Circumventing the Supremacy Clause? Understanding the Constitutional Implications of the United States' Treatment of Treaty Obligations through an Analysis of the New York Convention

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Circumventing the Supremacy Clause?
Understanding the Constitutional Implications of the United States’ Treatment of Treaty Obligations Through an Analysis of the New York Convention*

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I. INTRODUCTION

A. The Critical Role of International Agreements in Furthering International Relations

The United States’ participation in treaties and other international agreements is becoming more necessary and an increasingly prevalent occurrence as a result of globalization. The rapid pace of technological innovation and more effective means of transportation have caused our world to shrink, making countries even more interconnected. The corresponding explosion of international business and commercial transactions has resulted in high levels of risk and uncertainty due to a complex mix of laws, monetary factors, politics and cultures that vary across countries. For global players, it has become essential to have international agreements that can mitigate the risks inherent in international commercial transactions. Accordingly, the United States and other international states continually adapt to changing conditions by creating international agreements, inter alia, NAFTA, GATT, the Vienna Convention, the Geneva Convention and The New York Convention. As the world becomes increasingly reliant on treaties, international agreements and trade agreements, the United States must become more vigilant in upholding such agreements.

B. The Critical Role of Arbitration in Furthering International Commercial Relations

International trade agreements are a particularly dynamic area where international relations are increasing as a result of globalization. Of course, conflict between and among countries is bound to arise in the course of free trade and international commercial transactions. International litigation is of particular importance in resolving such disputes. However, jurisdictional problems can arise as parties may be legally subject to the judicial systems of more than one country. This leads to judicial inefficiency, increasing costs, and uncertainty in enforcing judgments. As a result, international arbitration has become more prevalent as a way of mitigating these problems. Arbitration clauses are routinely used in commercial transaction agreements, making arbitration a standard means of resolving international commercial disputes.

When parties to commercial agreements contract to resolve disputes through international arbitration, contractual clauses generally specify the location in which the arbitration will be held and the law that will be used to resolve the dispute. However, problems arise when the prevailing party, seeking to enforce an international arbitration judgment rendered in one country, must go to another country to have the judgment recognized. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) currently provides the primary vehicle for the enforcement of foreign arbitral awards. Article III of the New York Convention provides that

2. Id. at 4-6.
4. The laws of the country under which the parties agree to resolve their conflict may not necessarily be the country where the parties agree to arbitrate. For example, the parties may agree to arbitrate in England using the laws of France.
7. JULIAN D.M LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 693 (The Hague: Kluwar Law International 2003); see generally The New York Convention (The New York Convention was ratified by the United Nations in 1958; the United States became a signatory to The New York Convention in 1970; 122 countries are currently signatory to the New York Convention).
“each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”

Thus, countries that are signatories to the New York convention agree to uphold arbitration judgments that are brought to their country for recognition. The international arbitration regimes’ success depends on a precedent of signatories upholding arbitral awards. The New York Convention provides the framework to this end.

C. United States Protectionist Policies Challenge the Promotion of International Commercial Relationships

Unfortunately, the courts of the United States are impeding the spread of international arbitration as a way to resolve commercial disputes. In recent years, the United States has failed to uphold treaty obligations and other international agreements to which it is a signatory. Examples include the failure of the United States to pay U.N. dues during the 1990s and until 2001, and its failure to advise alien prisoners of their consular rights under the Vienna Convention on Consular Relations. Additionally, the United States has shown an increasing willingness to impose protectionist measures to support its domestic industries. These measures violate the General Agreement on Tariffs and Trade (GATT).

Emerging case law in the U.S. federal courts has contributed to this problem by offering conflicting interpretations of the New York Convention. Federal courts are invoking Article VII of the New York Convention in order to justify the application of domestic law in place of the international law stipulated by the New York Convention.

8. NEW YORK CONVENTION art. III.
10. Id. at 22.
12. Id.
13. Ari Afilalo, Not in My Backyard: Power and Protectionism in US Trade Policy, 34 N.Y.U. J. INT’L L. 749, 752 (2002) (stating that the approach of the United States to international trade conflicts with the general direction of economic globalization because the United States is motivated by their power rather than rules to achieve what they believe to be a desired state of affairs).
14. Id. at 751-52 (GATT is a free trade policy, that was established after World War II, whereby global tariffs on trade would be gradually removed and other protectionist policies eliminated).
15. Id.
16. Davis, supra note 5, at 47; see also Erica Smith, Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin, 20 B.U. INT’L L. J. 355,
cases include *In re Chromolloy Aeroservices*, *Baker Marine v. Chevron* and *Spier v. Calzaturificio Tecnica*.\(^{17}\) This treatment of international agreements and trade contracts evidences a U.S. policy of protecting domestic citizens and businesses. While potentially profitable in the short run for the United States, this behavior comes at the expense of weakening the United States' leadership and relationships with international actors.

The approach taken by the legislative, executive and judicial branches of the U.S. government creates a danger that the United States will evade its obligations under the New York Convention. In effect, domestic law is substituting for the international law set forth in the New York Convention. This, in turn, will weaken the Supremacy Clause\(^{18}\) of the U.S. Constitution, which enumerates treaties as the supreme law of the land. An unyielding preference for domestic law will also impair commercial relationships with other countries that are signatories to treaties with the United States. To avoid such negative consequences and foster international relations, the United States must pursue a policy of upholding arbitral awards. Doing so will ensure the United States retains a position of leadership and respect in creating and enforcing future international agreements.

**D. Understanding the New York Convention**

The U.S. Supreme Court has recognized that the New York Convention encompasses two important goals.\(^{19}\) First, the Convention encourages the recognition and enforcement\(^{20}\) of commercial arbitration

\(^{357}\) n.6 (2002) (Article VII provides a "more favorable law" provision that allows a party to avail itself of the national arbitral law of the country where recognition and enforcement is sought).

\(^{17}\) Davis, *supra* note 5, at 47.

\(^{18}\) U.S. CONST. art. VI, § 2 (This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.).

\(^{19}\) Scherk v. Alberto-Culver Co., 417 U.S. 506, 508-09, 520 n.15 (1974) (the Supreme Court denied Alberto-Culver’s attempt to litigate in a United States District Court and upheld an arbitration clause between Alberto-Culver (American corporation) and a German toiletries manufacturer, Scherk, whereby the parties agreed to resolve disputes in France under the law of Illinois).

\(^{20}\) An "enforcement" action usually involves a party armed with an award seeking to collect a sum of money from the party defeated in a foreign arbitration
agreements in international contracts. Such agreements are enforced through Article III of The Convention, which provides that signatory countries must recognize and enforce arbitral awards. Second, the Convention seeks to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced. Such consistency is enforced through Article V of the New York Convention, which provides very limited defenses against, and exceptions to, the enforcement of arbitral awards. These underlying tenets of the New York Convention are intended to both encourage international arbitration practices and prevent forum shopping.

However, the aforementioned goals of the New York Convention face defeat by the very provisions of the Convention: Articles V and VII conflict and contradict each other. Article VII provides that an arbitral award is enforceable to the full extent of the laws of the country where enforcement is sought. A party seeking to enforce an arbitration award is therefore entitled to all of the rights prescribed by the law of the country where enforcement is sought, even if those rights are not provided for in the New York Convention. This language opens the door for the U.S. judiciary to use domestic law in place of the laws set forth in the New York Convention when a dispute regarding an arbitral award comes before a U.S. court.

