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How Transnational Law Complicates Treaty Interpretation

Stephen D. Walt[†] & *Bruno Zeller*[††]

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Introduction

International commercial law conventions ("transnational law") increasingly have become the legal device of choice regulating international commercial transactions. These treaties contain substantive provisions that define the legal entitlements of parties to transactions within their scope. At the same time, they also mandate how the treaty's text is to be interpreted. In particular, international

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commercial law conventions require that uniformity be taken into account in interpreting the text. United Nations Commission on International Trade Law (UNCITRAL) conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), are the most prominent example of these international commercial law conventions.[1] At a minimum, an international convention, once ratified, displaces domestic law to the extent that domestic law is inconsistent with the convention's provisions. But the incorporation of international commercial law conventions into domestic law has a further legal consequence. Its incorporation adds a method of textual interpretation for transnational law — "the uniformity directive"[2] — to the methods in force in domestic law for the interpretation of treaties. As a result, the interpretation of transnational law texts relies on both generally applicable methods of treaty interpretation and interpretive methods specific to transnational instruments.

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1 *See* U.N. Convention on Contracts for the International Sale of Goods (CISG), art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3; U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, G.A Res. 50/48, art. 5, (Dec. 11, 1995); U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, art. 2 (Sept. 23, 2009) [hereinafter the Rotterdam Rules]; U.N. Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, art. 5 (Nov. 23, 2005); U.N. Convention on International Bills of Exchange and International Promissory Notes, G.A. Res. 43/165, art. 4 (Feb. 28, 1989). For UNCITRAL Model Laws containing the same mandate, *see* UNCITRAL Model Law on Cross-Border Insolvency, art. 8 (1997); UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 61/33, art. 2A(1) (Dec. 4, 2006). For a soft law containing the uniformity directive, *see* UNIDROIT Principles of International Commercial Contracts, art. 1.6 (2016).

UNCITRAL was established in 1966 by the United Nations General Assembly. Its mandate is to promote the harmonization and unification of international trade law "by preparing and promoting the use and adoption of legislative and non-legislative instruments." *See A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, 1 (2013). UNCITRAL uses special terminology for the international instruments it produces. Products it calls "Conventions" are proposals for multilateral treaties, which nation states join according to their domestic law for joining multilateral treaties. "Model Laws" are templates offered for adoption by nation states through whatever method they use to enact domestic law. Model Laws are not proposals for treaties. *See id*. at 13–14. Throughout this paper, we refer to multilateral treaties that have come into effect as "conventions." To date, the CISG and the United Nations Convention on the Use of Electronic Communications in International Contracts are in effect as treaties. *See* UNCITRAL, Overview of the Status of UNCITRAL Conventions and Model Laws (showing an overview status table).

2 *See infra* note 56 and accompanying text; *cf*. UNIDROIT Principles of International Commercial Contracts, *supra* note 1, art. 1.6.

We maintain that international commercial conventions, once incorporated into domestic law, make legal interpretation more difficult and its results less predictable. Textual interpretation of transnational law is made more difficult not because transnational law introduces substantive rules into a legal system that differ from those of domestic law. Almost any incorporation of transnational law into national law does this. Instead, transnational law makes its interpretation more complex and less predictable because it introduces an interpretive method that differs from the methods for interpreting treaties generally. The increased difficulty in interpretation is exhibited in the tendency to rely on well-known domestic law methods to interpret transnational law.

The argument of this paper that transnational law makes interpretation more difficult consists of four claims: (1) international commercial conventions become law when incorporated into national law; (2) this both changes the content of law in that legal system by displacing previously applicable domestic law and adds a method for interpreting international commercial conventions: the uniformity directive; (3) the uniformity directive differs from the methods of interpretation applicable to treaties generally; and (4) the interpretive methods applicable to transnational law, including the uniformity directive, are unstructured and leave courts without guidance in applying them.

This paper is organized as follows. Part I describes the connection between methods of textual interpretation and the nature of law. Part II outlines the different approaches to textual interpretation common among legal orders. It identifies the interpretive methodology required by the law of treaties incorporated into domestic law. Part III argues that the uniformity directive contained in international commercial conventions changes the interpretive rules of the legal order into which transnational law is incorporated and makes its interpretation more complex. A conclusion summarizes the paper's argument.

A note about the sort of transnational law with which the paper is concerned is in order. Among the various sorts of laws that count as transnational are international commercial conventions that have two features. One is that these conventions, when ratified, displace domestic law with respect to issues within their scope. The other feature is that the conventions themselves contain a rule of textual interpretation that requires taking uniformity into account in the

construction of their provisions. This uniformity directive, described below, in turn mandates that the conventions be interpreted internationally, independent of domestic law.[3] UNCITRAL Conventions and Model Laws include the uniformity directive.[4] This paper addresses transnational laws which have both features.

Not all international commercial conventions contain a uniformity directive. For example, an "arbitration agreement" or "arbitral award" subject to the Convention on the Enforcement and Recognition of Foreign Arbitral Awards[5] (the "New York Convention") perhaps should be construed independently of national law understandings of these terms. It might be a good idea to require the New York Convention's terms to be construed uniformly in accordance with international law. Doing so could promote one of the New York Convention's purposes, which is to provide an international law for the recognition and enforcement of foreign arbitral awards.[6] However, the requirement of a uniform definition of the New York Convention's terms is not found within the Convention itself.[7] The uniformity directive, if it applies, does so based on extra-textual considerations. Although the arguments below might apply to transnational laws generally, their focus is on transnational laws that both displace domestic law and contain the uniformity directive.

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3 *See* CISG, *supra* note 1, art. 7(1) ("regard is to be had to [the CISG's] international character and the need to promote uniformity in its application . . . in international trade").

4 *See id.*

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958).

6 *See, e.g.*, Franco Ferrari, *How International Must International Arbitration Be?*, *in* 1 EPPUR SI MUOVE: THE AGE OF UNIFORM LAW 847–855 (Unidroit ed., 2016); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3503 (2d ed. 2014) (explaining the basics of international arbitration and providing references to judicial decisions and rewards).

7 Article 31 of the Vienna Convention on the Law of Treaties might support the requirement that the New York Convention's provisions be interpreted uniformly, independent of national law. *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969). Article 31(1), which states a general rule of interpretation of treaties, directs that a treaty's provisions be interpreted in accordance with the ordinary meaning of the terms of the treaty "in light of its object and purpose." *See id*; *see also infra* text accompanying notes 41–43. This directive requires a uniform interpretation of a treaty only to the extent that the particular treaty's object or purpose is one of uniformity. That is a contingent matter, not one dictated by the provisions of the treaty.

I. Methods of Textual Interpretation and Legal Theory

Methods of textual interpretation rely on a theory of the nature of law and a legal system. This is because, as interpretive devices, the methods assume that they correctly identify the meaning of legal texts. To be sure, the meaning of a legal text is independent of the methods for ascertaining it; otherwise, the exercise is not one of interpretation but of deeming or declaring the text to have a certain meaning—a different sort of activity. However, the text's meaning can be identified as the semantic content of its terms, the information the legislature intended to communicate, the information those subject to the statute reasonably understand the legislature to communicate, or other information conveyed. Each is an aspect of its meaning. The law of a legal system determines which among the candidates counts as the meaning of a legal text, and the text's meaning in turn identifies the legal entitlements of the parties described by the text's provisions.[8] Thus, a method of textual interpretation is correct or appropriate because it ascertains this meaning. Because law selects from among candidates the meaning of a legal text, the method's correctness or suitability depends on the nature of law and a legal system.

Given this dependence, the conception of law is primary and constrains the method of interpreting legal texts. Accordingly, an interpretive method that misidentifies the meaning of the text is a bad method. For instance, if a method of textual interpretation recommends the morally best meaning be given to a statutory provision, while law consists of authoritative issued commands, the interpretive method is inappropriate. It identifies the text's meaning, if at all, only by accident. Closer to transnational law, if a particular interpretative method requires reliance on understandings foreign to domestic law, while law counts as authoritative only domestic understandings of relevant terms, the interpretive method is inappropriate.[9]

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8 We take no position on the general jurisprudential question as to whether legal entitlements are created or discovered. Whether legal entitlements are created or discovered, textual interpretation's role identifies those entitlements based on operations on legal texts having the force of law. Accordingly, throughout this paper we refer to textual interpretation as "identifying" the entitlements, understanding the term to be neutral as to whether the meaning of legal texts create or recognize legal entitlements.

9 For recognition of a similar reliance of the legal status of international arbitral awards on a theory about the nature of law, see EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).

In addition to constraining methods of textual interpretation, theories about the nature of law ultimately determine which methods count as interpretive legal standards. Methods of textual interpretation are legal standards governing evidence of the meaning of legal texts. They specify the sort of information on which an interpretation of the text must be based. As with any legal standard, an interpretive method counts as a legal standard only if it is among the norms that constitute law in a legal system. Thus, it is not enough for a method to specify the sort of evidence for the meaning of legal texts, even if the evidence is probabilistically associated with that meaning. This is because a nonlegal interpretive method conceivably could do the same. That method, even if correctly ascertaining the meaning of legal texts, would not be a legally authoritative interpretive norm. It would serve merely as a guide without the force of law. To be a legally authoritative norm, the interpretive method must itself be a legal standard. For this reason, a theory about the nature of law in the end determines the legal character of methods of textual interpretation.

For example, assume that law consists of authoritatively promulgated commands. These commands could include authoritative orders as to how legal texts are to be interpreted to determine what is commanded. Among those orders might be the instruction: "Interpret the terms of the text according to the meaning intended by the authority promulgating the text."[10] "Interpret the terms of the text according to their ordinary meaning" might not be among those commands. In this case interpretation according to ordinary meaning is a nonlegal interpretive method.

Given that interpretive methods ultimately rely on a legal theory, on which theory about the nature of law should they rely? Obviously, the answer is "the correct legal theory." The trouble, of course, is that the correct theory of the nature of law and its details are matters of perennial jurisprudential dispute. The argument in Part III below that transnational law makes textual interpretation more difficult does not depend on the truth of a particular theory of law. It instead takes note of the uncontroversial fact that domestic

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10 *Cf.* Larry Alexander, *Legal Positivism and Originalist Interpretation*, 16 REVISTA ARGENTINA DE TEORIA JURIDICA [RATJ] 1, 4 (University of San Diego School of Law Research Paper No. 15-200, November 2015). If law is authoritative norms posited, it follows that courts must interpret texts promulgated by authorities according to the meaning intended of those texts.

law contains both certain accepted methods of interpretation and (where transnational law has been ratified) transnational law's uniformity directive. Both types of interpretive methods are accepted as legally valid without regard to their basis in a theory of law. Part III argues that the combination of these different accepted methods, not their ultimate jurisprudential foundation, makes the interpretation of transnational legal texts more complex. Nonetheless, a theory of law that makes acceptance of interpretive norms foundational to their legal status is a version of legal positivism. This Part describes that version.

