting for the US ‘Attitude’ Towards International Law*, 30 REV. INT’L STUD. 81–82 (2004) (“International law is in a process of continuous evolution. . . . Treaty negotiations can be viewed as an opportunity to improve a state’s relative power in a given issue area.”).

318. See EMMANUELLE JOUANNET, *THE LIBERAL-WELFARIST LAW OF NATIONS: A HISTORY OF INTERNATIONAL LAW* 36 (2012) (explaining how the law of nations of the Moderns has evolved over time).

319. The “kaleidoscopic world” theory has been proposed and developed by Edith Brown Weiss. This theory of international law recognizes the multiplicity of state and non-State actors involved in the international legal order. See generally EDITH BROWN WEISS, *ESTABLISHING NORMS IN A KALEIDOSCOPIC WORLD* 51 (2017) (explaining the fundamental transformation of the international system and referring to it as a “kaleidoscopic world.”).

disputes—shared not only by the State parties but also by the international community at large.<sup>320</sup> The complexity and significance of today's treaty system are lost in the contracts analogy.

We do not mean to indict analogies in general, much less to contend that analogic reasoning cannot serve useful purposes in the law and legal education. Lawyers and judges have long utilized—have even been dependent on—analogic reasoning.<sup>321</sup> Its central role in constructive argumentation, particularly in the common law tradition, has been recognized and even celebrated.<sup>322</sup> Every law student understands the fundamental proposition that similar cases should be decided similarly.<sup>323</sup>

At the same time, given the differences between common law (as it is understood and applied in the U.S. legal system) and almost every other legal system around the world (especially those in the civil law tradition), the limitations and risks of analogical argument need to be taken into account.<sup>324</sup> It is understandable that domestic

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320. See Christian J. Tams, *The Role of Treaties in Pursuing the Objectives of the UN Charter*, in *THE OXFORD HANDBOOK OF UNITED NATIONS TREATIES* 69, 79–80 (Simon Chesterman et al. eds, 2019) (explaining that treaties have now been used as a mean to ensure “rapid deployability of peacekeepers, and for standby arrangements.”).

321. See Scott Brewer, *Indefeasible Analogical Argument*, in *ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE* 33, 33–34 (Hendrik Kapten & Bastian van der Velden eds, 2018) (“Among philosophers, legal theorists, cognitive psychologists, and AI theorists, a very common, almost universally accepted view of analogical arguments is that such arguments cannot have the epistemic force of valid deductive arguments.”).

322. See LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 3 (2005) (“Analogical arguments are . . . especially prominent in legal reasoning, so much so that they are regarded as its hallmark.”). Cf. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1–2 (1948) (explaining that “[t]he basic pattern of legal reasoning is reasoning by example” and that the “scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced”); Vern R. Walker, *Discovering the Logic of Legal Reasoning*, 35 *HOFSTRA L. REV.* 1687, 1687 (2007) (“The rule of law rests on the quality of legal reasoning. The rule of law requires that similar cases should be decided similarly. . . .”).

323. See DANIEL HENRY CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS* 4 (1885) (listing the reasons why the doctrine of state decisis is important).

324. See Akbar Rasulov, *Theorizing Treaties: The Consequences of the Contractual Analogy*, in *RESEARCH HANDBOOK ON THE LAW OF TREATIES* 74, 77–80 (Christian J. Tams et al. eds., 2014) (discussing some of the oversight that has

judges with a limited acquaintance with other legal systems, much less the nature and role of treaties in contemporary international practice, might default to familiar precedent without fully appreciating how such recourse can lead their analyses astray. Whatever the strengths and pertinence of case-oriented analogies may be in the common law tradition, that approach is not always best suited for international issues.<sup>325</sup>

It is long past time—in the classroom and the courtroom—to retire the *Foster v. Neilson* meme.

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come to exist because municipal legal categories are applied to the “operative fabric of international law”).

325. *Id.*