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# The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic

**Brian F. Havel and John Q. Mulligan\***

*This comment is in response to an article by Jeffrey Wool and Andrej Jonovic in which they explore the relationship between transnational commercial treaties and national law at the moment of implementation of those treaties within a State's domestic legal system. This comment argues that, in reality, national law poses the greatest danger to the predictability and uniformity intended by transnational commercial treaties at the later-occurring stages of interpretation and enforcement. The comment first considers how the framework developed by Wool and Jonovic for identifying the proper boundaries of national and transnational law does not account for the eventual shifting of those boundaries over time through the "renationalization" of supposedly transnationalized laws. The comment cites examples of that shift that are already taking place in certain States' enforcement of the Convention on International Interests in Mobile Equipment (The Cape Town Convention). It goes on to describe the circumstances under which courts further renationalize treaty law through a variety of interpretive choices they must inevitably confront. The comment then examines the two most commonly employed safeguards against renationalization and applies them to the Cape Town Convention. The first safeguard is autonomous interpretation, a doctrine which is in fact written into the Cape Town Convention. The comment summarizes some of the research on the doctrine's effectiveness in the enforcement of another transnational commercial treaty, the Convention on the International Sale of Goods, and contemplates what that history may presage for autonomous interpretation of Cape Town. Finally, the comment turns to the second commonly utilized safeguard against renationalization, investor-State dispute settlement, which pertains mostly to the State administration and enforcement of a treaty's provisions rather than their judicial or agency interpretation. Because these dispute settlement clauses have become increasingly controversial in recent years, the comment surveys the prospects for bringing Cape Town claims under the dispute resolution provisions of existing international investment treaties as an alternative to amending the Convention to include a freestanding investor-State dispute settlement mechanism.*

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## I. Introduction

The purpose of this comment is to respond to the analysis by Jeffrey Wool and Andrej Jonovic, published in 2013, of the reception of the Cape Town Convention ('CTC')<sup>1</sup> into

national law.<sup>2</sup> The comment begins with a précis of what we perceive to be the core elements of the Wool/Jonovic article, and then considers how the absorption of treaties into municipal legal systems can become corrupted over time by a process of 'renationalization'.<sup>3</sup> The ambitious reach of the CTC – nothing less than a private/public stabilization of the legal treatment of security interests in mobile equipment across multiple jurisdictions<sup>4</sup> –

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<sup>1</sup> Convention on International Interests in Mobile Equipment (adopted 16 November 2001, entered into force 1 April 2004) 2307 UNTS 285 ('Cape Town Convention').

<sup>2</sup> Jeffrey Wool and Andrej Jonovic, 'The Relationship Between Transnational Commercial Treaties and National Law – a Framework as Applied to the Cape Town Convention' [2013] 2 *CTCJ* 65.

<sup>3</sup> Martin Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' [2003] *Unif L Rev* 683.

<sup>4</sup> Cape Town Convention, Preamble.

means inevitably that the treaty's insistence on uniformity and predictability will potentially clash with long-rooted national norms and practices. Having laid out some principles to consider with respect to the 'renationalization' of multiparty treaties, the comment will examine some perceived consequences of one of the most noteworthy gaps in the CTC, the absence of any formal inter-State or State/private party dispute settlement mechanism or even a method for authoritative interpretation of the treaty by some supranational regulatory organization.

It is here, in fact, that we see one of the most problematical obstacles to the CTC's future dominion: because it seeks to anesthetize future political conflict by its extensive system of reservations and declarations,<sup>5</sup> it has front-loaded some quite high expectations for its successful operation in national jurisdictions after completion of the process of reception and incorporation. If the challenges raised by Wool and Jonovic are not to be considered trivial, and in our view they are not, then neither should the prospects for future compliance be so considered. Yet the Convention (and the Aircraft Protocol<sup>6</sup>) account for the challenge of localized deviations only with the prospect of a misty future of review conferences and possible amendments.

This comment, however, makes the further assumption that the provisions for future review – Article 61 of the Convention and Article XXXVI of the Aircraft Protocol<sup>7</sup> – are not mere surplusage and do intend coherent treaty reform to remain possible (and in that way to be distinct from the messy experience of predecessors like the Warsaw Convention<sup>8</sup>).