A. *Textual Interpretation for Legal Positivists*

Legal positivism is a view about what makes a norm a legal norm. It holds that law depends on social facts of one sort or another. Versions of legal positivism differ according to social facts central to law or the extent of law's dependence on social facts. Classical positivism maintains a narrow conception of the social facts on which law depends. For instance, for John Austin, law consists of coercive orders issued by one whose orders are habitually obeyed.[11] Contemporary positivists, by contrast, allow a broader range of social facts, such as the acceptance of certain criteria of legal validity among officials. Legal positivists also divide over to the extent to which law depends on social facts. "Hard" or "exclusive" positivism maintains that the existence and content of law consists entirely of social facts; "soft" or "inclusive" positivism allows law to depend partly on matters independent of social facts, such as moral norms.[12]

H.L.A. Hart's version of legal positivism is a prominent type of "soft" positivism.[13] According to Hart's theory, law depends on the shared social practice of judges and other legal officials. In particular, the norms they accept as the ultimate criteria of legal

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11 *See* JOHN AUSTIN, AUSTIN: THE PROVINCE OF JURISPRUDENCE DETERMINED 118–19 (W. Rumble ed., 1995) (1832).

12 *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994). Hard and soft positivism make conceptual claims about law. For different versions of positivism, which make normative claims about adjudication or legal institutional design, see Frederick Schauer, *Positivism Before Hart*, 24 CAN. J.L. & JURIS. 455 (2011).

13 *See, e.g.*, Hart, *infra* note 14, at 250–54; Alexander, *supra* note 10; Kenneth E. Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY 125 (J.L. Coleman & S. Shapiro eds., 2012).

validity are the foundation of a legal system.[14] For Hart, the legal system consists of valid legal norms and the norms officially accepted as the ultimate criteria of validity. Norms are laws within that system because they are valid according to the criteria. However, unlike valid norms, the ultimate criteria of validity—what Hart calls the "rule of recognition"—has no legal basis.[15] It is a presupposition of legal validity, not itself valid. Instead, the criteria of validity are the result of a shared social practice among legal officials in which their joint acceptance of the criteria is shown by their use of the criteria. This practice is a fact about their legal reasoning and other judicial behavior with respect to this fundamental norm. At the level of ultimate criteria, law has whatever content legal officials treat it as having.

Methods of textual interpretation may or may not be part of the rule of recognition. These methods can include different general standards such as the injunction to interpret the terms of a legal text according to their ordinary meaning, their author's intent, or the understanding of those subject to the text's provisions. Interpretive methods also can include more specific interpretive standards. Among specific interpretive standards are both linguistic and substantive canons of interpretation, as they both help determine the meaning or scope of a legal text.[16] Canons such as "penal statutes are to be construed narrowly," "the terms of the text are to be construed according to the meaning of the same terms in comparable statutes" or "statutes are to be applied generally unless they clearly indicate a narrower application" are examples. Whether interpretive standards are general or more specific, their place in a system of legal norms depends on the way they figure in the official practice of interpreting texts.

Broadly, interpretive standards can play two different possible roles within official legal practice. One is as underived basic legal norms. Judges commonly accept interpretive standards, relying on them to determine the legal entitlements identified by statute or other legal text. In this case, following Hart, the interpretive methods are among the ultimate legal norms in the legal system in

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14 H.L.A. HART, THE CONCEPT OF LAW 100 (3d ed. 2012).

15 *Cf. id.* at 109 (maintaining that the rule of recognition "can neither be valid nor invalid but is simply accepted").

16 *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

which they are used.[17] The other possibility is that interpretive standards are derivable from other legal norms, whether or not legal officials commonly accept them. In this case these standards would be valid interpretive norms, but not among the legal system's foundational norms. More likely, some interpretive standards might be underived and officially accepted while others are derivable from ultimate criteria of validity. Whether interpretive methods are among the ultimate legal norms or are derived from them is both a logical matter (broadly understood) concerning the derivability of interpretive norms and an empirical matter concerning the norms judges commonly accept.

B. An Implication for Transnational Law

Hart's version of legal positivism has a direct implication for the incorporation of transnational law into domestic law. Because the rule of recognition serves to identify legal norms as the norms of a legal system, a change in the criteria of validity shifts the legal system. Thus, if interpretive methods are part of the rule of recognition, the introduction of a novel method shifts the legal system into which it is incorporated. The same is not true where, in accordance with authoritative criteria, one valid norm supplants another valid norm. A change in a legal rule according to ultimate criteria that are unchanged leaves the character of the legal system unaltered. For example, the Himalaya Clause, incorporated into U.S. law from English law by decision,[18] doesn't change the character of the U.S. legal system. It only alters a substantive rule insulating certain non-privity parties from liability to the cargo owner for damage or loss of the cargo.[19] Accordingly, if transnational law's uniformity directive as an interpretive standard is part of the rule of recognition, the incorporation of transnational

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17 *See* Kent Greenawalt, *Hart's Rule of Recognition in the United States*, 1 RATIO JUR. 40, 48–50 (1988).

18 *See* Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959); *cf.* Contracts (Rights of Third Parties) Act 1999, c. 31 § 6(5)(a) (U.K.) [https://perma.cc/X8H7-AR62]; The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, art. 19 (2009), *supra* note 1. The English case recognizing the validity of the clause is Adler v. Dickson, [1954] 2 LLR 267 (U.K.).

19 *See generally* Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd., 543 U.S. 14 (2004) (explaining that Himalaya clause protections in multimodal bills of lading apply to a railroad transporting goods on the final leg of journey of the cargo as well as to the ocean carrier).

law shifts the legal system into which it is incorporated.

The question, then, is whether transnational law's uniformity directive is among the ultimate criteria of validity in a legal system that has incorporated the directive. Hartian positivism counts a norm as law only if the norm is part of the rule of recognition or derived from norms that are part of that rule. Ratification of an international commercial convention incorporates the uniformity directive where the directive is among the convention's provisions. The question is the status of the directive among the legal norms of a ratifying country.

Although the question is an empirical one concerning the norms legal officials in a ratifying country commonly use, the directive appears not to be among the ultimate criteria of validity. This is because the directive is part of a convention that is ratified in accordance with the treaty-making powers authorized by the law of the ratifying country. The treaty therefore cannot itself be part of the criteria that gives to specified authorities the power to make treaties. As such the treaty and its provisions, including the uniformity directive, cannot be part of the ultimate criteria of validity.[20] Instead, the ratified treaty and its interpretive directive is legally valid in virtue of its derivation from a foundational norm. Whatever the basis of the authority of other interpretive standards, the uniformity directive's authority derives from other legal norms.

Routine judicial behavior in dealing with treaties confirms the derivative character of the uniformity directive. To determine whether transnational law applies to create legal entitlements, courts inquire whether it is part of national law. As a threshold question, the inquiry seeks to confirm that the relevant international commercial convention has been ratified and, where necessary, given domestic effect through implementing legislation.[21] Having confirmed transnational law's application, courts frequently go on to rely on the uniformity directive within the convention to construe

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20 For complexities in identifying the ultimate criteria of validity in the United States, see Greenawalt, *supra* note 17.

21 *See, e.g.*, VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780 (7th Cir. 2014); Asante Tech., Inc. v. PMC-Sierra, Inc., 164 F.Supp.2d 1142 (N.D. Cal. 2001); Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894 (7th Cir. 2005) (providing examples of cases that apply international transnational law, like the CISG, in domestic judicial proceedings).

that law's provisions.[22] This interpretive practice is not exceptionless; courts in ratifying countries appear to differ as to how seriously they take uniformity directive.[23] Nonetheless, even courts that fail to act on the uniformity directive give lip service to it.

It is worth emphasizing what follows and what does not follow from the derivative character of transnational law's uniformity directive. Because the directive's authority derives from the ultimate criteria of validity, it is not part of that criteria. Thus, ratification of transnational law in accordance with the criteria does not by itself amount to a shift in the legal system of the ratifying country. This is true even though the uniformity directive, as part of transnational law, introduces a novel standard of textual interpretation into domestic law. However, the fact that the ultimate rule of validity is unchanged does not mean that the content of the legal system of which it is a part is unaltered. The introduction of a novel interpretive standard arguably significantly changes the authorized interpretive methods available to a court. As a second-order standard that determines how a legal text identifies legal entitlements provided by transnational law, the uniformity directive often will be relied on. It potentially will help determine the scope of transnational law as well as its content. This is so particularly where key provisions of transnational law are vague, as is the case with a number of provisions in UNCITRAL's model laws. Perhaps most importantly, to construe transnational law uniformly, the directive requires courts to take into account the interpretations of that law by foreign courts—not merely as guidance, but as a legal obligation. Taken together, these changes in interpretive practice count as an important shift in law. Part III argues that this change makes the textual interpretation of transnational more difficult.

C. The Problem of Controversy

There is a familiar problem with Hart's practice-based account of law. On Hart's account, the ultimate criteria of law are determined by the convergent practice among legal officials. This requires wide official consensus as to the criteria norms must satisfy

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22 *See, e.g.*, Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et al., CISG-online case no. 1780, Tribunale di Forli (It.) (Feb. 16, 2009) [https://perma.cc/U4CS-52HP].

23 *Compare id., with* Hellenic Petro, LLC v. Elbow River Mktg. Ltd., 2019 WL 6114892 (E.D. Cal., Nov. 18, 2019); Raw Materials, Inc. v. Manfred Forberich GmbH & Co., 53 UCC Rep. Serv.2d 878 (N.D. Ill. 2004).

to count as law. But courts and other legal officials often disagree about controlling legal standards, including the most fundamental norms. Their practice reveals controversy, not wide acceptance, as to the governing criteria of validity. The presence of this sort of controversy means that Hartian positivism, dependent as it is on convention, therefore cannot be true.[24] With respect to methods of textual interpretation, judicial practice exhibits a similar lack of consensus. Courts disagree over whether legal texts are to be interpreted according to ordinary meaning, the drafter's intentions or some admixture of the two. The presence of controversy here prevents interpretive methods from being among the ultimate criteria of validity.[25]

A Hartian positivist has several possible responses to the problem. One is that there is wide official consensus over interpretive standards cast in suitably general terms. Disagreement, when it exists, is instead over specific formulations of these standards. This is expected when a standard lacks a canonical linguistic formulation, as provided in an authoritative legal document. Another response is that the controversy is over the application of these standards, not the standards themselves.[26] For instance, although legal officials agree that the terms of statutes are to be given their ordinary meaning, they disagree about what that meaning is. As another example, although officials agree that a federal statute's terms are not to apply to a particular outcome unless Congress evinces a clear intent to the contrary, they might disagree as to whether Congress has evinced the requisite intent.

For two reasons, it is unnecessary to decide here whether these responses are convincing. First, whatever official consensus or controversy there may be with respect to other interpretive methods, official acceptance of the uniformity directive is unnecessary. The directive is valid in virtue of being a provision of a treaty, which itself has been ratified in accordance with other legal rules.[27] As the

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24 For a classic statement of the objection, see RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 29 (1977); RONALD DWORKIN, LAW'S EMPIRE 15–30 (1986).

25 *See* Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1757–58 (2013).

26 *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 99–100, 118 (2001).

27 For example, the United States has ratified the CISG in accordance with Article II of the federal constitution. *See* U.S. CONST. art. II, § 2, cl. 2.

directive's authority is not part of the ultimate criteria of legal validity, it is enough that the directive is derivable from the criteria. Second, there appears to be wide official consensus as to the authority of transnational law's uniformity directive. For both reasons, the problem of controversy is not a problem for the mandate to interpret transnational law uniformly.