By contrast, Article V provides seven limited exceptions upon which a signatory country may refuse to enforce an arbitral award. The intent

21. Id.; see also NEW YORK CONVENTION art. III.
22. NEW YORK CONVENTION, art. III (Article III of the New York Convention states that “each Contracting Stated shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles”).
23. Id.; see also NEW YORK CONVENTION art. V.
24. See generally NEW YORK CONVENTION art. V.
25. Ostrowski, supra note 3, at 1657; see also Hamid F. Gharavi, Chromalloy: Another View, 12 MEALEY’S INT’L ARB. REP. 21, 21-22 (1997) (forum shopping occurs when parties purposely try to arbitrate in a forum where arbitral awards can more easily be overturned under local law).
26. Davis, supra note 5, at 46. See also Smith, supra note 16 (regarding Article VII as a “more favorable law” provision).
27. Davis, supra note 5, at 46; See generally NEW YORK CONVENTION art. VII.
29. NEW YORK CONVENTION, ARTICLE V. Article V of the New York Convention provides as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition is sought, proof that:
   a. The parties to the agreement referred to article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing
of Article V is to limit the grounds upon which a court can base its refusal to uphold an arbitral award. Because none of the grounds for refusal are mandatory, a country may still choose to enforce the arbitral award. For example, Article V(1)(e), a particularly important refusal provision, provides a court in the rendering country, or a country under the laws of which the award is made, with the authority to annul the arbitral award. This allows for the local enforcement standards of the rendering country to come into play.

As will be discussed infra, the current trend among countries, including the United States, is to follow the tenets of Article V by upholding arbitral agreements rendered in a foreign country and rarely

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any indication thereon, under the law of the country where the award was made; or

b. The party against whom the award is invoked was not given property notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separate from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

30. See supra note 24.


32. Davis, supra note 5, at 46.

33. Lew, supra note 7, at 716; see also Alghanim & Sons v. Toys "R" Us, 126 F.3d 15 (2d Cir. 1997) and Spector v. Torenberg, 853 F. Supp. 201 (S.D.N.Y 1994) (where the Second Circuit noted that Article V(1)(e) of the Convention allows U.S. courts to apply domestic law to set aside or suspend and arbitral award).
invoking these exceptions.\textsuperscript{34} However, we are beginning to see a change in this trend in the U.S. federal courts.\textsuperscript{35}

Given the limited grounds for refusing to uphold an arbitral award under Article V, Article VII is considered to be very controversial because it augments the power of a country in a different fashion than Article V.\textsuperscript{36} Article VII states that "the provisions of the present Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon."\textsuperscript{37} This language might allow for the application of a state's domestic law or treaty when such laws provide for more favorable rulings.\textsuperscript{38} Therefore, the laws of the enforcing country may dominate and control the outcome of the arbitration dispute if they provide for a more favorable outcome than the New York Convention.\textsuperscript{39}

Consequently, the provisions of Article V and VII are in direct conflict with each other. Article V allows the rendering country to annul an arbitral award. Article VII allows the enforcing country to override an Article V annulment, which will generally be based on the local law of the rendering country, and uphold an arbitral award on the basis of the more favorable domestic law of the enforcing country.\textsuperscript{40} Article VII can be explained as encouraging greater enforcement of arbitral awards, one of the goals of the New York Convention, through the use of domestic law.\textsuperscript{41} However, Article VII also has the effect of providing a backdoor for countries to import domestic law into an international treaty, if doing so enhances enforceability. It is important to remember, though, that the exceptions in Article V are specifically limited for the purpose of achieving greater uniformity in arbitral enforcement practice.\textsuperscript{42} Therefore,

\begin{itemize}
\item \textsuperscript{34} Vagts, supra note 11, at 331.
\item \textsuperscript{35} Davis, supra note 5, at 47 (three recent federal court decisions—In re Chromalloy Aeroservices, Baker Marine v. Chevron, and Spier v. Calzaturificio Tecnica—have addressed the conflict between Articles V and VII and have emerged with inconsistent results).
\item \textsuperscript{37} NEW YORK CONVENTION, art. VII.
\item \textsuperscript{38} Taherzadeh, supra note 36, at 386; See also Matter of Chromalloy Aeroservices, 939 F. Supp 907 (D.D.C. 1996) (where a United States district court used Article VII as an avenue and justification for employing domestic law to uphold the validity of a foreign arbitral award that had previously been nullified by an Egyptian Court).
\item \textsuperscript{39} Lew, supra note 7, at 698.
\item \textsuperscript{40} See supra notes 13 and 29; see also Matter of Chromalloy Aeroservices, 939 F. Supp. 907, 914 (D.D.C. 1996) (United States district court upheld the validity of a foreign arbitral award that had been earlier nullified by a foreign court in the rendering country).
\item \textsuperscript{41} Ostrowski, supra note 3, at 1661.
\item \textsuperscript{42} See generally supra note 24.
\end{itemize}
there is a conflict between the goal of enforceability of arbitral decisions, as reflected by Article VII, and uniformity in practice, as reflected by Article V.\textsuperscript{43}

Ultimately, signatories to the New York Convention need to resolve this discrepancy and determine which article to apply in the event of conflict. This Comment shows that U.S. federal courts tend to favor Article VII at the expense of Article V. This leaves open the opportunity for the United States to enforce domestic law in place of the New York Convention international law. This Comment argues that the United States’ foreign and commercial relations would benefit from greater deference by the United States’ international obligations. Such deference would also help the United States to retain a strong leadership force in the international realm. Thus, the United States should adopt a policy of favoring Article V of the New York Convention and respect foreign review of international commercial arbitration awards.

II. THE UNITED STATES AND TREATY OBLIGATIONS

A. Trend of U.S. Treatment of Treaties: From the Charming Betsy Doctrine to the Head Money Cases—And Back Again?

The United States is a party to thousands of treaties and international agreements.\textsuperscript{44} Admittedly, the small number of treaty violations in relation to the total number of international agreements suggests that the United States is not a persistent violator of treaties and generally upholds its international obligations.\textsuperscript{45} When the United States has erred and breached an obligation under an international agreement, the government has either taken steps to remedy the breach or has paid fines for its

\textsuperscript{43} Ostrowski, \textit{supra} note 3, at 1661-62 (note 51) (additionally, most countries adhere to the uniform standards laid out in Article VII of the New York Convention. This is evidenced by the UNCITRAL’s Model Law on International Commercial Arbitration, whose laws have been derived from the New York Convention and which has been adopted by Australia, Bermuda, Bulgaria, Canada, Cyprus, Hong Kong, Mexico, Nigeria, Russian Federation, Scotland, and Tunisia, and is being considered by the United States, Germany, and New Zealand).

\textsuperscript{44} Vagts, \textit{supra} note 11, at 331.

\textsuperscript{45} Id. (The United States is party to over ten thousand international agreements; however, the problem stems from how the United States has handled recent treaty violations). \textit{See also} \textsc{Congressional Research Service, S. PRT. 106-71, Treaties and Other International Agreements: The Role of the United States Senate} 39 (2001) (the congressional research service reports that the United States is party to 600 treaties and nearly 11,000 separate executive agreements).
errors.\textsuperscript{46} In recent years, however, there have been prominent instances in which the United States has breached its obligation but has not made efforts to remedy its violations or compensate the injured parties.\textsuperscript{47} This trend can be observed in the following overview of U.S. federal court cases.