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<sup>5</sup> Brian F Havel and Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (CUP 2014) 353-54.

<sup>6</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (adopted 16 November 2001, entered into force 1 March 2006) 2307 UNTS 285 ('Aircraft Protocol').

<sup>7</sup> Cape Town Convention, Article 61; Aircraft Protocol, Article XXXVI.

<sup>8</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12

October 1929, entered into force 13 February 1933) 137 LNTS 11 ('Warsaw Convention'). The Warsaw Convention was the subject of repeated, periodic attempts at revision before a replacement convention was finally adopted in 1999.

With that in mind, we will explore the notion that at least some of the gaps, shortcomings, and deviations that may be exposed as the CTC takes hold in domestic jurisdictions could be addressed by appropriate dispute settlement mechanisms. Those mechanisms, if sufficiently robust, might in turn divest the individual signatory States of what now appears to be an appreciable capacity for mischief after the treaty arrives within their national legal systems.

## II. The Wool/Jonovic Analytical Framework

Wool and Jonovic set out to describe the framework within which commercial law treaties co-exist with national law. Five problems occupy the authors: how treaties acquire the force of law in contracting States (typically through a constitutional process); how national jurisdictions resolve conflicts between treaties and local rules (a question of 'primacy' that is likely to be resolved legislatively or constitutionally); at a more granular level, how treaties are to be reconciled with national law in the context of specific covered transactions (including the extent to which treaties should be interpreted autonomously); the national law that applies to a covered transaction, where national law is needed; and finally, the extent to which the national law of a *non-contracting State* can sweep a transaction into coverage by a treaty. The article makes its most significant contribution, in our view, to the third of these problems, namely, the respective roles of treaty law and national law in regulating specific transactions.

In analyzing the boundaries where treaty authority over a transaction ends and national law governance begins, Wool and Jonovic classify the potential legal questions regarding a covered transaction into four categories: those explicitly regulated by the terms of the treaty; 'penumbra' issues that are implicit in the subject matter of the treaty and which

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October 1929, entered into force 13 February 1933) 137 LNTS 11 ('Warsaw Convention'). The Warsaw Convention was the subject of repeated, periodic attempts at revision before a replacement convention was finally adopted in 1999.

are to be determined by judicial gap-filling in accordance with the treaty's general principles; legal questions clearly outside the scope of the treaty and resolvable by national law without reference to the treaty's general principles; and finally, questions explicitly assigned by the treaty for determination according to applicable national law. Moreover, the article elucidates four overarching principles of the CTC that should be used when penumbra issues arise: enforceability of contract provisions; transactional predictability based on international best practices in asset-based financing and leasing; reliance on *sui generis* treaty concepts; and government respect for basic CTC rights. As to the last, Wool and Jonovic borrow from the jurisprudential ideas of the European Union by insisting that the CTC pre-empts incompatible national rules, such as a rule requiring the debtor's consent to the exercise of re-registration rights. Finally, the authors identify a handful of penumbra issues that would fall outside the reach of these global principles and extensively list the items that the CTC has assigned to governance by national law.

Wool and Jonovic have provided a roadmap for practitioners, creditors, debtors and other interested parties who are seeking to establish the applicable legal authority that governs every element or legal question raised by an international financing transaction for mobile equipment. But their article stops short of recognizing a 'dynamic' process of treaty interpretation in national courts (as explored by Michael Van Alstine and others).<sup>9</sup>

<sup>9</sup> M P Van Alstine, 'Dynamic Treaty Interpretation' [1998] 146 *U Pa L Rev* 687. Van Alstine argues that through 'a dynamic process of interaction between national courts on an international level', greater uniformity will eventually be accomplished. We have borrowed van Alstine's terminology (specifically the notion of a 'dynamic' process of national court interpretation) but not his substantive thesis that a consensus-building dialogue between national courts in different adopting States can essentially serve as a continuation of the drafting process. In this comment, our concern is that national court interpretations can just as readily loom as a source of fragmentation rather than consensus.