II. Methods of Textual Interpretation: The Interpretive Mandate

Hartian positivism is only one of many different theories of law, even among legal positivists. There is no consensus as to the correct theory of law; all are subject to continuing controversy. Even if there were consensus, there still could be disagreement about which interpretive methods were grounded in the consensus theory of law. For both reasons, because interpretive methods depend on a theory of law, which interpretive methods are linked to the correct legal theory also is controversial. Nonetheless, both domestic and treaty law recognize a variety of specific methods of interpretation of legal texts. These methods are in some, and perhaps many, instances a diverse lot. Predominant among them is the injunction to construe legal texts according to the ordinary meaning of their terms, the intended meaning of the enacting legislature or the understanding of those subject to text's provisions, or to promote the legislative purpose for which the text was enacted. Canons of textual interpretation, some reflecting aspects of linguistic communication generally and others the understandings peculiar to law, create interpretive presumptions. They add further tools of interpretation.

The plurality of different recognized legal methods makes textual interpretation difficult, whatever the correct theory of law might be. It makes the outcomes of interpretation unpredictable in hard cases, where equally authoritative methods underwrite different results. In short, the problem is at the level of interpretation, not at the foundational level of the nature of law. This Part briefly describes the plurality of interpretive methods present in domestic law and the law of treaties. Its purpose is not to criticize this state of affairs—the subject of a large literature--but to establish a baseline of sorts against which the uncertainty in the interpretation of transnational law can be assessed. Part III argues that, compared to this benchmark, the incorporation of the uniformity directive into domestic law makes the textual interpretation of transnational law even more uncertain and its results unpredictable.

A. Pluralistic and Constrained Interpretive Approaches

Legal systems tend to authorize similar methods of textual interpretation.[28] However, even when legal orders share the same interpretive methods, they can differ as to the rules (if any) for employing authorized methods. For instance, both the injunction to construe statutes according to their ordinary meaning and the legislative purpose behind their enactment might be part of two different legal systems. One country's law might contain a rule giving effect to legislative purpose over ordinary meaning while a rule of the other country's law requires giving effect to ordinary meaning over legislative purpose. Without a rule or principle that makes coherent use of various authorized interpretive methods, the methods merely provide a variety of considerations that judges may take into account in interpreting a legal text. An advantage of transnational textual interpretation is that it introduces an authorized common interpretive method into domestic law.

The authorized interpretive strategies of countries fall broadly into two approaches. One approach recognizes a variety of different interpretive methods with no mandated priority or weight given to any method. The other approach fixes a method or a principle for making different recognized interpretive methods coherent. The first approach is pluralistic, while the second is constrained. U.S. law governing statutory interpretation is an instance of the pluralistic stance. There is no federal statute that instructs courts how to interpret statutes generally. Although there are statutory rules that apply to the interpretation of federal statutes, they are not instructions for construing the meaning of statutory provisions.[29] The federal statutes that contain provisions prescribing how the

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28 *See* Gerrard Carney, *Comparative Approaches to Statutory Interpretation in Civil and Common Law Jurisdictions*, 36 STATUTE L. REV. 46, 58 (2014); ROBERT S. SUMMERS ET AL., *Interpretation and Comparative Analysis*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407 (D. Neil MacCormick & Robert S. Summers eds., 2016). For country surveys, see *id*. For the common origins of methods of statutory interpretation in civil law and common law, see Horst Klaus Lücke, *Statutory Interpretation: New Comparative Dimensions*, 54 INT'L & COMP. L. Q. 1023 (2005) (book review).

29 The Dictionary Act, for instance, applies generally to all federal statutes. *See* 1 U.S.C. §§ 1–7 (2021). In providing definitions of statutory terms, the Act assists in their interpretation. However, its definitions are not exhaustive and say nothing about how statutory provisions, in which the terms defined by the Act appear, are to be construed.

statute is to be interpreted are limited to specific subject matters.[30] Instead, interpretive methods with general application are created by judges. Courts recognize a variety of methods as authoritative, none of which has priority over the others.[31]

Gluck and Posner report that the federal appellate judges they surveyed overwhelmingly take a pluralistic approach to statutory interpretation.[32] Most adopt an approach they describe as "intentional eclecticism": a strategy that uses all available materials to implement what the court takes to be the Congressional intent expressed in legislation. At the same time, they find that a minority of judges surveyed, who rely on other stances to statutory interpretation, also make use of a range of interpretive materials. Gluck and Posner's study confirms that federal judges use a variety of interpretive methods. This eclecticism in method is present even when individual appellate judges differ in their general approach to statutory interpretation. An unanswered question is whether Congress or the Supreme Court has the authority to declare rules of statutory interpretation binding on lower courts.[33]

The second approach is "constrained." Rather than authorizing a variety of interpretive methods, without a rule or principle making them coherent, domestic law can give a particular method priority or weight as part of its general rule of interpretation. The method given priority or weight by the rule constrains the use of other interpretive methods. In interpreting statutes in accordance with the general rule, courts can rely on an interpretive method only if its use is consistent with the prescribed method.

The extent to which the constraint is restrictive depends, of course, on the content of the general rule or principle that gives

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30 *See, e.g.*, 11 U.S.C. § 102 (2021) (U.S. Bankruptcy Code rules of construction); Harmonized Tariff Schedule of the United States, General Rules of Interpretation and Additional U.S. Rules of Interpretation, 19 U.S.C. § 1202, available at https://hts.usitc.gov/current [https://perma.cc/ZC55-LET6].

31 *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); Frank Easterbrook, *The Absence of Method in Statutory Interpretation*, 81 U. CHI. L. REV. 81, 81, 84 (2017); Berman & Toh, *supra* note 25, at 1757–1758.

32 Gluck & Posner, *supra* note 31, at 1303.

33 *See, e.g.*, Nicholas Quinn Rosencranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2086 (2002); Gluck & Posner, *supra* note 31, at 1346; Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020).

priority or weight to a particular method. For example, an instruction to interpret a statute according to the ordinary meaning of its terms, without exception, is a highly restrictive constraint.[34] Louisiana's general rule of statutory interpretation, although less restrictive, imposes a significant constraint on interpretive method: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."[35] This rule prizes textual meaning over other interpretive tools, where the provision's limitations do not apply. By comparison, Arizona's general rule is less constraining. It provides that statutes "should be liberally construed to effect their objects and to promote justice."[36] While requiring resort to legislative intent ("objects"), the rule does not bar reliance on textual meaning to construe a statute.

Mildly constraining are certain "Interpretation Acts" enacted in the countries of the British Commonwealth. Some of these Acts contain general rules of construction. For example, Australia's Victoria Interpretation of Legislation Act 1984 prescribes how statutes are to be interpreted. Article 35 of the Act provides:

> In the interpretation of a provision of an Act or subordinate instrument—(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object[.][37]

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34 *Cf.* COLO. REV. STAT. § 2-4-101 (2021) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

35 LA. CIV. CODE ANN., art. 9 (2021).

36 ARIZ. REV. STAT. § 1-211 (LexisNexis 2021); *accord* IOWA CODE § 4.2 (2021) (offering that statutes shall be liberally construed to promote their objects and "assist the parties in obtaining justice").

37 *Interpretation of Legislation Act 1984* (Vic) s 35 (Austl.) (http://classic.austlii.edu.au/au/legis/vic/consol_act/iola1984322/) [https://perma.cc/2TWJ-MB7Q]. *Cf.* Singapore Interpretation Act 1965 § 9A (https://sso.agc.gov.sg/Act/IA1965?ProvIds=P12-#pr9A) [https://perma.cc/5KMQ-ZM56]; Laws of Malaysia, Interpretation Acts 1948 and 1967 § 17A (2006) (Commonwealth Countries Interpretation Acts) (https://ppuu.upm.edu.my/upload/dokumen/20180726160154RUJ_3_INTERPRETATION_ACT_388.pdf) [https://perma.cc/GPL8-WVNX].

By its terms, the Article requires that a statutory interpretation construe the legislative purpose expressed in the statute. Considered alone, the Article limits authorized interpretive methods to those aimed at discovering legislative intent. However, under Australian law the process of interpretation is not confined to giving effect to the legislative purpose fixed in a statute. Rather, interpretation is a three-stage affair involving the text of the provision, the statutory context in which the provision appears, and the legislative purpose behind the provision. This process is the "text, context, purpose" approach to statutory interpretation.[38]

Interpretation by "text, context, purpose" does not significantly constrain the use of these interpretive methods. Although the process excludes some interpretive methods, such as legislative intentions not reflected in the statute, it does not give priority or special weight to purpose over text or context. Rather, these methods appear to have equal importance in interpretation. As often noted, the text of the statute is the starting point for any interpretation if there are contentious issues in its construction.[39] Courts adopt the ordinary or plain meaning of the statute's terms: "the meaning commonly attached to words by the users of them."[40] However, the ordinary or plain meaning will not always be determinative. Scientific, technical, and legal terms of art are to be given their specific technical meaning.[41] Because the legislative intent is given effect only if it is fixed in the statute, the meaning of the statute must be determined independently of legislative purpose. Otherwise, there is no difference between what the statute provides and what the legislature intended it to provide. Textual meaning is primary. For this reason, in its role in statutory interpretation the meaning of the text constrains the legislative purpose as much as the legislative purpose constrains the meaning of the text.

Even considered alone, Article 35's rule favouring a purposive

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38 *See* James Duffy & John O'Brien, *When Interpretation Acts Require Interpretation: Purposive Statutory Interpretation and Criminal Liability in Queensland*, 40 U. NEW S. WALES L. J. 952, 952 (2017) (describing the Australian High Court's "modern approach" to statutory interpretation).

39 *See* Australian Fin Direct Ltd v Dir of Consumer Affs, (Vic) [2007] HCA 57 (Austl.).

40 KIM LEWISON & DAVID HUGHES, THE INTERPRETATION OF CONTRACTS IN AUSTRALIA 167 (4th ed. 2012).

41 *See* N Guthridge Ltd v Wilfley Ore Concentrator Syndicate, Ltd, [1906] CLR 583 (Austl.).

interpretation is only mildly restrictive. For one thing, the legislative purpose behind a statute might not be apparent from the text or extrinsic materials. Further complicating the inquiry into purpose is the familiar problem that the purpose often represents a legislative compromise, which itself can be hard to discern with any precision. In both cases, Article 35's directive does not help interpret a statute. Beyond these difficulties, the Article does not help select an interpretation in cases in which there is more than one equally plausible construction. Suppose there are two different statutory constructions equally supported by the text's meaning. Suppose too that both constructions would promote the legislative purpose reflected in the statute. Because Article 35 requires selecting the construction that promotes the statute's purpose, it does not prefer one construction over the other. The preference for one of the constructions therefore must be made on a basis other than that described in Article 35.[42]

Both pluralistic and constrained approaches to statutory interpretation, to different extents, leave courts with discretion as to the choice of interpretive method. Domestic law lacking a general rule of interpretation permits a court to select among authorized interpretive methods.[43] Under that law a court can rely on one or more of these methods to interpret a statute. It can base its construction only on the text of the relevant statute. Alternatively, the court can rely on legislative purpose, canons of construction or other authorized methods in addition to the meaning of the text.