In 1804, the United States Supreme Court, in \textit{Murray v. Schooner Charming Betsy}, established that U.S. courts should construe later-enacted statutes in a manner that does not conflict with or overrule prior treaties, if such construction is reasonably possible.\textsuperscript{48} Under the folds of \textit{Murray}, the United States had entered into the Non-Intercourse Act of 1800, which prohibited commercial intercourse between U.S. residents, and residents of any territory of the French Republic.\textsuperscript{49} An American citizen, the plaintiff, was intercepted by a public armed ship, operating under the authority of the President of the United States, while sailing with goods from the United States to a French island in violation of the agreement.\textsuperscript{50} Chief Justice Marshall's opinion held that, because the American citizen was actually domiciled in Denmark, he was not acting as an American and was not in violation of the agreement.\textsuperscript{51} The Supreme Court construed the commercial activities of an American citizen in such a manner as to uphold the international agreement.\textsuperscript{52} The Supreme Court specifically held that acts of Congress should never be construed to violate the law of nations if any other possible construction remains. This has come to be known as the \textit{Charming Betsy} doctrine.\textsuperscript{53}

Despite the Supreme Court's specific charge to uphold international agreements, about eighty years later the Court began to carve out a new approach to international agreements. In 1884, the Supreme Court in \textit{Edye v. Robertson (The Head Money Cases)} upheld a statute\textsuperscript{54} entitled "An act to regulate immigration" that imposed a tax on immigrants of

\begin{itemize}
\item \textsuperscript{46} Vagts, \textit{supra} note 11, at 313, 331.
\item \textsuperscript{47} See generally Vagts, \textit{supra} note 11, at 313 (instead or remedying their actions the legislative, executive and judicial branches have justified their actions by relying on the doctrine describing the "later-in-time" rule where domestic statutes enacted after prior international agreements take precedence, thus, giving less credence to the binding effect of international law).
\item \textsuperscript{48} Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) (thus, the Supreme Court did not give effect to a later-in-time rule, whereby later-enacted domestic statutes are allowed to override treaty provisions).
\item \textsuperscript{49} Murray v. Schooner Charming Betsy, 1804 U.S. Lexis 252, ***24-25.
\item \textsuperscript{50} Murray, 6 U.S. at 116.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. at 120-21 (the Supreme Court held that, although claimant was an American citizen, he acquired commercial privileges that were attached to his domicile in Denmark, rather than to his country of citizenship).
\item \textsuperscript{53} Id. at 118; Vagts, \textit{supra} note 11, at 322.
\item \textsuperscript{54} Edye v. Robertson, 112 U.S. 580, 599-600 (1884).
\end{itemize}
fifty cents per person.\textsuperscript{55} This statute was in violation of various treaties between the United States and foreign powers in peace, amity and commerce.\textsuperscript{56} The Court stated that a treaty is not irrepealable or unchangeable, and that the Constitution gives it no superiority over an Act of Congress. Congress may therefore repeal or modify a treaty by enacting an Act at a later date.\textsuperscript{57} This view of the authority of Congress to give greater deference to domestic law than to a treaty became known as the \textit{Head Money Cases} doctrine.\textsuperscript{58}

Interestingly, on the same day that the \textit{Head Money Cases} were decided, the Supreme Court also decided \textit{Chew Heong v. United States}, which followed the approach of the \textit{Charming Betsy} doctrine.\textsuperscript{59} In \textit{Chew Heong}, the plaintiff, who was residing in the United States, left in 1881 and then sought to return in 1884.\textsuperscript{60} He was denied entrance into the United States on the basis of the Chinese Restriction Act, signed into power by Congress in 1882.\textsuperscript{61} The Supreme Court declined to enforce\textsuperscript{62} the provisions of the later-enacted Chinese Restriction Act\textsuperscript{63} in favor of respecting a treaty obligation between the United States and China, which was intended to encourage commerce and foreign relations between the two countries.\textsuperscript{64}

As a result of the \textit{Chew Heong} and \textit{Charming Betsy} cases, the Supreme Court has provided strong authority dating back to the 1800's to resolve conflicting laws by favoring treaty obligations over domestic law. However, this line of cases stands in direct conflict with the \textit{Head Money Cases}, which upholds domestic law at the expense of international law. Interestingly, to date neither the \textit{Charming Betsy} doctrine nor the \textit{Head Money Cases} have been overturned. Following the \textit{Chew Heong} case, though, the \textit{Charming Betsy} doctrine became the more prevalent view, with the courts interpreting statutes to conform to treaties.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{55} Id. at 586.
\item \textsuperscript{56} Id. at 588.
\item \textsuperscript{57} Id. at 598-99.
\item \textsuperscript{58} Vagts, \textit{supra} note 11, at 316.
\item \textsuperscript{59} \textit{Chew Heong v. United States}, 112 U.S. 536 (1884).
\item \textsuperscript{60} Id. at 538.
\item \textsuperscript{61} Id. at 538.
\item \textsuperscript{62} Id. at 580.
\item \textsuperscript{63} Id. at 580.
\item \textsuperscript{64} Id. at 541-42.
\item \textsuperscript{65} Vagts, \textit{supra} note 11, at 318 (for example, in 1914, the Supreme Court held in \textit{Rainey v. United States} that if there were a conflict between a new tax on Americans'
More recently, however, U.S. courts have changed their approach, favoring instead the later-in-time approach of the *Head Money Cases*. Under a later-in-time rule, later-enacted statutes have greater effect than prior-enacted treaties. Such an approach encourages and provides an excuse for courts to import domestic law into disputes where international agreements are involved. This Comment contends that such a trend creates a danger whereby countries, such as the United States, will enact domestic laws that will overrule treaties and international agreements for the express purpose of evading the obligations contained therein. Needless to say, this new attitude of the United States, combined with the later-in-time rule, will have a negative effect on the United States' foreign relations with other countries. Courts will have traded short-term gains for long-term distrust of foreign powers and commercial enterprises.

**B. United States Treaty Obligations in Modern Times: Increasing Willingness to Violate International Agreements**

A recent and prominent breach of the United States' international obligations occurred during the 1990s when the United States withheld full dues owed to the United Nations. In defending the position of the United States, Senator Jesse Helms, the chair of the Senate Committee on Foreign Relations, explained that "treaty obligations can be superseded by a simple act of Congress." He further asserted that "when the United States joins a treaty organization, it holds no legal authority over us." It was not until 1999 that the United States signed legislation that authorized payments of $926 million in arrears and assessments to the United Nations. However, the United States attached conditions to each use of foreign-built yachts and an 1815 treaty with Britain that the tax law would certainly prevail).

66. *Id.* at 313.
67. *Id.*; See also Whitney v. Robertson, 124 U.S. 190, 194 (1888) (the Supreme Court explained that where a treaty and an act of congress relate to the same subject, the courts will attempt to interpret them in a manner which will give effect to both; however, if it is not possible to do so without violating the language of one or both provisions because they are inconsistent, the one last in date will control the other).
70. *Id.* at 352.
payment. Although an appropriate interpretation of Article XVII of the U.N. Charter relating to budgetary authority has been contested, a 1962 Advisory Opinion made clear that the U.N. General Assembly has the power to impose payment obligations on member states. Therefore, the United States' failure to pay United Nations dues was a violation of the U.N. Charter. The United States' withholding of dues not only created resentment from other member states, but resulted in other negative consequences to the United States as well. Clearly, such actions tarnish the image of the United States, thereby diminishing its ability to act as a leader in the negotiation of future multilateral international agreements.

Another recent and significant treaty violation occurred in 1998 when the United States Supreme Court invoked the later-in-time rule in Breard v. Greene. The plaintiff in Breard v. Greene, a prison inmate from Paraguay about to be executed, argued that his conviction and sentence should be overturned because of violations of the Vienna Convention on Consular Relations (the "Vienna Convention"). The Vienna Convention, in effect since 1969, provides that arresting authorities must advise a foreign national of his/her right to inform his/her national consulate of an arrest, conviction or sentence. The Supreme Court, however, denied habeas corpus and certiorari and held that the Antiterrorism and Effective Death Penalty Act of 1996 overrides the Vienna Convention.