In other words, although the authors have sketched a Cartesian system for looking at the principles of implementation as they exist at the moment of reception, a different picture may emerge when commercial treaties like the CTC become subject to a process of local judicial interpretation and enforcement over a substantial period of time. This comment now turns its attention to that process, acknowledging that such a discussion would be much more difficult without the framework that Wool and Jonovic have capably constructed.<sup>10</sup>

### III. The Renationalization of Treaty Regimes

#### *A. International Rules in a Dynamic National Context*

Achieving uniformity in the interpretation and application of multiparty commercial treaties is a challenge wholly distinct from achieving uniformity in implementation. The CTC remit reaches many discrete areas of what has heretofore been the preserve of local rules within national legal systems, such as registration, priority rules, bankruptcy, and enforcement remedies. Multinational treaty rules, therefore, do not exist in a vacuum but must be incorporated into those extant systems. UNIDROIT has provided regulatory toolkits (called 'accession kits') for this purpose and States are able to choose a number of different routes to incorporation of the specific rules.<sup>11</sup>

<sup>10</sup> Wool has more recently developed a framework for treaty compliance that is published elsewhere in this issue of the CTC Journal. Jeffrey Wool, 'Compliance with Transnational Commercial Law Treaties – A Framework as Applied to the Cape Town Convention' [2014] 3 *CTCJ*.

<sup>11</sup> For example, the Australian government considered three different implementation 'models'. In the first, the CTC would be given the direct force of law within Australia via implementing legislation and made to prevail over domestic securities law in the event of conflict. In the second, domestic securities law would be amended to incorporate CTC terms and provisions. The third was a hybrid approach, involving some direct implementation and some amendment of preexisting securities law. 'Cape Town Convention Implementation Options, Pre-existing Interests, Courts

As discussed in Part II, Wool and Jonovic map the various hierarchical relationships between treaties and national law and designate appropriate spheres of authority for each. Their article leans philosophically toward a framework in which the two overlapping regimes might harmoniously coexist, but the empirical reality is that the integration process is never seamless. Vessels of legal uniformity like the CTC instead crash against the shores of national legal systems, emerging less than perfectly intact. The best we can hope for – as the article seems to appreciate – is to minimize the consequential damage.

As noted above, Wool and Jonovic deal effectively with the methodology of implementation or incorporation, the moment when a multiparty treaty is formally integrated into a national code. They look at the relative positions of national and treaty law from that temporal perspective. But the acts of drafting a treaty and securing ratification are only the beginning steps toward the creation of a uniform legal regime in a given subject area. In some States, as the authors describe, the provisions of that treaty will need to be incorporated into national legal systems by the legislatures of the contracting parties.<sup>12</sup> Subsequently, in all contracting States, those provisions will then need to be given effect by the branches of national and local governments (including, for the CTC, national judiciaries and administrative bodies<sup>13</sup>) charged with their interpretation, administration, and enforcement.

A temporal viewpoint (no matter whether monist or dualist systems apply<sup>14</sup>) is important to the present analysis. In responding to Wool and Jonovic, this comment reflects on the interaction between transnational commercial treaties and national law at a different moment. Rather than what we might call precursor effects, this comment considers some of the *post hoc* effects that national law and national institutions can have on treaties that are supposedly operational

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and Insolvency Issues' (Consultation Paper, Department of Infrastructure and Transport, 2010).

<sup>12</sup> Wool and Jonovic (n 2) 65–67.

<sup>13</sup> Cape Town Convention.

<sup>14</sup> Wool and Jonovic (n 2) 65–67.

*de jure*. Many multilateral treaties have been adopted in pursuit of international uniformity for a specific legal regime, only to see that uniformity eroded over time by local actors, causing a progressive 'renationalization' of the law in question. While States may agree on a set of rules, the application of those rules is highly dependent upon the behavior of those domestic actors within the contracting States responsible for their interpretation and enforcement. Two recent examples come to mind of a discontinuity between promises made by States under the CTC and compliance by domestic institutions with those promises.