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42 Even less restrictive are the general rules of construction contained in the Uniform Statute and Rule Construction Act (1995), proposed for adoption by the Uniform Law Commission. *See* UNIF. STATUTE AND RULE CONSTR. ACT (UNIF. L. COMM'N 1995). Under section 18 of the Act, a statute is to be interpreted inter alia to give effect to its objective and purpose as well its entire text. *Id.* § 18(a)(1), (2). For its part, section 19 provides that the statute's text is the primary source of its meaning. Because section 18 requires interpretation to give effect to both the entire text and legislative purpose, both interpretive methods are of equal importance. Neither therefore constrains the other. Only one state (New Mexico) to date has enacted the Act. *See* N.M. STAT. ANN. 12-2A-1 et seq. (2021).

43 Justice Breyer describes the interpretive discretion a pluralistic approach gives courts: "[T]he fact that most judges agree that these basic elements—language, history, tradition, precedent, purpose, and consequence—are useful does not mean they agree about just where and how to use them. Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. The differences of emphasis matters . . ." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 6 (2004).

Lacking a general rule organizing interpretive methods, a pluralistic approach allows a court to choose the interpretive method that seems appropriate to the statutory issue presented.

A general rule of interpretation constrains the choice of interpretive method. However, the extent to which the rule limits a court's discretion depends on the content of the constraint. A precise rule requiring use of a particular interpretive method without limitation does not allow reliance on other methods, but a rule with lesser effect allows some discretion in the choice of interpretive tools. For instance, a rule that bars reliance on legislative history to discern statutory meaning unless the statute is ambiguous leaves to the court the choice of method when the statute is ambiguous.[44] If the court finds the statute to be ambiguous, it can rely on legislative history as well as other interpretive tools. Likewise, a rule that prescribes the purpose of statutory interpretation leaves to the court's discretion the choice of interpretive method to promote that purpose. The rule limits but does not require use of a particular interpretive method. Where domestic law contains general rules of interpretation, it appears to allow discretion in the choice of interpretive methods. As argued in the next section, the rules of interpretation applicable to treaties also give courts discretion in interpretation.

B. The Treaty Law Benchmark

The Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention") governs the interpretation of treaties.[45] Its rules of interpretation apply in virtue of ratification of the treaty or customary international law, which contains interpretive rules reflected in the VCLT.[46] Under the VCLT the aim of interpretation is to construe the treaty according to the meaning intended by the parties to it.[47] Article 31 of the VCLT provides three rules of

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44 *Cf.* Pepper v. Hart, [1992] UKHL 3, 1 All E.R. 42 (U.K.).

45 1155 U.N.T.S. 331 (1969).

46 *See, e.g.*, RICHARD GARDNER, TREATY INTERPRETATION 18 (2d ed. 2015); Gonzales v. Guitterrez, 311 F.3d 942, 949 n.15 (9th Cir. 2002); Haitian Centers Council v. Sales, 969 F.2d 1350, 1361-1362 (2d Cir. 1992); *cf.* Restatement (Fourth) of the Foreign Relations of the United States § 306 comm. *a* (2018) (concluding the VCLT's rules of treaty interpretation are accepted as reflecting customary international law, including by the United States).

47 *See* 1155 U.N.T.S. 331, art. 31(4) (arguing that special meaning be given to a treaty

interpretation to meet this aim. Article 31(1) states the first rule: a treaty is to 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 light of its object and purpose."[48] The two other rules require consideration of certain sources to interpret the treaty under Article 31(1)'s rule. As a second rule, Article 31(2) stipulates that, in addition to the text, the context comprises two sorts of items: agreements relating to the treaty made by all treaty parties at the treaty's conclusion, and instruments made in connection with the treaty's conclusion and accepted by other parties as instruments relating to the treaty. The third rule, stated in Article 31(3), requires consideration of three sorts of items in addition to the context: subsequent agreements concerning the treaty's interpretation made between the treaty parties, subsequent practices in applying the treaty which establishes an agreement regarding its interpretation, and relevant rules of international law applicable to relations between the parties.

Although Article 31(1)'s rule states a requirement that interpretations must meet, not the methods to be used to satisfy that requirement, certain methods of interpretation are reliably associated with the requirement. Conventional meaning discloses the ordinary meaning of treaty terms. For its part, information about the entire text of the treaty as well as agreements between treaty parties made at the conclusion of the treaty describes the context in which the treaty's terms are produced. Finally, the intent of the drafters in drafting a term is relevant to the term's purpose. Each of these interpretive methods helps interpret a treaty according to the ordinary meaning of its terms, taking into account context and the term's purpose, respectively.

The VCLT rules of interpretation constrain the use of interpretive methods to construe treaties. In particular, Article 32 restricts reliance on preparatory work in the process of construction. The Article only permits recourse to supplementary material such as preparatory work to confirm or determine the meaning in two circumstances: when the interpretation in accordance with Article 31 leaves meaning ambiguous or obscure or when Article 31's

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term if the parties' intended meaning is established); Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 EUR. J. INT'L L. 169, 172-73 (2015).

48 *See* 1155 U.N.T.S. 331, art. 31(4) (1969).

application produces a manifestly absurd or unreasonable result. By its terms, Article 32 gives priority to the interpretive methods permitted under Article 31's general rules.[49] Preparatory work can be used to clarify the meaning of a treaty provision only if application of Article 31's rules do not do so. If Article 31's rules do not leave the meaning of the provision ambiguous or obscure, or yield an absurd or unreasonable result, Article 32 does not allow reliance on preparatory work to clarify the meaning.

Nonetheless, Article 32's constraint on the use of preparatory material is mild. This is because Article 31(1) is sufficiently malleable to avoid Article 32's application. As noted above, Article 31(1)'s rule requires that the treaty's terms be interpreted in accordance with their ordinary meaning, taking into account context and the terms' purpose. This rule of interpretation is not a plain meaning rule. It does not prize conventional meaning over context or the purpose for which the term is used.[50] Article 31(1) instead mandates that the construction be based on the conventional meaning of terms, the context of the enactment, and their intended effect. According to the Article, treaty terms must be interpreted according to the ordinary meaning, "in light of" context and their "object or purpose." Thus, for purposes of construing the meaning of a treaty term, none of these interpretive methods is given priority. Each is on par with the other. As a result, Article 31(1) gives no guidance where reliance on the methods yields conflicting results.

It follows that a court can exercise its interpretive discretion given by Article 31(1) to allow or bar reliance on preparatory materials. For example, the ordinary meaning of a treaty term might conflict with the purpose for which the use of the term was intended. In this case Article 31(1) leaves to the court the choice of interpretive method to construe the term's meaning. In light of the conflict among interpretive methods, the court can find the meaning

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49 *See* Ulf Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation*, 49 NETH. INT'L L. REV. 133, 136 (2007).

50 *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 206-207 (3d ed. 2013) (arguing that Article 31(1) gives no greater weight to one factor over others). For assertions that Article 31 describes a plain meaning rule, see Rebecca M. Kysar, *Interpreting Tax Treaties*, 101 IOWA L. REV. 1327, 1402 (2016) (concluding that the Vienna Convention adopts a "plain meaning approach" to interpretation); Evan Criddle, *The Vienna Convention on the Law of Treaties and U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 438 (2004) (Article 31 states a "robust textualist canon").

to be unclear. Accordingly, Article 32(a) permits it to rely on preparatory materials to clarify the term's meaning. Alternatively, the court can rely on either the term's ordinary meaning or its intended purpose to clarify the term's meaning in a way that avoids an absurd or unreasonable result. Clarified in accordance with the interpretive methods permitted by Article 31(1), Article 32 does not allow preparatory materials to inform the meaning of the term.

The presence of interpretive discretion makes construction of a treaty sometimes difficult, and a forecast of its judicial construction based on interpretive methods uncertain. Different interpretive methods provide different sorts of evidence about the meaning of the text, and without a prescribed method for combining them, it is hard to know whether an interpretation is correct. More to the point, the outcome of a judicial interpretation of a treaty is sometimes hard to predict based on the rules of interpretation of treaties. The extent to which discretion makes treaty interpretation difficult is an empirical question about the application of interpretive methods to specific treaties, about which we have nothing to say. For purposes of describing a benchmark against which transnational law can be compared, it is enough to note the discretion in the rules of treaty interpretation leaves to courts. Part III argues that, compared to this benchmark, transnational law makes interpretation more difficult to predict.

There is a question as to whether the rules of treaty interpretation apply to legislation implementing treaties. The law of the United States and a few other nations distinguishes between two sorts of treaties: self-executing and non-self-executing. Self-executing treaties have automatic effect as part of domestic law. They do not require implementing legislation to be enforceable as domestic law in court. Non-self-executing treaties, to have domestic effect, require implementing legislation. UNCITRAL conventions are a mix of self-executing and non-self-executing treaties.[51] The VCLT's rules of treaty interpretation, as a

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51 *See, e.g.*, Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995); Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (offering that the CISG is a self-executing treaty); Secretary of State, Letter of Submission, August 8, 2014, Senate Consideration of Treaty Document 114-19, available at www.congress.gov (concluding that the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit is a non-self-executing treaty). Whether a treaty is self-executing or non-self-executing sometimes is unclear. *Compare* CLMS Mgmt.

codification of customary international law, apply to the construction of self-executing treaties, even in the courts of nations that have not ratified the Vienna Convention.[52]

The interpretive rules applicable to legislation implementing non-self-executing treaties are less clear. Two different positions on the matter can be taken. One is that, because a non-self-executing treaty is enforceable domestically only by legislation, domestic law rules of statutory interpretation control. The other position is that the VCLT's rules of interpretation applicable to treaties also govern the interpretation of legislation implementing a treaty.[53] U.S. courts appear to take the latter position, at least where the legislation tracks the treaty's language.[54] We do not have to decide which view is correct. If domestic law rules of statutory interpretation govern the

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Serv. Ltd. P'ship v. Amwins Brokerage of Ga., LLC, 8 F.4th 1007, 1024 (9th Cir. 2021) (arguing the New York Convention is a self-executing treaty), *with* Stephan v. Am. Int'l Ins., 66 F.3d 41, 45 (2d Cir. 1995) (arguing that the New York Convention not self-executing).

52 *See, e.g.*, Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975) (applying the VCLT rules to the construction of the Warsaw Convention).