The Court barely considered, and gave no deference to, the international

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71. See Murphy, supra note 68, at 389-90 (e.g., reduction of the percentage of the United States' assessment for regular United Nations expenses and United Nations peacekeeping expenses).
72. Article XVII, paragraph (2) of the United Nations Charter states that "the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."
75. Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 AJIL 348 (2000) (two significant consequences for the United States are as follows: (1) a United States representative was not elected in 1996 to a traditional seat on the biennial budget committee, and (2) the size of the arreage raised the possibility that the United States would lose its vote on the General Assembly).
76. Id. at 352.
78. Id. at 373.
79. Id. at 376.
80. Vagts, supra note 11, at 320.
81. Breard, 523 U.S. at 376.
treaty.\textsuperscript{82} Instead, the Court looked to U.S. law, stating that procedural rules of a forum State govern the implementation of a treaty in that state.\textsuperscript{83}

Another example of the United States government favoring later-enacted domestic statutes is the Congressional enactment of amendments to the Internal Revenue Code as a means to override tax treaty obligations.\textsuperscript{84} The Tax Reform Act of 1986 led to a major change in U.S. policy with respect to tax treaties with other countries.\textsuperscript{85} Initially, the Internal Revenue Code of 1954 had provided that tax treaties would prevail over Code provisions.\textsuperscript{86} But in 1988, the Technical and Miscellaneous Revenue Act of 1988 significantly amended basic Code provisions governing treaty relationships, so that treaties were no longer given preferential treatment over Code provisions.\textsuperscript{87} The Technical and Miscellaneous Revenue Act of 1988 has since been vigorously used to override many treaty obligations between the United States and other countries.\textsuperscript{88} For example, in \textit{Lindsey v. Commissioner}, the tax court subjected petitioner, a U.S. citizen in Switzerland, to double-taxation, contrary to a tax treaty between the United States and Switzerland, because the Tax Code limited the application of the foreign tax credit.\textsuperscript{89} Kenneth Gideon, former Assistant Secretary of Treasury, has stated that it is important for the United States to uphold tax treaties it negotiates with other countries; otherwise foreign countries will become far less willing to negotiate treaties that are favorable for the United States.\textsuperscript{90}

In the arena of international business and commercial transactions, the \textit{Steel Case} illustrates the use of the Safeguards Agreement, contained within the General Agreement on Tariffs and Trade (GATT), by the United States to escape international obligations under GATT.\textsuperscript{91}

\begin{flushright}
\textsuperscript{82} Id. at 375 (the Supreme Court stated that the argument that the Vienna Convention was the “supreme law of the land” and trumps the procedural default doctrine was “plainly” incorrect).
\textsuperscript{83} Id. (The Supreme Court stated that while “respectful consideration” should be given to the interpretation of an international treaty in an international court, absent an express provision to the contrary, the procedural rules of the forum state are what govern).
\textsuperscript{84} Vagts, \textit{supra} note 11, at 320.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Lindsey v. Commissioner, 98 TC 672, 673-74 (1992).
\textsuperscript{90} Sachs, \textit{supra} note 85, at 867.
\textsuperscript{91} Afilalo, \textit{supra} note 13, at 751-52, 758 (GATT was adopted in 1947, in large part a result of World War II, in order to advocate a free trade policy. GATT aims to eliminate the protectionist policies of member countries in order to foster increased commerce and cross-border consumption between trading partners. The \textit{Steel Case}}
Safeguards Agreement, enacted in 1994, allows World Trade Organization (WTO) member countries to protect a specific domestic industry from increasing imports of any product that is causing, or threatening to cause, serious injury to that industry. In 2002, President Bush invoked the Safeguards Agreement and imposed tariffs for a three-year period on steel. As a result, the United States faced sanctions from the WTO when at least ten countries filed suits against the United States for violating GATT. The complaints asserted that the domestic problems of the steelmakers were insufficient to invoke the Safeguards Agreement and advance domestic interests over international treaty obligations. In response to the United States' use of the Safeguards Agreement to advance domestic policies over the free trade policies under GATT, the United Nations has declared that the decision of the United States "is a major setback for the world trading system."

The treatment of international agreements by the legislative, executive, and judicial branches of the United States government, as evidenced by the failure to pay United Nations dues, the tax cases and the Steel Case, reflects two trends. First, the United States is invoking the later-in-time rule and relying on domestic law at the expense of treaty obligations with greater frequency. Second, the United States is following an overzealous protectionist approach to international trade law that is also a violation of international trade agreements. These two trends suggest the United States' future approach to the New York Convention and to international commercial agreements.

The next portion of this Comment will analyze U.S. case law interpreting and applying the provisions of the New York Convention. The analysis depicts a movement away from the early cases, where the

92. Id. at 766-67 (this allows the domestic government to give temporary relief to the effected domestic industry; when trade patterns cause a member country to experience dramatic and sudden injury, the Safeguards Agreement provides a legal avenue by which the government is allowed to suspend trade obligations and impose temporary tariffs in excess of agreed upon levels).
93. Id. at 770, 773-74 (sixteen United States steelmakers had been operating under the protection of the bankruptcy courts and applied to the President for industry protection because of an influx of imports of steel products).
94. Id. at 774-75.
95. Id.
96. Id. at 775-76 (quoting Neil King, Jr., & Geoff Winestock, Plan to Rescue Steel Industry Draws Fire, WALL ST. J., Mar. 7, 2002, at A3).
courts upheld the application of the New York Convention. The most recent cases interpreting the New York Convention reflect the growing tendency of the courts to uphold domestic law in place of international law where international commercial arbitration agreements are involved. The trends above evidence a very real danger that U.S. courts will invoke Article VII of the New York Convention and apply domestic law, in violation of international law, on a more frequent basis.

III. THE NEW YORK CONVENTION

A. Article V: The Force Behind Uniform Enforcement of Arbitral Awards

Early Supreme Court cases reviewing international arbitration agreements generally enforced non-domestic awards rendered in the United States. Upholding arbitral awards domestically effectively furthers the goal of international enforcement of arbitral awards. In these early cases, the Supreme Court laid down important policy considerations for following Article VII of the New York Convention and enforcing arbitral awards.

In M/S Bremen v. Zapata Off-Shore Co., an American oil company contracted with a German towing company to tow an oil rig from Louisiana to Italy. The contract included a forum selection clause by which any dispute was to be tried before the London Court of Justice. The Court rejected an Article V(2)(b) argument that the arbitration provision contravened the public policy of the forum and upheld the arbitration clause. The Supreme Court explained that in order for American businesses to expand throughout the world, the United States must not insist that all disputes be resolved in U.S. courts and under its laws, but rather must concede to the use of a neutral forum.

In Scherk v. Alberto-Culver Co., an American Corporation contracted to purchase three business entities and trademarks for cosmetics goods from a German businessman. The Court upheld a forum selection clause to litigate any disputes before the International Chamber of Commerce in Paris using the laws of Illinois. The Supreme Court’s decision rested on the policy argument that upholding contractual forum selection clauses was an indispensable precondition to achieving the orderliness and predictability essential to international business

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97. Qiu, supra note 31, at 623.
99. Id.
100. Id. at 15-16.
101. Id. at 11-12.
103. Id. at 520-21.
transactions. 104 The Court reasoned that forum selection clauses avoid the danger that the dispute might be submitted to a forum adverse to the interests of one of the parties. 105

In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., a Japanese car manufacturer engaged in a joint venture to distribute cars through a Puerto Rican corporation. 106 The Supreme Court upheld an arbitration clause 107 that provided for resolution of disputes in accordance with the rules and regulations of the Japan Commercial Arbitration Association. 108 The Court relied on a policy reflecting concerns for international comity and respect for the capacities of foreign and transnational tribunals in reaching its holding. 109 The Court further stated that sensitivity to the need for predictability in the resolution of disputes in the international commercial system required it to enforce the arbitration clause. 110

The Second Circuit has followed the Supreme Court’s example in providing important policy considerations for the enforcement of arbitral awards. In Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier, the Second Circuit affirmed an arbitration award in favor of an Egyptian government-owned corporation against an American engineering firm that abandoned a project to construct a paper mill. 111 The Court’s decision was based on the overriding policy consideration of reciprocity that counseled courts to invoke Article V defenses with caution. 112 The Court was concerned that foreign courts would frequently utilize these defenses as a basis for refusing to uphold arbitral awards. 113

In summary, the foregoing policies that weigh in favor of upholding arbitral awards are, inter alia, the expansion of commercial activity of American businesses throughout the world, the achievement of orderliness and predictability in international commercial transactions, respect for

104. Id. at 516.
105. Id.
107. Id. at 640.
108. Id. at 617.
109. Id. at 629.
110. Id.
112. Id. at 973-74.
113. Id.
judicial decisions rendered in foreign countries, and the avoidance of forum shopping.