The first example relates to China's implementation of the CTC's Article 15 provisions for aircraft de-registration. China reportedly required creditors to procure a court order before its aircraft registration authority would de-register an aircraft. Article 15 requires national registration authorities to honor requests for de-registration made using a properly submitted irrevocable de-registration and export authorization (known as an IDERA). China's decision to require a court order in addition to the IDERA seems contrary to Article 15's purpose, which is to assure to creditors a more certain and expedited de-registration process in the event of debtor financial difficulties. China nevertheless interpreted such a requirement to be consistent with the CTC.<sup>15</sup>

The Russian Federation provides a second example of noncompliance activity, again concerning IDERA. Russia did not initially file an opt-in declaration with respect to IDERA when it acceded to the CTC and Aircraft Protocol in 2011.<sup>16</sup> Because an IDERA

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<sup>15</sup> China's decision was revealed through 2010 diplomatic cables obtained and released by WikiLeaks. We have recently discussed the matter with officials within the US Federal Aviation Administration (FAA) and there has been no apparent change in China's position. The FAA is continuing to 'work with' Chinese authorities toward a solution.

<sup>16</sup> Ludwig Weber and Artur Eberg, 'The Cape Town Convention and its Implementation in Russia and the Commonwealth of the Independent States (CIS)' [2014] 39(1) *Air & Space L* 1, 18.

opt-in declaration is required to qualify for the Cape Town discount, Russia deposited that declaration two years later (along with an opt-in declaration on the CTC's choice-of-law provision, also required to qualify for the discount), and passed a federal law to incorporate these subsequent declarations into the Russian legal system.<sup>17</sup> But as of this writing, the affected Russian administrative agencies have not yet made the regulatory changes necessary to adopt the IDERA mechanism.<sup>18</sup> Indeed, this may not be the only CTC provision where the facts on the ground in Russia continue to fall short of the Convention's aspirations. Although Russia has opted-into the CTC provisions authorizing the use of self-help remedies, the concept is novel to the Russian system and the prospects for actually utilizing such remedies within Russia are not promising.<sup>19</sup>

As these examples tend to illustrate, the relationship between national law and transnational commercial treaties can also be viewed as a series of interpenetrating layers. National legal systems, a jumble of statutes, regulatory actions, and judicial and administrative decisions, comprise a pre-existing sedimentary layer onto which the transnational provisions are poured. Again, the Wool/Jonovic article considers the moment of applying a supervening layer and the complications that typically occur. But whatever may be the immediate result of that experiment, over time the law continues to evolve and that is especially so with respect to national systems that inherently are subject to more frequent revision, refinement, and interpretive glossing than transnational treaties. So we must be prepared for the eventuality that additional layers of national law will come to overlay the CTC.

Ideally, especially with a detailed commercial treaty such as the CTC, the treaty's provisions are specific enough that most transactions under its auspices will require little interpretation. But it is inevitable that some disagreement

about the treaty's terms will eventually arise and must be adjudicated by some authority that may be (as in the case of the CTC) external to the treaty itself. 'Treaties tend to be more incomplete contracts than national texts because of high transaction costs and future uncertainties.'<sup>20</sup> Dispute settlement in the context of transnational commercial treaties can be classified into a typology of three: a dedicated international tribunal convoked under the treaty, arbitration provided for in the treaty (including investor-State arbitration, which will be discussed in more detail in Part IV), and default reliance on national judicial systems or regulatory agencies. The CTC, lacking any kind of dispute resolution either between States or between States and private investors who wish to use the treaty, will ultimately be interpreted by national courts and administrative agencies. Importantly, these interpretations will take place only after the treaty has been ratified, incorporated into, and recognized as part of the legal system governing the national body performing the interpretation. As Pauwelyn and Elsig so aptly wrote, 'Treaty interpretation intervenes at a crucial stage between commitment and compliance.'<sup>21</sup>

### *B. Dynamic Treaty Interpretation in National Courts*

Pauwelyn and Elsig identify five different variables that influence treaty interpretation and that can produce differing outcomes depending on the choices made by the interpreting body.<sup>22</sup> While the focus of these authors is on the behavior of international tribunals, application of the variables in a national court setting demonstrates that interpretation by local judges and officials holds the potential to renationalize the treaty

<sup>17</sup> Ibid. A more thorough explanation of the Cape Town discount can be found on page 79.