53 The source of authority (if any) to apply the VCLT's rules of interpretation to domestic legislation implementing a treaty is controversial. One view might be that customary international law, as federal common law, authorizes application of the VCLT's rules to the interpretation of implementing legislation. An opposing view is that the statute implementing a treaty evinces a presumptive Congressional intent authorizing the use of the VCLT's rules to interpret the statute's provisions. *Cf.* Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1133-1134 (2014) (arguing that federal courts rely on legislative intent to justify reliance on customary international law in statutory interpretation). The controversy implicates the general question as to whether customary international law is federal law, applicable without the need for enacting legislation. For a sample of the large literature on the question, *see* Ernest Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

54 *See, e.g.*, Pliego v. Hayes, 843 F.3d 226 (6th Cir. 2001); *cf.* United States v. Martinez, 599 F.Supp.2d 784 (W.D. Tex. 2009) (finding the statute implementing Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography should be interpreted based on the VCLT's rules of interpretation); Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 YALE L. J. 1784, 1801-1805 (2011) (surveying cases in which non-executing treaties influence the interpretation of statutes); *cf.* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010) (recommending that the interpretation of a statute implementing a treaty be interpreted consistent with the interpretation of the treaty). For the same view taken by Australian courts, see Ackers v Saad Investment Co, Ltd, [2010] FCA 1221 ¶ 45 (Austl.).

construction of statutes implementing non-self-executing treaties, the benchmark against which transnational law can be compared will not be treaty law. Domestic law rules instead are the appropriate baseline against which the difficulty of interpreting implementing statutes is assessed. However, domestic law rules of statutory interpretation, like the VCLT's interpretive rules, are an unstructured mix of standards that leave courts with discretion in the selection and application of interpretive methods.[55] Thus, the argument in Part III is unaffected by the change in the benchmark of comparison. The argument's conclusion that transnational law makes interpretation more difficult holds even if domestic law rules control the interpretation of implementing statutes. For ease of presentation, Part III assumes that the VCLT's rules of interpretation govern the interpretation of statutes implementing non-self-executing treaties.

III. The Uniformity Directive in the Interpretation of Transnational Law

Transnational law complicates treaty interpretation. This is because its uniformity directive introduces a method of interpretation foreign to VCLT's methods applicable to the interpretation of treaties generally. The uniformity directive is mandatory: courts must take uniformity into account in interpreting the treaty's provisions, whatever other interpretive tools are available to them. The directive adds to, rather than replaces, the methods for interpreting treaties generally. This increases the variety of methods courts must take into account in construing transnational law. Although the VCLT's rules of treaty interpretation constrain the choice of interpretive methods, the addition of the uniformity directive alters the constraint. The altered constraint increases the discretion courts have in the selection of methods to interpret transnational law. In increasing the interpretive discretion, the uniformity directive makes interpretation more difficult than it would be without the directive. This Part describes and defends the claims on which this conclusion is based.

A. *Uniformity as an Interpretive Method*

The uniformity directive is the requirement that an interpretation

55 *See supra* notes 33-35 and accompanying text.

of a treaty take uniformity in the treaty's application into account.[56] There are different versions of this directive. At a minimum, a uniform application of a treaty's provision requires the applying tribunal to recognize how other tribunals have construed the provision, and give their construction some weight in its own construction of the provision.[57] A more demanding requirement of uniformity is that the applying tribunal give weight to the reasoning other tribunals offer in support of their constructions. A yet different demand for uniformity requires the tribunal to forecast the prospect that its interpretation will become the consensus interpretation. Although these demands all require that an interpretation take uniformity into account, they differ as to the way in which uniformity must be considered, or the sort of uniformity that must be taken into account in the interpretation. The language of the uniformity directive in international commercial law conventions is consistent with these different understandings of the uniformity requirement.[58]

Whatever its specific content, a uniformity directive considers a consensus in interpretation among tribunals to be a reason for the interpreting tribunal to adopt the same construction. In this the directive is in an important respect similar to a range of phenomena that are "path dependent." In the broadest sense of the term, an economic outcome is path dependent if it results from or is influenced by previous choices, rather than current conditions.[59] A

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56 *See* CISG, *supra* note 1, art. 7(1) ("[R]egard is to be had to [the CISG's] international character and the need to promote uniformity in its application . . . in international trade.").

57 *See, e.g.*, Hub St Equip Pty Ltd v Energy City Qatar Co., [2021] FCAFC 110 ¶ 18 (Austl.) ("Due regard should be paid to the reasoned decisions of the courts of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law [on International Commercial Arbitration]. . . ."); *cf.* Ginger Dixon, *The Harmonizing Directive of Section 1508: Foreign Case Law's Role in Interpreting Chapter 15 of the U.S. Bankruptcy Code*, 36 NW. J. INT'L L. & BUS. 435 (2016) (recommending that section 1508 of the U.S. Bankruptcy Code be construed to require courts to treat as persuasive authority foreign case law interpreting provisions of the UNCITRAL Model Law on Cross-Border Insolvency Act, as adopted, similar to provisions of Chapter 15 of the Bankruptcy Code).

58 *See, e.g.,* CISG, *supra* note 1, art. 7(1) (arguing that, in the interpretation of the CISG, "regard is to be had . . . to the need to promote uniformity in its application . . . in international trade").

59 *See* Stan J. Leibowitz & Stephen E. Margolis, *Path Dependence, Lock-In and History*, 11 J. L. ECON. & ORG. 205 (1995). For legal applications of path dependence, *see*

path dependent outcome may not be efficient or suitable to current conditions but persists given previous choices. To be sure, the uniformity directive is an interpretive method—a normative requirement—not a causal explanation. Nonetheless, at the level of interpretation, the directive counts a consensus in the constructions in previous decisions as a reason for adopting the same construction in the instant case. The directive requires path dependence in treaty interpretation.

Transnational law's uniformity directive understands the demand for uniformity in interpretation in a particular way. Many of the UNCITRAL's products contain a uniformity directive, stated in almost identical terms.[60] Of these products, the CISG is the most widely adopted. Article 7 of the CISG provides that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need for uniformity in its application and the observance of good faith in international trade."[61] The Article's uniformity directive is weak. Article 7 does not specify how much weight the need for uniformity must be given in the CISG's interpretation. It requires only that the applying tribunal have "regard for" this need. To have "regard for" uniformity in interpretation demands at a minimum that the way other tribunals have construed a provision, including foreign courts, be a consideration that the applying tribunal must take into account in its construction of the CISG's provisions.[62] Beyond this, the directive does not specify how the decisions of other courts are to be taken into account, nor does it seemingly demand that the reasoning of other courts be followed.

Courts and commentators construe Article 7(1)'s directive to require the CISG to be interpreted "autonomously," not nationalistically.[63] An autonomous interpretation mandates

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Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998).

60 *See* CISG, *supra* note 1 and accompanying text.

61 CISG, *supra* note 1, art. 7(1).

62 *See* Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et. al., CISG-online case no. 1780, Tribunale di Forli (It.) (July 12, 2002).

63 *See* Medical Marketing Int'l v. Int'l Medico Scientifica, S.R.L., 1999 WL 311945, at *2 (E.D. La. 1999); SO.M.AGRI s.a.s. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, CISG-online case no. 819, Tribunale di Padova (It.) (Feb. 25, 2004);

construing the CISG's provisions independently of domestic law. It does not allow a court to rely on the meaning given to particular terms by domestic law, even if the specific CISG provision and its domestic law counterpart are expressed in the same words. The apparent thought is that an interpretation of the CISG based on notions borrowed from domestic law will not be favored by tribunals in other ratifying countries. A uniform interpretation is more likely to result when courts construe the CISG's provisions independently of domestic law.

The uniformity directive is a distinct interpretive tool of international commercial conventions, with its own justification. Text and legislative intent, for instance, are methods that provide evidence of the meaning of the text's provisions. For their part, canons of construction, whether linguistic or substantive, arguably reflect the presumptive legislative intent with respect to the text's meaning.[64] By contrast, uniformity is an interpretive method that favors a construction of a text (other things being equal) because other courts have favored the same construction. The fact that other courts have converged on a construction is a reason to adopt it too. Nonetheless, the construction may not implement legislative intent or be best supported by the text.

This difference in result is unsurprising given the directive's distinct rationale. UNCITRAL conventions are applied by national courts in ratifying countries. There is therefore the potential for divergent judicial interpretations of the same provisions. The injunction to have a regard for uniformity helps coordinate interpretations by tribunals so that they converge on a construction of relevant provisions.[65] This convergence in interpretation among tribunals benefits parties subject the UNCITRAL's products by

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FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTIONS 12 (2d ed. 2012*);* INGEBORG SCHWENZER & PASCAL HACHEM, *Article 7, in* SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 119 (I. Schwenzer ed., 4th ed. 2016); C.M. BIANCA & M.J. BONELL, *Article 7, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 75 (C.M. Bianca & M.J. Bonell eds., 1987).

64 *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 348, 383 (2005).

65 For a survey of how tribunals have applied the uniformity directive under the CISG, see CLAYTON P. GILLETTE & STEVEN D. WALT, THE INTERNATIONAL SALES CONTRACT: 40 YEARS OF THE CISG 270 (F. Benatti, S.A. Garcia-Long & F. Vigliano eds., 2022). The Uniform Commercial Code, enacted as part of state law, contains a uniformity directive. *See* U.C.C. § 1-301(a) (2017).

enabling them to forecast with some confidence how provisions applicable to their transactions will be construed by national courts and arbitral tribunals. By comparison, the rationale for relying on the text is accuracy. The meaning of its terms accurately reflects their ordinary meaning and presumptively reflects the meaning intended by the legislature. The justification of the uniformity directive is convergence of interpretations, not accuracy.

B. The Uniformity Directive Among the Mix of Interpretive Methods

As noted, the ratification of an international commercial convention incorporates the uniformity directive into national law. As part of that convention, the directive is an interpretive method applicable to the ratified convention. Because the uniformity directive is mandatory, a court in the ratifying country cannot construe the convention without at least taking uniformity into account. At the same time, the directive does not displace other interpretive methods applicable to treaties generally, as part of national law. Thus, these methods continue to be applicable to construe the convention. In short, the directive is a mandatory but not exclusive interpretive method.

1. *Mandatory application*. The uniformity directive is a mandatory interpretive method ("regard is to be had . . . to the need for uniformity"[66]). It requires courts in a ratifying country, in interpreting the convention, to consider the impact of a proposed construction of the convention on uniformity in the convention's interpretation. Thus, a court whose interpretation relies only on interpretive methods reflected in the VCLT's rules of interpretation, without taking uniformity in account, violates the directive. It breaches the obligation that Article 7(1) of the CISG, and comparable provisions of other UNCITRAL conventions, impose on tribunals interpreting transnational law. This is true even if the court interprets transnational law in accordance with the VCLT's rules of interpretation.[67]

Commentators label the tendency of courts to interpret transnational law through the lens of domestic law notions the

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66 *See id*.

67 *See supra* notes 50-51 and accompanying text.

"homeward trend."[68] The charge sticks only because the interpretive practice criticized does not take uniformity into account. The criticism has been made with respect to interpretations of the CISG's substantive provisions.[69] But the charge has a more general application, extending to the CISG's interpretive provisions too. It applies also to constructions of transnational law that rely only on either domestic law interpretive rules or the VCLT's rules of interpretation. In both instances the constructions fail to take uniformity into account. As a result, constructions that ignore the uniformity directive are instances of the "homeward trend."

Gainsford v. Tannenbaum,[70] decided by an Australian appellate court, is an instance of the "homeward trend" in interpretation. The case involved the interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law"),[71] enacted into Australian law as the Cross-Border Insolvency Act ("Cross-Border Act" or "Act").[72] Under the Model Law and Cross-Border Act, Australian courts generally must recognize a foreign insolvency proceeding if certain specified conditions are met. A foreign proceeding must be recognized as a foreign main proceeding if the proceeding takes place in the country in which the debtor has its center of main interests. If the foreign proceeding takes place in a country in which the debtor does not have its center of main interests, the proceeding must be recognized as a foreign non-main proceeding. More extensive relief is available if the foreign proceeding is a main rather than non-main proceeding.