B. The Federal Arbitration Act: Article VII's Vehicle for Importing Domestic Law Into International Disputes

As the previous section illustrates, the majority of case law reflects a trend in U.S. courts to uphold the provisions of the New York Convention and to enforce arbitral agreements. However, recent case law out of the federal circuit courts has produced opinions that indicate a preference for domestic law over international treaty obligations through the use of the later-in-time doctrine. A brief discussion of the United States Federal Arbitration Act is warranted to comprehend the interplay of the relevant United States domestic law.

The Federal Arbitration Act (hereinafter referred to as the "FAA") sets out the domestic rules of arbitral law for the United States.

Chapter One, Section 10 of the FAA enumerates four grounds upon which federal courts may vacate or modify arbitral awards: excess of arbitral authority; arbitrator misconduct; evident partiality; and fraud. In addition, federal case law has implied three additional grounds for the denial of arbitral awards: manifest disregard of the law; an arbitrary and capricious or irrational award; and violation of public policy.

114. Davis, supra note 5, at 47 (the most notable and controversial cases concerning this issue include In re Chromalloy Aeroservices, Baker Marine v. Chevron, and Spier v. Calzaturificio Tecnica).

115. It should be noted that the New York Convention is a non-self-executing treaty. Treaties that are non-self-executing require implementation by Congress to take effect as domestic law where the international agreement would achieve what lies within the exclusive law-making power of Congress under the Constitution. Lori F. Damrosch et al., International Law Cases and Materials 206 (West Publishing Co. 2001) (1980). As such, the United States Federal Arbitration Act is the domestic legislation that gives effect to the New York Convention in the United States.

116. Id. at 68 (the Federal Arbitration Act was enacted in 1925 and later amended in 1970 when the United States ratified the New York Convention).

117. Id.; see also Qiu, supra note 31, at 620-21.

118. Rodriguez v. Prudential, 882 F. Supp. 1202, 1209 (D.P.R. 1995) (the District Court explained that the "manifest disregard" of the law language derives from the United States Supreme Court's holding in Wilco v. Swan, 346 U.S. 427 (1953)); Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1990) (the First Circuit proposed that the "manifest disregard" language applies to two classes of cases: (1) to labor arbitrations, where an award is contrary to the plain language of a collective bargaining agreement; and (2) where it is clear from the record that the arbitrator recognized the applicable law and then chose to ignore it).

119. Brown v. Rauscher, 994 F.2d 775, 781 (11th Cir. 1993) (the 11th Circuit provided two justifications for reviewing an arbitral award for arbitrariness and capriciousness: (1) a determination of whether an arbitral award is arbitrary of capricious is a legal issue, which a court is well equipped to evaluate; and (2) to remand the case to
However, Chapter One of the FAA does not directly address the enforcement of foreign judgments. Thus, it is unclear whether Congress intended the FAA to include jurisdiction over foreign awards. This nuance is of considerable substantive importance because the intent of Congress would dictate the scope of the courts’ power to vacate or modify non-domestic arbitral awards. Consequently, there is dispute as to whether the above-mentioned grounds can be used as a basis for federal courts to vacate or modify non-domestic arbitral awards rendered pursuant to Article V of the New York Convention. Resolution of this conflict is important for future enforcement of the New York Convention.

If the U.S. courts have enforcement power over foreign arbitral awards under the FAA, then Article VII of the New York Convention is triggered and federal courts may rely upon local laws to vacate or modify awards. Alternatively, if Chapter 2 of the FAA limits federal courts to the express provisions of the New York Convention, then Article V of the New York Convention is triggered and arbitral grounds can only be denied on the grounds enumerated therein.

120. Exxon Shipping v. Exxon Seamen’s Union, 11 F.3d 1189, 1194 (the Third Circuit stated that federal courts can vacate arbitration awards on public policy grounds, citing a proposition from an earlier Third Circuit case, Ludwig Honald Mfg. v. Fletcher, 405 F.2d 1123, 1128 note 27 (3d Cir. 1969), where the Court held that an arbitral award could be properly vacated either because it “violates a specific command of some law” or “because of inconsistency with public policy”).

121. Ostrowski, supra note 3, at 1675 (Chapter One of the Federal Arbitration Act could be read as indicating that cases involving the recognition and enforcement of foreign awards was not contemplated at the time of the Act’s inception; however, this does not mean that international arbitration is necessarily outside the scope of the Act).

122. ld. at 1676.

123. ld. (If recognition and enforcement of foreign awards is outside of the Federal Arbitration Act, then the United States would not have prima facie authority to confirm a foreign award, unless the arbitration agreement specifically provides otherwise).

124. Qiu, supra note 31, at 621.

125. Ostrowski, supra note 3, at 1677.

126. ld.
C. Recent Federal Case Law: The Preference for Article V or VII Depends on Which Provision Favors Domestic Citizens and Businesses

In *Matter of Chromalloy Aeroservices*127 (*Chromalloy*), the court employed Article VII to enforce an arbitral award, benefiting a United States corporation, that had been rendered invalid. Arbitration proceedings against the Egyptian Air Force took place in Cairo under Egyptian law and the arbitral tribunal issued a ruling in favor of Chromalloy.128 When the Egyptian Air Force refused to pay the award, Chromalloy applied to the U.S. District Court for the District of Columbia for enforcement of the award.129 Subsequently, the Egyptian Air Force filed an appeal with the Egyptian Court of Appeal for nullification of the award to Chromalloy.130 The Egyptian Court of Appeal granted the Egyptian Air Force’s request for nullification. The Egyptian Air Force then filed a Motion to Dismiss Chromalloy’s petition to enforce the award in the U.S. District Court.131 Despite the nullification, the U.S. District Court for the District of Columbia granted Chromalloy’s petition to recognize and enforce the arbitral award in the United States.132 This decision creates a conflict between the power of the rendering country to vacate the award on the basis of an Article V public policy exception and consideration of the domestic law by the enforcing country under Article VII of the New York Convention.133

The U.S. District Court based its decision on a presumption that Article VII of the New York Convention enabled it to invoke Chapter One of the FAA for the recognition and enforcement of an arbitral award.134 However, as earlier mentioned, it is not clear whether Chapter


128. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 914-15.
133. Id. at 914.
134. Ostrowski, *supra* note 3, at 1668; see also Chromalloy, 939 F. Supp. at 914 (the court specifically stated that while Article VII does not eliminate all consideration of Article V, it requires that the court protect Chromalloy under the domestic law of the United States; the court further alleged that there was no conflict between the use of Article VII to invoke the Federal Arbitration Act and the language of the New York Convention).
One of the FAA even applies to, or can be invoked in relation to, foreign-rendered arbitral awards.\textsuperscript{135} Therefore, the use of Article VII of the New York Convention to import and rely on U.S. domestic arbitration law only adds to the uncertainty of the enforcement process, which is contrary to the goal of Article V of the New York Convention.\textsuperscript{136} Further, the use of Article VII to import U.S. law in order to enforce a judgment, while Article V was used to set aside the judgment on the basis of local laws in Egypt, creates controversy as to which country's local laws should take precedence over the others.\textsuperscript{137} 

Under the Chromalloy court's decision, it appears that the federal court took the approach that would allow the importation of U.S. domestic law. While the court's justification was that its decision would further the international arbitration system and enforcement of arbitral decisions, this case can also be viewed as an overstepping by the federal courts to invoke U.S. domestic law rather than Egyptian domestic law.