<sup>18</sup> Ibid 28.

<sup>19</sup> Ibid 24-25.

<sup>20</sup> Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in J Dunoff and M Pollack (eds) *International Law and International Relations: Taking Stock* (CUP 2013) 447.

<sup>21</sup> Ibid 446.

<sup>22</sup> Ibid 450.



text regardless of how clearly its terms have been forged by its international drafters.<sup>23</sup>

### 1. Choice of Interpretive Method

The first identified variable is which ‘heuristic’ should be used to guide interpretation: the text of the treaty, the intent of the contracting parties, or the purpose of the treaty.<sup>24</sup> Obviously all interpretations will rely heavily on the text, and the Vienna Convention on the Law of Treaties expressly relegates non-textual sources such as the *travaux préparatoires* to secondary status for treaty interpretation.<sup>25</sup> Interpretation becomes necessary when the text itself is ambiguous on the specific issue in question. If that occurs, a court has to decide whether to scrutinize other portions of the treaty for clues, or whether to view the treaty as a contract between States and seek to discern and effectuate the intent of those States. The court might also consider whether to glean the overall objectives that the treaty was drafted to accomplish and to settle ambiguities in a manner that advances those goals.

### 2. Timing – the Evolutionary Approach

The second variable is one of timing.<sup>26</sup> Is the text of the treaty to be read in light of the context in which it was drafted, or should terms be given their meaning at the time they are being interpreted, often referred to as an ‘evolutionary’ approach? As an example, the future development of unmanned aircraft systems may present courts with difficult interpretive questions regarding which, if any, components of such systems are covered by the CTC.<sup>27</sup> The likely endurance of the

CTC will inevitably trigger this kind of evolutionary scrutiny, for example when constitutional due process issues are pleaded to restrain the autonomous exercise of self-help rights and the attempted commandeering of domestic legal systems to enforce certain CTC provisions. While these issues are hardly significant concerns at present for a treaty as recent as the CTC, if the Convention is to have its desired long-term effect, they will likely arise eventually.

One common argument for taking the evolutionary approach to treaty interpretation is the supposed rigidity of treaties. Unlike domestic legislation, multilateral treaties are notoriously hard to alter because each of the contracting States needs to give its consent to any changes. In the aviation law field, one need only look at the history and evolution of the Warsaw Convention for private liability.<sup>28</sup> That instrument was subject to a decades-long critical assault on its most basic premises and saw numerous attempts at reform either through amending protocols or private airline agreements, before it was finally superseded by a redrafted treaty 70 years after it came into existence.<sup>29</sup> The evolutionary approach is sometimes seen as a way to keep treaties up to date without having to gather all of the parties to negotiate amendments every decade.<sup>30</sup>

Of course, such an approach may be less necessary if one believes that the CTC benefits from certain built-in safeguards against rigidity, namely, its narrow issue-specificity and its arguably unique system of sectoral protocols. By drafting a convention specific to a narrow and highly technical subject area – international security interests in mobile equipment – and then further circumscribing the scope with protocols specific to each equipment category, it is feasible that the resulting rules have been drawn with enough

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Vienna Convention on the Law of Treaties (adopted 22 March 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’).

<sup>26</sup> Pauwelyn and Elsig (n 20) 452.

<sup>27</sup> The Cape Town Convention applies to aircraft frames and engines, but unmanned aircraft systems will likely rely on valuable and expensive components for remote piloting that are distinct from the frames and engines.

<sup>28</sup> Warsaw Convention.

<sup>29</sup> For a detailed history of the Warsaw Convention and the various attempts to revise or replace it prior to the adoption of a successor convention in 1999, see Havel and Sanchez (n 5) 252–275.

<sup>30</sup> Pauwelyn and Elsig (n 20) 453.

precision and attention to the present and future needs of industry actors to deflect interpretive diversity by national tribunals. The narrow subject matter and protocols also may make amendment a more manageable task, as changes do not necessarily have to satisfy a sprawling constituency that ranges from aircraft manufacturers to financiers of space assets. Additionally, the CTC's extensive use of declarations and reservations may enable States at an early stage to defuse tension between their national principles and the terms of the Convention, mitigating the usual domestic pressures for reform. Conversely, the degree of specificity and detail in the CTC's text could render its terms obsolescent far sooner than, for example, human rights treaties that employ more generalized language and leave courts greater room for updating through an evolutionary interpretation.