In *Gainsford*, recognition of an insolvency proceeding initiated

68 *See* Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 15 VINDOBONA J. INT'L COMM. L. & ARB. 15, 15 (2009); John Honnold, *The Sales Convention In Action--Uniform International Words: Uniform Application?*, 8 J. L. & COMM. 207, 208 (1988); Michael F. Sturley, *International Uniform Law in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987).

69 *See*, *e.g.*, Joseph Lookofsky & Harry Flechtner, *Nominating* Manfred Foberich*: The Worst CISG Decision in 25 Years?*, 9 VINDOBONA J. INT'L COMM. L. & ARB. 199 (2005); Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 400 (2004); Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get it Right?*, 3 LOY. U. CHI. INT'L L. REV. 85 (2005).

70 *See* Gainsford v. Tannenbaum, [2012] FCA 904 (Austl.) [hereinafter Gainsford].

71 *See* UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 15(3) (2014) [hereinafter Model Law].

72 *Cross-Border Insolvency Act 2008* (Cth) (Austl.) [hereinafter Cross-Border Act].

in South Africa against an individual debtor was sought in Australia. The debtor had left South Africa and settled in Australia before the South African bankruptcy proceeding was commenced. Among other issues, the Federal Court had to determine whether the South African insolvency proceeding was a foreign main proceeding or a foreign non-main proceeding. Under the Cross-Border Act there is a presumption that, absent contrary proof, the individual debtor's center of main interests is her habitual residence.[73] However, neither the Act nor the Model Law define "habitual residence." In addition, under the Act a foreign non-main proceeding takes place where the individual debtor has an "establishment."[74] Construing these terms, the *Gainsford* court concluded that neither the debtor's center of main interests nor his establishment was in South Africa.

To construe the term "habitual residence," the court relied on Australian principles of statutory construction.[75] Its reliance is misplaced. To be sure, the Model Law is a template for adoption as domestic law, not a proposal for a treaty,[76] and the Cross-Border Act therefore is a piece of ordinary domestic legislation. As such, Australian principles of statutory interpretation govern the Act's construction. However, Article 8 of the Act states a rule of interpretation that requires regard for uniformity in the interpretation of the Act.[77] This rule is specific to the Act; it is not among domestic principles of construction that apply to statutes generally. In construing the term "habitual residence" through the lens of Australian principles of statutory interpretation, the court follows the "homeward trend" in the interpretation of the Act.

The *Gainsford* court hedges its bet by finding, alternatively, that these principles allow reliance on international conventions to inform the meaning of the term under the Act. Determining that "habitual residence" had a settled meaning there, the court elected to construe the term in the same way for purposes of the Act.[78] But the question is not whether Australian principles of statutory

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73 *See* Cross-Border Act, *supra* note 72, § 16(3); Model Law, *supra* note 71, art. 16(3).

74 *See* Cross-Border Act, *supra* note 72, §§ 2(f), 17(2)(b); Model Law, *supra* note 71, arts. 2(f) & 17(2)(b).

75 *See* Gainsford, *supra* note 70, at [37].

76 *See* CISG, *supra* note 1.

77 *See* Cross-Border Act, *supra* note 72, art. 8.

78 *See* Gainsford, *supra* note 70, at [40]-[41].

interpretation allow recourse to international conventions. Under the terms of the Act, it must be whether the Act's uniformity directive allows reliance on these international instruments to construe the meaning of the Act's terms.

The court's route to its construction may or may not comply with Article 8's uniformity directive, depending on its interpretation. Article 8 of the Model Law and the Cross-Border Act both provide that "[i]n the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application." If "international origin" refers to the particular law being interpreted, the required source of interpretation is law-specific. In this case, Article 8's mandate requires the court to take into account other courts' constructions of "habitual residence" only under the Model Law, as incorporated into the domestic law of other nations. Judicial constructions of the term "habitual residence" as part of conventions therefore are irrelevant under Article 8. In inquiring into the interpretation of a term in treaties or domestic legislation other than legislation implementing the Model Law, the court would fail to follow Article 8's uniformity directive. However, if "international origin" in Article 8 refers to international instruments generally, the required source of interpretation is potentially all laws with an international basis. In this case, the court's reliance on the meaning of "habitual residence" in treaties would not violate Article 8's uniformity directive. Ultimately, the better understanding of Article 8's relevant language probably depends on which construction more effectively harmonizes applications of the Model Law, as adopted in domestic legislation.

2. *Non-displacing effect*. The uniformity directive supplements rather than displaces the VCLT's rules of treaty interpretation applicable to international commercial conventions. Three considerations show that the directive has this limited effect. First, the terms of the uniformity directive prescribe an interpretive method rather than displacing other interpretive methods in force. For instance, the CISG's uniformity directive requires that in the interpretation of the CISG "regard be had" to uniformity.[79] The directive in other international commercial conventions contains the same relevant language.

To require that "regard be had" to uniformity obligates a court

79 *See* CISG, *supra* note 1, art. 7(1).

to take uniformity into account in the process of interpretation. However, the requirement does not prevent the court from relying on other interpretive methods in force as well. Nor does it conflict with other interpretive methods that applicable rules of interpretation require courts to use. Article 31(1) of the VCLT requires a treaty to be interpreted in accordance with the ordinary meaning of the treaty's terms, their context and object or purpose.[80] The uniformity directive, when applicable, adds a method to these interpretive methods. Nonetheless, a court still can interpret an international commercial convention in accordance with these interpretive methods while also taking uniformity into account. This is because, taken together, neither the VCLT's rules of interpretation nor the directive are exclusive interpretive methods. Thus, the addition of the uniformity directive does not preempt the interpretive methods required by the VCLT.

Second, international commercial conventions containing the uniformity directive have a limited scope. They do not address procedural rules such as rules of evidence, standards of proof, statutes of limitation and arguably attorneys' fees.[81] These matters instead are left to the applicable national law of the forum. In addition, international commercial conventions expressly omit provisions on a range of substantive issues likely to arise in commercial contexts, such as the validity of contracts or application of tort law.[82] Their limited scope suggests that uniformity is not the only concern of transnational law. Other concerns, such as the provision of efficient default terms, arguably are important too.[83] If so, the benefits of a uniform construction must be taken into account in interpretation along with other factors, including the ordinary meaning of terms of transnational law or their purpose. As a result, the inclusion of the directive in a treaty with limited scope does not signal that uniformity is the sole method for interpreting transnational law. The safer inference from the transnational law's limited scope is that, unlike some other treaties, uniformity is an

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80 *See supra* note 52 and accompanying text.

81 *See generally* Clayton P. Gillette & Steven D. Walt, *Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG's Application*, 22 UNIF. L. REV. 452, 482-483 (2017).

82 *See, e.g.,* CISG, *supra* note 1, arts. 4(a),(b), 5.

83 The Preamble to the CISG, for example, recites the consideration that "the development of international trade on the basis of . . . mutual benefit is an important element . . . ." *See id.*

additional interpretive requirement.

Third, the view that the uniformity directive displaces other interpretive methods is implausible. Treaties that have just become effective initially lack judicial interpretations; a convergence in interpretation can occur only after a series of cases construing its terms.[84] The interpretation in the initial cases in the series, by necessity, must be made in an uncoordinated fashion. But if the uniformity directive displaces other methods of interpretation in force, there are no means of interpreting the treaty's terms in these cases. This is unlikely. Thus, rather than displacing other interpretive methods, the application of the directive presupposes that they remain in force.

The displacement of interpretive methods likely also frustrates the aim of textual interpretation. Scholars disagree about this aim. Some view the point of textual interpretation to be to understand the semantic meaning conveyed by an act of communication, such as a text. Other scholars view the aim of interpretation to be to understand the linguistic meaning the drafters intend to convey in the text.[85] Whichever view is correct, methods of interpretation allow inferences about the semantic meaning of the text or communicative intent conveyed by it. They ease the burden of determining the semantic meaning of the text or the information the drafter's intent adds to that meaning. The displacement of other interpretive methods by the uniformity directive would leave uniformity as the sole basis upon which to make inferences about semantic meaning or communicative intent. By itself, uniformity is unlikely to be a reliable basis for drawing inferences about them. The ordinary meaning of the text or its purpose is a more reliable guide to the text's semantic meaning or the communicative intent of its authors. Thus, reliance on the uniformity directive alone will not best accomplish the aim of interpretation.

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84 The interpretation of several of the provisions of the Convention on the Recognition and Enforcement of Arbitral Awards might be an example. For instance, the settled understanding of Article II(3), which allows exceptions to the enforcement of arbitral awards, is that the exceptions refer to contract defenses to enforcement, not to public policy considerations. *See* Convention on the Recognition and Enforcement of Arbitral Awards, United Nations, June 10, 1958, 330 U.N.T.S. 3.

85 *See supra* notes 8-10 and accompanying text; Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 247 (A. Marmor & S. Soames eds., 2011).

C. The Increased Difficulty of Interpretation

The uniformity directive adds an interpretive method to the VCLT's rules of interpretation governing the construction of transnational law. As applied, Article 31(1) of the VCLT requires the interpretation of an international commercial convention to be in accordance with the ordinary meaning of the convention's terms taking into account their context and the convention's object or purpose. These different sources reflect different methods of interpretation: the conventional meaning of the convention's terms, their place within the convention as a whole, and the end the parties intend the convention to accomplish. The mandate that the construction of transnational law take into account uniformity in interpretation is a separate requirement. Article 31(1) requires that the meaning of the convention's terms be interpreted on the basis of specified methods. By comparison, the uniformity directive requires that consideration be given to whether an interpretation harmonizes with the interpretations of other tribunals.

Because Article 31(1)'s interpretive methods are separate from the uniformity directive, an interpretation of transnational law must be based on both. The interpretation must be in accordance with ordinary meaning of relevant terms, context, and the transnational law's purpose, in addition to considering the harmonization of the interpretation with the interpretations of other tribunals. As noted above,[86] Article 31(1)'s rule of interpretation does not give priority to any of the interpretative methods it prescribes. Instead, the rule describes a plurality of methods each of which is on par with the others. To these methods the uniformity directive adds the requirement that an interpretation take uniformity into account. For its part, the directive does not give priority to uniformity over other interpretive methods or a particular weight with respect these methods. Thus, taken together, Article 31(1) and the uniformity directive prescribe an unstructured set of methods on which an interpretation of transnational law must be based.

The point to note is that treaty interpretation is difficult under Article 31(1)'s rule of interpretation. This is because the Article requires an interpretation to take into account ordinary meaning, context, and purpose without prescribing how this is be done. The Article requires only that the interpretation be based on the ordinary

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86 *See* Linderfalk, *supra* note 49 and accompanying text.

meaning of the treaty's terms "in light of" context and the treaty's object or purpose. It therefore leaves to the court's discretion how the different interpretive methods are combined in a particular case. The need to combine different interpretive methods, with no instruction as to how to do so, makes it hard to know whether the methods are being combined correctly.