In \textit{Baker Marine v. Chevron},\textsuperscript{138} the court utilized Article V to uphold an arbitral decision of the rendering country. An arbitral panel in Nigeria awarded Baker Marine judgments against Chevron and Danos. Baker Marine subsequently applied to enforce both awards in the Nigerian Federal High Court.\textsuperscript{139} Concurrently, Chevron and Danos appealed to the Nigerian Court to have the awards set aside.\textsuperscript{140} The Nigerian court set aside both the Chevron and Danos judgments.\textsuperscript{141} Consequently, Baker Marine applied to the Northern District of New York for recognition and enforcement of the judgments pursuant to U.S. law.\textsuperscript{142} The District Court denied the application and Baker Marine appealed to the U.S. Court of Appeals for the Second Circuit.\textsuperscript{143} The Second Circuit affirmed

\begin{thebibliography}{99}
\bibitem{135} Ostrowski, supra note 3, at 1675.
\bibitem{136} \textit{Id.} at 1670.
\bibitem{137} \textit{Id.} at 1673-74.
\bibitem{138} Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F. 3d 194, 195-96 (2d Cir. 1999) (two corporations, Baker Marine and Danos, entered into a contract with Chevron, whereby an arbitration clause stipulated that all disputes would be settled by the Arbitration Rules of the United Nations Commission on International Trade Law employing the substantive laws of the Federal Republic of Nigeria. Baker Marine charged both Chevron and Danos with violating their contracts and all parties submitted to arbitration).
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{Id.} at 196.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.}
\bibitem{143} \textit{Id.}
\end{thebibliography}
the rulings of the district court and declined to enforce the arbitral awards.\textsuperscript{144}

In \textit{Baker}, the Second Circuit upheld the decision of the Nigerian Courts on the basis of Article V, thereby respecting the decision made in the rendering country. Unlike the Chromalloy court, the Second Circuit chose not to enforce the initial arbitral award. Thus, when confronted with the exact same situation as the \textit{Chromalloy} court, the Second Circuit decided to rely on alternate reasoning in order to achieve a different result than the \textit{Chromalloy} court. The Second Circuit reasoned that arbitration agreements should be treated like all contracts and suggested that enforcing annulled arbitration awards would violate, rather than promote, U.S. arbitration policy.\textsuperscript{145} The Court recognized that the refusal to uphold arbitral agreements systematically hindered the authority of the courts to render decisions and discouraged the use of international arbitration agreements.

The \textit{Baker} court, however, did not resolve the interplay between U.S. arbitration policy and domestic law. If the \textit{Chromalloy} decision were followed, Article VII of the New York Convention would require such an analysis.\textsuperscript{146} Interestingly, Baker Marine was neither a United States citizen nor a United States corporation, whereas Chromalloy was. If the differences in the outcomes of those cases could be reconciled on this basis, this begs the question of whether the \textit{Baker} court might have decided differently had the decision led to a favorable result for a U.S. citizen. The \textit{Baker} court even distinguished the \textit{Chromalloy} case by specifically acknowledging that Baker Marine was not a U.S. citizen.\textsuperscript{147} Thus, within a three-year time period the U.S. federal courts employed two completely different approaches to arbitration policy.

In \textit{Spier v. Calzaturificio Tecnica (Spier)},\textsuperscript{148} the court purported to follow an Article V analysis when it upheld a decision by an Italian court. Italian arbitrators found in favor of Spier and awarded a judgment of one billion Italian lire.\textsuperscript{149} Tecnica challenged the award through three

\textsuperscript{144} \textit{Id.} at 197 (the Court warned that applying domestic arbitral law to foreign awards under the New York Convention would undermine the policy of finality and would produce conflicting judgments and would encourage forum shopping).

\textsuperscript{145} \textit{Davis, supra} note 5, at 51.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Baker Marine}, 191 F.3d at 197 (the Court specifically drew this distinction "unlike the petitioner in Chromalloy, Baker Marine is not a United States citizen, and it did not initially seek confirmation of the award in the United States").

\textsuperscript{148} \textit{Spier v. Calzaturificio Tecnica, S.P.A.}, 71 F. Supp. 2d 279, 280-81 (S.D.N.Y. 1999) (Spier, a United States citizen, entered into a contract with Tecnica, an Italian corporation, under which disputes were to be settled by arbitration. Spier alleged a claim against Tecnica that they had developed a means of production derived from expertise acquired from Spier, and the matter was submitted to arbitration).

\textsuperscript{149} \textit{Id.}
levels of the Italian court system. All three courts held the judgment unsupported and nullified the award. Consequently, Spier petitioned for enforcement of the Italian arbitrators' award in the U.S. District Court for the Southern District of New York. The District Court denied Spier's petition to enforce the Italian arbitral award.

The Spier court's refusal to enforce the arbitral award followed the reasoning of the Baker court, stating that the United States may only deny enforcement of an arbitral award on the basis of Article V of the New York Convention. Because the United States was not the rendering country, the court held that the award was subject to annulment only under Italian law. The court in Spier, like the Baker court, also did not consider or distinguish Chromalloy's Article VII argument. Avoiding the implications of Article VII is problematic because, as the Chromalloy court notes, Article V is a permissive and thus an optional standard, while the language in Article VII appears to require mandatory consideration of the local laws of the enforcing country. Thus, in interpreting case law and the New York Convention, a resolution as to the Article V and Article VII conflict is necessary to encourage and promote international arbitration practices. Such a resolution should also curb the possibility that U.S. federal courts will manipulate the laws to the advantage of U.S. citizens, but to the possible detriment of the United States' international relations.

D. Where Are We After Chromalloy, Baker and Spier?

Currently, the Chromalloy, Baker and Spier cases leave open the opportunity for the United States to disregard the letter and spirit of the

150. Id. at 281-82.
151. Id. at 282.
152. Id. at 288-89.
153. Davis, supra note 5, at 53.
154. Id.
155. Davis, supra note 5, at 54 (the Spier court does acknowledge the Chromalloy decision, but attempts to distinguish the case on the ground that Egypt failed to uphold their agreement not to appeal an adverse arbitral decision).
156. Id.; see also Chromalloy, 939 F.Supp at 909 (the argument of the Chromalloy court involves the specific language of Articles V and VII of the New York Convention: the court contends that the Article V language "recognition and enforcement of the award may be refused . . ." is permissive, while the Article VII language "the provisions of the present Convention shall not affect the validity . . . nor deprive any interested party of any right he may have to avail himself of an arbitral award" is mandatory; thus, taking precedence over the Article V language (emphasis added).
New York Convention in favor of domestic law. Initially, Chromalloy set the stage for the controversy by acknowledging the conflict between Articles V and VII of the New York Convention and attempting to both interpret and reconcile them. The Chromalloy court applied the Article VII option to employ local law where it is more favorable because it is a mandatory provision, whereas the Article V grounds for nullifying an award are permissive. While this decision may seem justified, given the language of Article VII, it deliberately allows the United States to assert its own domestic law in place of the law of other countries. This will create greater tension between the United States and countries that are parties to international arbitration agreements by causing second-guessing as to a decision made based on the laws of one country and debate over which country’s laws should prevail. The Baker Marine and Spier courts employed Article V to uphold the parties’ choice of law but failed to acknowledge the arguably mandatory language of Article VII. Thus, the treatment of Articles V and VII remains unresolved in how the United States’ and other countries’ approach the issue. Such disparities in treatment create a lack of consistency in enforcing and adjudicating international arbitration agreements that could affect the growth and effectiveness of the international arbitration process.

157. *Id.* at 75-76.
158. *Id.*
159. It may appear that Chromalloy is actually an outlier in deferring to the authority of Article VII and that Baker and Spier are the authority to be relied upon because they were decided in 1999, whereas Chromalloy was decided in 1996. However, neither Baker nor Spier overruled Chromalloy nor did they specifically resolve the conflict between Articles V and Articles VII. Furthermore, the most recent case to cite either Chromalloy, Baker, or Spier as authority was Karaha Bodas Company v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 360-67 (5th Cir. 2003), which cited to Chromalloy as authority for its holding. In Karaha Bodas, an Indonesian Company, Pertamina, and a company incorporated in the Grand Caymans, KBC, had agreed to arbitrate contract disputes in Switzerland. After an award was granted to KBC, Pertamina sought to have the award annulled in Indonesia and KBC sought enforcement in the United States. The Fifth Circuit explained that the New York Convention bestows authority upon an enforcing country (i.e. the United States) to enforce an arbitral award even where an award has been rendered or nullification proceedings are accruing in the country where the award was rendered. Accordingly, the Fifth Circuit utilized Article VII of the New York Convention to rely upon authority under Chapter 2 of the Federal Arbitration Act to enjoin the Indonesian Company, subject to the jurisdiction of the United States, from making repeated attempts to prosecute in Indonesia in order to annul the arbitral award.
IV. IS THERE A SOLUTION?

A. International Comity and the Debate Over Who Should Have Controlling Authority

Choosing to favor either Article V or Article VII of the New York Convention may turn on the question of what is "competent" authority on a given matter.\textsuperscript{160} The answer to this question depends on who is better suited to make the decision regarding enforcement of an arbitral award—the rendering country or the enforcing country. Article V advocates granting ultimate authority to the rendering country, which has the advantage of eliminating improper awards at the source and providing judgments that are consistent with the procedural and substantive laws of the country in which the parties contracted to resolve arbitrations.\textsuperscript{161} Additionally, the parties can rely on the expectation that their dispute will be resolved in one jurisdiction and avoid one party's forum shopping to find a court that will enforce the judgment.\textsuperscript{162}

At the same time, leaving the ultimate authority regarding arbitral decisions to the rendering country poses a danger of no correction within a domestic law vacuum.\textsuperscript{163} Allowing arbitral decisions to be completely subject to the laws of the rendering country may create a lack of checks and balances on the international arbitration system.\textsuperscript{164} Enhancing the power of local courts is contrary to the view that international arbitration is a system that is delocalized and detached from national arbitration laws.\textsuperscript{165} This is the reason that Article VII may be advantageous. However, Article VII can also be viewed as undermining other countries' legal tribunals by enforcing the domestic laws of the enforcing country, rather than the laws of the rendering country where the parties agreed to arbitrate.

\begin{footnotes}
\item[161] Ostrowski, supra note 3, at 1662-63.
\item[162] Id. (citing Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 1-6 (1981)).
\item[163] Ostrowski, supra note 3, at 1663.
\item[164] Id.
\end{footnotes}
The notion that the U.S. Constitution is the "supreme law of the land" is a fundamental tenet of U.S. law, society and history. The Supremacy Clause of the Constitution, found in Article VI, specifically declares that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."\(^{166}\) Unlike interpretations of many provisions of the Constitution that are frequently debated because of their vagueness, the text of the Supremacy Clause is rather clear in its meaning: because treaties hold equal weight to the Constitution under the Supremacy Clause, treaties also are the "supreme law of the land."\(^{167}\) Therefore, the obligation of the federal courts of the United States to uphold international treaties, including the New York Convention, as the supreme law of the land is mandatory, and is a necessary component of our democratic society.

Despite this obligation, U.S. treatment of treaties in recent years demonstrates a pattern in which U.S. domestic law overshadows the importance of treaties and international relations.\(^{168}\) Should the United States follow a path by which it does not uphold the tenets of the New York Convention, the consequences could be detrimental not only to the promulgation of the international arbitration process, but also to the sacred notion that the Constitution is the supreme law of the land.

C. A Ploy to Exploit Article VII of the New York Convention? The Later-in-Time Rule Revisited

Utilizing the doctrine of the later-in-time rule, as applied in the Head Money Cases, to analyze the recent treatment by the U.S. federal courts of the New York Convention, reflects a danger that the federal courts will avoid upholding international treaty requirements despite the Supremacy Clause.\(^{169}\) The Head Money Cases and the later-in-time rule

\(^{166}\) U.S. CONST. art. VI, § 1, cl. 2.
\(^{167}\) David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 36 U.C. DAVIS L. REV. 1, 46 (2002); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 1999 (2d ed., Clarendon Press, 1996) (The Supremacy Clause was designed principally to assure the supremacy of treaties to state law.).
\(^{168}\) Vagts, supra note 11, at 313.
\(^{169}\) See generally LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 206 (2d ed., Clarendon Press 1996) (the obligations and authority to implement a treaty under the Supremacy Clause also implies an obligation and authority to interpret treaties and to determine what is required by the treaty).
provide a controversial rationale\textsuperscript{170} for federal courts to rely on as a basis for justifying the use of domestic law in place of treaty law. The \textit{Head Money Cases} would dictate that the federal courts have an adequate basis to invoke Article VII of the New York Convention and to employ domestic law where doing so would lead to a more favorable outcome.\textsuperscript{171} While use of Article VII may support the policy of enforcing arbitral awards, such action also has the potential to erode Article V's important aims of consistency and predictability.

An even greater danger arises if the United States acts in a manner that takes advantage of Article VII of the New York Convention. Under the force of the later-in-time rule, the U.S. Congress could conceivably enact new legislation that is contrary to treaty obligations, and then use Article VII to employ that new domestic law in place of the international law.\textsuperscript{172} In fact, Senator Jesse Helms, former Chairman of the Senate Foreign Relations Committee, even stated that the United States' treaty obligations could be superseded by a simple act of Congress.\textsuperscript{173} This attitude reflects a growing defiance on the part of the United States that could both offend treaty partners and affect the implementation and drafting of treaties with State parties in the future.

The backlash the United States has experienced due to previous breaches of international agreements has not yet been severe; the United

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{170} Id. at 210 (the later-in-time rule set forth in the Whitney doctrine, see supra note 67, implies an equality of United States treaties and legislation enacted by Congress; but the Supremacy Clause says only that treaties and statutes are both the law of the land, but does not assert that they are equal to each other).
    \item \textsuperscript{171} See supra notes 55-56.
    \item \textsuperscript{172} Henkin, supra note 169, at 206 (for international purposes, the President determines the initial view of the United States with respect to a treaty. However, Congress has opportunity to interpret a treaty either when it is implementing legislation to enact the treaty or when enacting other legislation that might otherwise be relevant to the operation of the treaty. Additionally, Congress can evade treaty obligations with legislation either by enacting legislation inconsistent with treaty obligations or by repealing legislature acts that were enacted for the purpose or implementing the treaty).
    \item \textsuperscript{173} Julian G. Ku, \textit{Treaties as Laws: A Defense of the Last in Time Rule for Treaties and Federal Statutes}, 80 IND. L.J. 1, 23, 27 (2005) (the last-in-time rule suggests that a treaty can be cancelled by a unilateral act of Congress; not only does this undermine the authority of the Supremacy Clause and the ability of the United States to uphold their international obligations, but it does so one the basis of a decision of one branch of the United States government. This also implicates a separation of powers problem, as the authority to enter into international treaties and executive agreements rests with the executive branch of the United States government). See also Henkin, supra note 169, at 106.
\end{itemize}
\end{footnotesize}
States has not suffered significant punishment or consequences. But this should not serve as validation that the United States is acting appropriately and prudently. There is a question that still remains unanswered—where do the Head Money Cases and the later-in-time doctrine leave the United States with respect to the Supremacy Clause and foreign relations?

The answer should be a United States that is attentive to its international treaty obligations and that upholds its "interests" with honor. In an advisory opinion by the International Court of Justice, a U.S. judge stated "a State cannot avoid its responsibility by the enactment of domestic legislation which conflicts with its international obligations." In order for the United States to maintain an elevated position in world affairs and with other world powers, the United States must act with honor by fulfilling the obligations that it represents that it will take on—thereby allowing other countries to keep their faith in the United States.

The "interest" of the United States involves a need to be attentive to the reactions that would arise from treaty partners as a result of its noncompliance. While the general response by other treaty participants to U.S. breaches of international obligations has not yet been substantially negative, the full picture may not yet be clear. As the United States continues to commit minor breaches of international agreements, the credibility of the United States is slowly eroding, destroying an image of interest and honor that the United States should be striving to uphold. The U.S. Constitution states that treaties are the supreme law of the land and take precedence over conflicting domestic law. However, the Head Money Cases and recent breaches of international obligations have given deference to domestic law, thereby eroding both the Constitution of the United States and our relationships with the rest of the world.