In addition, the uniformity directive by itself makes the interpretation of transnational law more difficult. As a treaty, its interpretation must rely on Article 31(1)'s unstructured set of interpretive methods. To this the uniformity directive adds an imprecise and unstructured mandate. The mandate is imprecise because it does not prescribe how much importance uniformity must have in a construction. As far as the directive goes, a court can have "regard" for uniformity even if it ultimately construes transnational law non-uniformly. Among all required sources of interpretation, uniformity need not be a paramount consideration in the court's construction. The directive also is unstructured in that it says nothing about how uniformity is to be combined with Article 31(1)'s interpretive methods. The addition of an imprecise and unstructured interpretive method to interpretive methods, which themselves are difficult to apply, makes the construction of transnational law even harder than the interpretation of other treaties.

The directive also prevents the use of information that otherwise can help resolve obscurities in treaty provisions. For instance, the *pari materia* canon of construction allows the interpretation of obscure statutory provisions in light of other statutes governing similar subject matters.[87] In this way information about the meaning of a provision in another statute can be used to clarify the meaning of the terms in a separate statute. As applied, the canon permits the

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87 *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 117-18 (2016); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975). For reliance on the *pari materia* canon in the interpretation of investment treaties, *see* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 275 (2009); Adrian M. Johnston & Michael J. Trebilcock, *Fragmentation in International Trade Law: Insights from the Global Investment Regime*, 12 WORLD TRADE REV. 621, 630 (2013). For criticism of the practice, *see* Martins Paparinskis, *Sources of Law and Arbitral Interpretation of Pari Materia Investment Protections Rules, in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE)FRAGMENTATION OF INTERNATIONAL LAW 87, 90 (O.K. Fauchald & A. Nollkaemper eds., 2012).

construction of an undefined term according to the definition of the same term in a comparable statute.[88] However, by requiring that the interpretations of transnational law be independent of domestic law, the uniformity directive bars reliance on comparable domestic statutes to inform the meaning of transnational law's provisions.[89] The directive therefore excludes information that can make the treaty's application more manageable. The point is not that the incorporation of the uniformity directive into transnational law is a bad idea. It is only that the directive can make it more difficult to know whether transnational law is being construed correctly.

As a result, the introduction of the uniformity directive makes the outcome of interpretations of transnational law more unpredictable. Article 31(1)'s rule of interpretation is uncertain in its application, as it mandates use of a plurality of interpretive methods with no priority or organizing principle. The addition of the directive to other required interpretive methods expands the set of methods on which an interpretation must be based. Because none of these methods have priority or more weight than others, neither the VCLT nor transnational law dictate how they are to be combined. Accordingly, in interpreting a provision, courts retain the discretion as to how the uniformity directive is employed together with other methods. By adding the uniformity directive, transnational law increases their discretion to construe that law. As a result, it makes a court's interpretation based on required interpretive methods harder to forecast.

The increased difficulty of treaty interpretation creates a familiar political problem. As with other laws, the entitlements identified by transnational law are backed by force, at least domestically. Legal coercion is legitimately threatened or exercised

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88 Bankruptcy courts, for example, sometimes rely on the definition of good faith under the Uniform Commercial Code into the Bankruptcy Code. *See, e.g.,* In re Ellingsen MacLean Oil Co., 834 F.2d 599, 605 (6th Cir. 1987) (noting that "the definition most often used [to define the term "good faith"] is that of the Uniform Commercial Code . . . "); *In re* Teleservices Group, Inc., 444 B.R. 767 (Bankr. W.D. Mich. 2011) (noting that the Uniform Commercial Code definition of good faith informs the meaning of good faith under Bankruptcy Code § 364(e)).

89 *See supra* note 48 and accompanying text; Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975) (noting that the directive might not bar reliance on the definition of the same term in comparable treaties, as the reliance tends to harmonize interpretations). *But see supra* note 83 and accompanying text (offering that comparable treaties leave terms undefined, barring reliance on domestic law definitions excludes information that can make the undefined terms less obscure).

only if those subject to coercion have an opportunity to know in advance that their conduct is proscribed.[90] This is the requirement that they receive fair notice. However, the difficulty of interpretation described above threatens the legitimacy of transnational law. A plurality of interpretive methods, with no guidance as to how to combine them, makes it impossible to forecast how transnational law sometimes will be interpreted, based on those methods alone. As a result, transnational law sometimes will not be known to those whose legal entitlements are identified by it. Unless the content of transnational law is discoverable independently of legally operative interpretive methods, enforcement of transnational law is illegitimate.

To be sure, pluralism in decision making sometimes is unobjectionable (and unavoidable). In everyday life we sometimes make difficult decisions about what to do based on different sorts of considerations. In making these decisions we take into account a range of concerns, including prudential, moral and aesthetic considerations, without an algorithm or standard for doing so. There is ostensibly nothing objectionable about making ordinary practical decisions in this way. But the interpretation of transnational law is different. An interpretation of an international commercial law treaty describes legal entitlements backed by force. Unlike a purely personal decision, the construction ultimately has consequences for others: it gives them rights or imposes obligations backed by sanctions. Without fair notice about how transnational law will be interpreted, its enforcement is problematic.

D. Two Illustrations

The expanded set of required interpretive methods helps explain the diverse judicial constructions of certain provisions of

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[90] *Cf.* Paul Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 PA. L. REV. 335, 336 (2005) (clarifying that a principle of legality requires that criminal liability and punishment be based on prior legislative enactment stated with "precision and clarity"); Christopher Kurtz, *Secret Law and the Value of Publicity*, 22 RATIO JUR. 197, 211 (2009) (contending that publicity is "part of what makes law law"); LON FULLER, MORALITY OF LAW 49-51 (1964) (noting the rule of law requirement that laws be generally available to those subject to them); Joseph Raz, *The Politics of the Rule of Law, in* ESSAYS IN THE PUBLIC DOMAIN: ESSAYS IN THE LAW AND MORALITY OF POLITICS 370, 371 (rev. ed. 1996) (describing a bureaucratic conception of rule of law requiring that laws be publicly and clearly stated); JOSEPH RAZ, THE AUTHORITY OF LAW 114 (1979) (noting the principle that laws should be open, adequately publicized, and derivable from the rule of law).

transnational law. If applicable rules of interpretation leave courts with broad discretion to employ different interpretive methods together, courts are able to interpret the same provisions very differently. To be sure, other explanations of the diversity in interpretations are possible. Most notably, different interpretations could result from a reliance on national law notions, in violation of the uniformity directive. Or the disparate results might be a temporary phenomenon, the consequence of an initial failure to harmonize interpretations of novel law. The introduction of the uniformity directive explains disparate judicial constructions of transnational law differently. It predicts disparate judicial interpretations even if courts do not rely on notions borrowed from national law. Because transnational law leaves courts with broad interpretive discretion, the disparity in interpretations potentially is persistent, not the temporary result of construing novel law. The role of the uniformity directive in disparate interpretations is illustrated by the judicial construction of two provisions of transnational law.

1. *Revocation of an offer*. The CISG's rules of contract formation are based on offer and acceptance. An offer that recites a period within which it can be accepted presents an issue which the CISG leaves unresolved. Under Article 16(2)(a), an offer cannot be revoked "if it indicates, whether by stating a fixed time for acceptance or otherwise, that is irrevocable."[91] This provision is open to two different interpretations as to when an offer "indicates" that it is irrevocable. One is that an offer is irrevocable for the period stated if it fixes a period for acceptance. This understanding is consistent with the rules in civil law systems, which hold that setting a time after which the period for acceptance expires indicates that the offer is irrevocable until that time. A different interpretation is that the offer is open until the stated time expires but can be effectively revoked prior to that time. Under Article 16(1), an offer is effectively revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance. This understanding fits with the common law rule, which provides that the inclusion of a fixed time after which the offer lapses does not make the offer irrevocable prior to that time.

The problem is that the CISG does not clarify when an offer indicates by its terms that it is irrevocable. The CISG's drafters

91 *See* CISG, *supra* note 1, art. 16(2)(a).

easily could have avoided the ambiguity in Article 16(2)(a) by supplying suitably clarifying language. They instead intentionally choose not to do so.[92] A proposed amendment to Article 16(2)(a) provided that the stating of a fixed time for acceptance does not by itself indicate that the offer is irrevocable.[93] The amendment was rejected.[94] By rejecting the amendment, the delegates to the 1980 Vienna Conference decided to leave Article 16(2)(a)'s relevant language ambiguous. The result is a sort of diplomatic compromise in which ambiguity is the price of the delegates' agreement on the CISG's text.

In these circumstances the uniformity directive does not favor a particular construction of Article 16(2)(a). Because there are no decisions construing the Article, an interpretation cannot take into account other courts' constructions. Just as important, there are no factors that give a particular interpretation salience, so that other courts could be expected to converge around it. The plain language of the Article does not dictate when an offer's terms "indicate" that the offer is irrevocable. Civil lawyers generally understand the fixing of a time period for acceptance to indicate that the offer is irrevocable, while common lawyers understand the offer as revocable while indicating that it is subject to lapse.

The impact of a particular interpretation on contracting costs also will not be apparent to an interpreting court. The irrevocability of an offer has two effects. It raises the offeror's cost of making the offer, as it commits the offeror to holding the offer open for a fixed period. At the same time, the irrevocability of the offer increases the value of the offer to the offeree, as the offer's continued effectiveness gives the offeree an option on the uncertain value of the subject matter of the offer over time. In comparison, the revocability of an offer reduces the offeror's cost of making the offer, because the offeror can retract an offer that is no longer in its interest to keep open. The revocability of the offer also reduces the offer's value to the offeree, as it does not have an option on the value

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92 *See* PETER SCHLECHTRIEM, UNIFORM SALES LAW 51-52 (1986); Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 354-55 (1983).

93 *See* 1980 Vienna Diplomatic Conference, U.N. Doc. A/CONF.97/C1/L.48 (United Kingdom proposal).

94 *See* 1980 Vienna Diplomatic Conference, *Report of the First Committee*, U.N. Doc. A/CONF.97/L1.

of the subject matter of the offer. Thus, the direction of the impacts on the offeror and offeree differ according to whether the offer is irrevocable or revocable. The efficient interpretation of an offer that fixes a time period for acceptance optimally reduces the net cost of making the offer. Although the net cost of making an offer revocable or irrevocable might be gauged, courts are not in a position to make the calculation reliably. As a result, the efficiency of interpreting an offer with a fixed period for acceptance as irrevocable or revocable cannot inform a court's interpretation of Article 16(2)(a).

Absent salient factors that favor a particular interpretation, the mandate to uniformity will not induce courts to settle on a particular interpretation. They will have disparate interpretations of the relevant language of Article 16(2)(a). The experience of the delegates at the 1980 Vienna Conference is consistent with this prediction.[95]

2. *Exemption From Performance*. Almost all legal systems allow parties to deviate from their contractual obligations without liability under prescribed conditions when circumstances substantially change between the conclusion of the contract and the time the contract is to be performed. Article 79 of the CISG, when it applies, excuses a party's performance under international contracts for the sales of goods. The Article exempts the buyer or seller from liability for damages for its failure to perform its obligations if the party can prove that the conditions described in the Article are satisfied. Specifically, the party seeking the exemption must demonstrate three things: (1) its failure to perform was due to an impediment beyond its control, (2) it could not reasonably be expected to have taken the impediment into account at the conclusion of the contract, and (3) the party could not reasonably have avoided the impediment or its consequences once the impediment occurred.[96]

Excuse from performance implicates issues concerning the assumption of risk, foreseeability and the consequences of intervening events. Article 79(1)'s conditions address them in terms peculiar to the CISG. The terms "impediment," "control" and

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95 *See* 1980 Vienna Diplomatic Conference, *Analysis of Comments and Proposals by Governments and International Organizations*, art. 16 at ¶¶ 1, 5 & 6, U.N. Doc. A/CONF.97/9.