174. See supra notes 46-47.
175. Id. at 324 (quoting Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 ICJ REP. 12, 34, para. 57 (Apr. 26)).
176. Vagts, supra note 11, at 324-25 (one of the explanations for the binding effect of treaties and their continued use is the reliance on each party to act with honor and in good faith; even the court in the Head Money Cases used the term "honor" in explaining the later-in-time rule and acknowledging that some obligation to international agreements was still incumbent on the United States).
177. Id. at 327 ("interest" refers to the reactions that noncompliance would arouse in countries who are parties to the international agreement or treaty; the court in the Head Money Cases was concerned even with the possibility of countries going to war over breaches of treaty obligations; concerns about war became less likely as the United States became more and more powerful).
178. Id. at 329.
D. Article V More Effectively Promotes International Arbitration and International Commercial Transactions

The impact of avoiding responsibilities under international agreements goes beyond threatening the strength and power of the Supremacy Clause of the Constitution and treaty obligations with signatory countries. The protectionist practices of the United States will have a detrimental effect on the international arbitration system and on business relationships between the United States and other countries.\(^\text{179}\) *Pacta sunt servanda* is the notion that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."\(^\text{180}\) Where good faith is not exercised, both the force of a treaty and the credibility of the breaching party are compromised.

Treaties act beneficially as a mechanism for enhancing cooperation.\(^\text{181}\) Much like the notion behind the game theory of the Prisoner's Dilemma,\(^\text{182}\) a treaty sets out rules for behavior for the parties to the agreement. When one party acts opportunistically and then denies violating the terms of the game, that party's probability of successful outcomes in future interactions will diminish.\(^\text{183}\) The opposing party will distrust the future behavior of the opportunistic party and may even refuse to engage

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\(^{179}\) John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956-57 (1999) (international agreements are important to the functioning of the United States in international commerce: the GATT sets the rules of international trade, which comprises one-third or the economic activity of the United States; NAFTA, which creates a free market among the United States, Canada, and Mexico, opens up opportunities for the economic growth of the United States).


\(^{181}\) *Id.* at 118.

\(^{182}\) CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY* 21-25 (West Group 1997). The Prisoner's Dilemma describes conflicting strategies for approaching negotiations. The basic notion is that aggressive bargaining strategies will allow you to be successful and win a lot in the short-run. Alternatively, cooperative interaction can bring a double benefit—a better result in the present negotiation and continued successful negotiations in future dealings. The risk, though, is that by acting cooperatively, the party you are negotiating with may, in fact, be acting aggressively and you could lose everything. Essentially, a bargainer has a short run incentive to act selfishly, but will fare better in the long run be developing a pattern of mutual cooperation.

\(^{183}\) Goldsmith, *supra* note 180, at 118.
in future negotiations.\textsuperscript{184} Similarly, the United States’ failure to abide by provisions of international agreements creates an unwillingness of countries to interact with the United States because of the increased risk of doing business.\textsuperscript{185} This result will spill over to commercial interactions if businesses in other countries conclude that the risk of contracting with U.S. businesses is too high. In the long run, the United States will suffer from a loss of exporting/importing opportunities, diminished influence in shaping international laws and treaties, and inability to foster positive foreign relations.

Related to the increased risk of doing business with the United States is the increased cost of doing business that will result for the United States. Parties to a contract or treaty will comply with its terms to the extent that doing so is cost-justified.\textsuperscript{186} If the United States is non-compliant in its treaty obligations then, as mentioned above, the risk of doing business and engaging in international agreements with the United States escalates. As a result, the United States loses credibility, and convincing other nations to engage in trade or policy agreements will become more costly. Consequently, continuous violations may threaten the ability of the United States to influence foreign policy.\textsuperscript{187}

In summary, the extent to which the United States upholds or does not uphold treaty obligations, especially with respect to the New York Convention, could have an important effect on both the predictability and fairness of the international arbitration system and the expansion of the arbitration system to mediate international commerce and trade relationships.

\textbf{E. What Now?}

Given the United States’ recent approach to international agreements and the deference federal courts give later-in-time domestic law despite

\textsuperscript{184} Id.

\textsuperscript{185} Id. (the theory behind the prisoner’s dilemma as applied to countries that are parties to treaty obligations implies that states will refrain from violating treaties for the following reasons: because they fear retaliation from other states, or because they fear a failure of coordination (which refers to the notion that when treaties define coordination actions, it becomes less likely that failure of a treaty will occur because of error), or because they fear a loss of reputation).

\textsuperscript{186} Id. at 135 (a particularly important cost is diminishing reputations, which can result in retaliation; for example, if a state violates its obligation to reduce tariffs under a free trade pact, then other states may retaliate by refusing to lower their own tariffs).

\textsuperscript{187} Id. at 136, 142 (this idea is also supported by a rational choice explanation where international leaders realize that the public internalizes legal norms and ideas that are set forth in international treaties and agreements; leaders, therefore, must support these norms or risk being accused of hypocrisy and disloyalty, not only by other parties to international agreements, but by their own constituents).
the Supremacy Clause, it is my prediction that the United States will continue to use Article VII of the New York Convention as a vehicle to import domestic law at the expense of uniformity in the international arbitration arena.

It is my conclusion that the more effective way to foster and encourage international relations is to give deference to Article V over Article VII where the two are in conflict. Article V poses only very limited exceptions for invalidating arbitral awards, providing for greater predictability and uniformity in the international arbitration system. Greater uniformity in the courts of different countries reviewing arbitral awards will foster an enhanced sense of fairness for parties to the arbitration. Additionally, upholding the tenets of Article V better mirrors the intentions of the parties to international trade agreements to arbitrate under the laws of the rendering country rather than the enforcing country. Lastly, there will not be competition between countries in determining whose law should apply because the occurrence of disparate judgments being entered in the courts of two different countries will be minimized.

With respect to all international states that are parties to the New York Convention, however, both Articles V and VII may be needed for the Convention's continuing functionality. Heisenberg’s Uncertainty Principle would suggest that there cannot be a clear conceptual separation of Articles V and VII of the New York Convention because doing so would affect the degree of the underlying policies being measured. To place all emphasis on one of the policies underlying Articles V and VII in order to resolve conflict would necessarily affect the degree to which

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188. Daniel S. Goldberg, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 Hous. L. Rev. 463, 479-80 (2002) (Heisenberg’s Uncertainty Principle is a theorem from nuclear physics holding that its is impossible to simultaneously determine an objects exact velocity and position because the more accurately you measure where the particle is, the less accurately you will be able to measure where it is going. The Heisenberg Uncertainty Principle is based on two premises: (1) any observation requires intervention into the system being studied, and (2) it can never be certain that the intervention did not change the system in an unknown way).

189. R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory From Quantum Mechanics*, 18 Fla. St. U. L. Rev. 855, 856-57 (1991) (the author provides an example in the context of the Supreme Court: the degree to which an asserted right is fundamental or basic cannot be measured without affecting the degree of what is being measured by the very act of measurement).
that policy even exists. Furthermore, the goals of upholding arbitral awards and consistency/predictability may have been integral for the existence of the New York Convention as a whole: parties to the Convention may not have initially become signatories if both provisions and, impliedly, both policies were not present.

In conclusion, both Articles V and VII are important for the continued existence of the New York Convention. However, the United States will profit from giving deference to Article V of the New York Convention, and respecting the legal systems of other countries. Such behavior will assist the United States in retaining a position of leadership and respect in creating foreign relations and enforcing treaty obligations in the future.

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190. Craig M. Bradley, The Uncertainty Principle in the Supreme Court, 1986 DUKE L.J. 1, 2 (1986) (the author contends that any attempt to achieve certainty regarding any important issue is unlikely to succeed because the process of rendering a decision will distort the issue decided as well as applicable precedents and doctrines; additionally, it will have the effect of creating uncertainty in other issues).