96 *See* CISG, *supra* note 1, art. 79(1).

"avoid" are not found in national law. The choice of novel terminology is deliberate. The CISG's drafters wanted the circumstances in which the CISG excused performance to be independent of national law doctrines. To discourage the construction of Article 79 through terms borrowed from domestic law, the Article uses terms unfamiliar to domestic law. Even without Article 79's special terminology, an implication of Article 7(1)'s uniformity directive bars the interpretation of Article 79's conditions based on the excuse doctrine of national law. Because relevant national law is diverse, an interpretation based on national law produces disparate constructions of these conditions. The mandate of uniformity therefore does not allow national law notions as a source of interpretation.

The trouble is that Article 79 leaves its crucial terms undefined. This presents several difficulties of interpretation. One involves the meaning of "impediment" under Article 79(1). The question here is what sort of intervening events count as impediments to performance. Although natural disasters, acts of terrorism, epidemics or prohibitory state regulations can prevent performance, "impediment" does not appear to be limited to cases in which performance is impossible. At the same time, not every event that affects performance counts as an impediment. The prevailing view counts as impediments events that make performance more expensive or less valuable to the performing party. The obvious problem is to determine the threshold at which increased expense or diminished value becomes an impediment. An increase in the cost of performing an obligation, without more, does not constitute an impediment to performance.[97] As a result, courts have the familiar interpretive task of determining the extent of the cost increase that impedes performance under Article 79(1).

None of the standard resources of interpretation help make the

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97 *See Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law*, art. 65 (at ¶ 10), U.N. Doc A/CONF.97/5 (1979) (noting the buyer's insolvency probably is not an impediment to its payment of the contract price); Vital Berry Marketing v. Dirafrost Frozen Fruit Industry NV, CISG-online case no. 371, Rechtbank van Koophandel Hasselt [Commercial Court Hasselt] (Belg.) (May 2, 1995) (noting that a significant drop in market price does not exempt the buyer from payment); Iron Molybdenum Case, CISG-online case no. 261, Oberlandesgericht Hamburg [OLG] [Court of Appeals Hamburg] (Ger.) (Feb. 28, 1997) (finding that a 300% increase in the commodity the seller promised its buyer does not exempt the seller's performance).

notion of an impediment more determinate. Diplomatic history does not clarify the notion.[98] For their part, excuse doctrines of domestic law cannot inform an understanding of "impediment," for two reasons. First, because the term is unfamiliar to domestic law, inferences from the judicial construction of domestic law excuse doctrine to Article 79(1)'s impediment requirement are unsafe. Second, an implication of the CISG's uniformity directive mandates that Article 79 be interpreted independently of domestic law.[99] Thus, a construction of the impediment requirement cannot rely on domestic law excuse doctrine, even if that law contains a comparable requirement. This leaves the uniformity directive itself: as applied, the mandate that an interpretation of the impediment requirement have regard for uniformity in the application of the requirement. The directive gives a court a reason to follow an interpretation of the requirement other courts have converged on. However, case law does not reveal a shared application of "impediment," particularly with respect to the increases in the cost of performance. Perhaps in response to the difficulty in construing "impediment," courts interpreting Article 79(1) often avoid addressing the impediment requirement, instead denying a claimed exemption on other grounds.[100]

The difficulty of construing "impediment" arises in connection with claims to financial hardship. Some legal systems permit a court to order the parties to renegotiate specific contract terms when performance becomes excessively onerous as a result of events that fundamentally alter the equilibrium of the contract.[101] If renegotiation is unsuccessful, the court can terminate the contract or modify its terms. An initial question is whether Article 79 governs

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98 *See CISG Advisory Council Opinion No. 7: Exemption of Liability for Damages Under Article 79 of the CISG* ¶¶ 27-29, CISG ADVISORY COUNCIL (2007), http://www.cisgac.com/cisgac-opinion-no7/ [https://perma.cc/LG9E-R6Q5].

99 *See supra* note 52 and accompanying text. For an instance of the reliance on domestic law excuse doctrine in the interpretation of Article 79, see Raw Materials, Inc. v. Manfred Forberich GmbH & Co., 54 UCC Rep. Serv. 2d 878 (N.D. Ill. 2004), criticized in Lookofsky & Flechtner, *supra* note 69.

100 For a survey of the cases, see UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods: 2016 Edition 376 at ¶ 12 (2016), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf [https://perma.cc/9KKK-UPNB].

101 *See* STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 291 (3d ed. 2020).

hardship. The Article is unclear as to whether hardship counts as an impediment.[102] If it does, Article 79 excuses a party's performance when events make performance excessively onerous, where the party could not reasonably have taken them into account or avoided or overcome the events or their consequences. Although several courts have found that Article 79 does not govern hardship,[103] almost all other decisions conclude that hardship falls within Article 79's scope.[104]

Given the consensus view of Article 79's scope in the courts, the CISG's uniformity directive argues in favor of counting hardship as an impediment. However, the question remains as to when intervening events create hardship. In particular, in the case of an increase in the cost of performance, how much of an increase makes performance excessively onerous? To answer the question, a required threshold of cost increase must be specified. Even if tribunals share the view that Article 79 governs hardship, they might disagree as to this required threshold. Case law does not reveal agreement on the extent of a cost increase that constitutes an impediment to performance. Although an impediment has been found when the price of inputs increased by 70%,[105] most decisions conclude that a 100% increase does not suffice.[106] Even a 300%

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102 *See* CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 304-05 (2d ed. 2016).

103 *See, e.g.,* Scafom International BV & Orion Metal BVBA v. Exma CPI SA, CISG-online case no. 1106, Rechtbank van Koophandel Tongeren [Commercial Court Tongeren] (Belg.) (Jan. 25, 2005); Nuova Fucinati S.p.A. v. Fondmetall International A.B., CISG-online case no. 102, Tribunale di Monza (It.) (Jan. 14, 1993).

104 *See, e.g.,* Vital Berry Marketing v. Dirafrost Frozen Fruit Industry NV, CISG-online case no. 371, Rechtbank van Koophandel Hasselt [Commercial Court Hasselt] (Belg.) (May 2, 1995); Romay AG v. Behr France S.a.r.l., CISG-online case no. 694, Cour d'Appel de Colmar [CA] [Court of Appeal Colmar] (Fr.) (June 12, 2001); Scafom International BV v. Lorraine Tubes S.A.S., CISG-online case no. 1963, Hof van Cassatie van Belgie [Belgian Supreme Court] (Belg.) (June 19, 2009); Steel Rope Case, CISG-online case no. 436, Arbitration Court at the Bulgarian Chamber of Commerce and Industry (Bulg.) (Feb. 12, 1998). *Cf. CISG Advisory Council Opinion No. 20: Hardship Under the CISG* 13 (at ¶ 2.2), CISG ADVISORY COUNCIL (2020), http://cisgac.com/opinion-no20-hardship-under-the-cisg/ (finding that courts and arbitral decisions "more or less unanimously" accept that Article 79 governs hardship).

105 *See* Scafom International BV v. Lorraine Tubes S.A.S., CISG-online case no. 1963, Hof van Cassatie van Belgie [Belgian Supreme Court] (Belg.) (June 19, 2009).

106 *See CISG Advisory Council Opinion No. 20*, *supra* note 104, at Annex 1 (collecting

increase in price has been found not to be impediment.[107] No case to date has set a required threshold of cost increase for an impediment, even as a presumption. Going beyond the case law, some scholars recommend a threshold of 100%.[108] Because case law has not settled on the required threshold for an impediment, uniformity in application does not provide a reason for favoring a particular threshold of cost increase.

Conclusion

The theoretical literature on the harmonization of transnational law asks whether uniformity in interpretation is a good idea, while the descriptive literature assumes that it is a worthwhile goal.[109] This paper asks a different question: Even if uniformity in interpretation is a worthwhile goal, are existing interpretive methods an obstacle to achieving it? Rules of treaty interpretation require use of a variety of different methods to determine the meaning of a treaty's provisions. Because these methods have no underlying principle or priority for their application in combination, courts are left with discretion in construing treaties. Treaty interpretation is hard not because courts have broad discretion in interpretation. Rather, it is hard because applicable rules of interpretation do not specify how interpretive methods are to be used together in exercising discretion.

For its part, transnational law's uniformity directive is similarly unstructured. A mandate merely to take uniformity into account in interpretation says nothing about how harmonization ought to figure

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cases); Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39 VICTORIA U. WELLINGTON L. REV. 709, 716 (2008) (surveying decisions up to 2008).

107 *See* Iron Molybdenum Case, CISG-online case no. 261, Oberlandesgericht Hamburg [OLG] [Court of Appeals Hamburg] (Ger.) (Feb. 28, 1997).

108 *See CISG Advisory Council Opinion No. 20*, *supra* note 104, ¶ 7.2; Ingeborg Schwenzer & Edgardo Munoz, *Duty to Renegotiate and Contract Adaptation in the Case of Hardship*, 24 UNIF. L. REV. 149, 156 (2019).

109 For literature investigating whether uniformity in law generally is a worthwhile goal, see David W. Leebron, *Claims of Harmonization: A Theoretical Framework*, 17 CAN. BUS. L. J. 63, 75-91 (1996); Larry E. Ribstein & Bruce H. Koyabashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Clayton P. Gillette & Steven D. Walt, *Uniformity and Diversity in Payments Systems*, 83 CHI-KENT L. REV. 499 (2008). For an example of the assumption that uniformity in laws is worthwhile, see A Guide to UNCITRAL, *supra* note 1, at 2 (describing UNCITRAL's mandate as including the preparation or promotion of uniform law as well as their uniform interpretation).

in combination with other applicable interpretive methods. By introducing an interpretive method that supplements methods otherwise applicable to treaties, transnational law's uniformity directive makes interpretation of international commercial conventions even more difficult. If uniformity in the interpretation of transnational law is achieved, it is the result of non-legal factors driving interpretations.

Transnational law's uniformity directive is intended to help harmonize interpretations of international commercial conventions by national courts. However, its impact on interpretation is ambiguous. On the one hand, as an independent requirement, the mandate to take uniformity into account encourages constructions that harmonize applications of transnational law. On the other hand, the uniformity directive is one among other required interpretive methods. Its addition therefore expands the methods on which courts must rely. Courts must interpret provisions of transnational law based on ordinary meaning, context and purpose as well as uniformity. Without a prescribed way of combining them, applicable rules of interpretation leave to courts the choice of how to do so. In any instance uniformity may or may not have decisive importance in an interpretation. Given the unstructured array of interpretive methods, it is unclear whether the uniformity mandate tends to produce interpretations that harmonize transnational law.