### 3. Judicial Activism

A third risk of renationalization flows from concerns about the degree of activism that local bodies are willing to employ.<sup>31</sup> National judges and administrators will be unlikely to enter the interpretive fray unless the question at hand is not explicitly covered by the text of the treaty. Should the court seek to fill gaps wherever it can to advance the treaty's objectives or to satisfy the intent of the parties, or should the court hew as closely as possible to the text and refuse to make any leaps or imply any rules without the most robust textual basis? The latter approach is manifestly better for predictability and uniformity, two primary objectives of the CTC.<sup>32</sup> But this poses an interesting dilemma in choosing the optimal means for achieving those objectives: should one require the interpretive stance most procedurally conducive to those objectives (ie, a strict textualism) or should national judges and administrators be given greater discretion with instructions to use that discretion in the service of predictability and uniformity? Phrased differently, could less predictability

and uniformity in the *process* of interpretation lead to greater predictability and uniformity in the *result*? Wool and Jonovic clearly favor having courts read the CTC expansively in order to achieve the desired uniformity and predictability.<sup>33</sup>

### 4. The Role of Precedent

A fourth variable that could potentially lead to renationalization of a domestically-implemented treaty system is that of precedent.<sup>34</sup> Are national judges and administrators in any way bound by prior interpretations of the same treaty, either by tribunals in their own system or by those of other nations? The Warsaw Convention experience is not entirely helpful in this respect, because the degree of comity shown to the decisions of other systems really does vary in accordance with the issue in question.<sup>35</sup> Respecting the rulings of foreign tribunals on a shared treaty, and granting those bodies a measure of persuasiveness inside a municipal system, certainly will bolster uniformity in interpretation and add a layer of predictability for parties contracting under the treaty.

Commenters seeking to address the problem of disparate interpretations of one of the CTC's sister treaties, the United Nations Convention on Contracts for the International Sale of Goods ('CISG'),<sup>36</sup> have repeatedly called for courts to demonstrate greater awareness of and deference to interpretations by foreign tribunals.<sup>37</sup> Officials who interpret a treaty

<sup>33</sup> Wool and Jonovic (n 2) 77.

<sup>34</sup> Pauwelyn and Elsig (n 20) 456.

<sup>35</sup> For example, under the same Warsaw Convention US and UK courts have adopted a position on the definition of 'bodily injury' and the availability of compensation for purely psychological distress that differs from the position of French and other civil law courts. Havel and Sanchez (n 5) 291.

<sup>36</sup> United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

<sup>37</sup> Marcia J Staff, 'United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases' [2009] 6 *South Carolina J Int'l L & Bus* 1, 48-49.

<sup>31</sup> *Ibid* 454.

<sup>32</sup> Cape Town Convention.



should be careful, however, not to allow the meaning of treaty provisions to be gradually shifted away from the text through successive rulings akin to a game of ‘telephone’.<sup>38</sup> While this kind of aggressive comity can also be a method for updating a treaty to conform to modern expectations, some have argued that treaties benefit from competing interpretations until the truest and best result is reached.<sup>39</sup>

### 5. Linkage with Other Instruments

The fifth and final variable identified by Pauwelyn and Elsig is linkage.<sup>40</sup> Is the treaty intended to be read as integrated into the larger body of international law, operating in conjunction with the Vienna Convention on the Law of Treaties, customary international law, other treaties, and even the vast repository of learned writings? Or was it drafted to constitute a self-contained regime, with terms and rules governing only those activities under its scope and without reference to other bodies of law? The CTC appears to fall into the latter category, although interpretations of its various protocols could provide useful interlocking analogies.

## IV. Two Strategies for Resisting Renationalization

### A. Introduction

Concerns about renationalization go beyond suggesting that some States might consciously dishonor their CTC obligations. Far more worrisome is the recognition that the law is not static, and that national law especially is prone to frequent revision and re-interpretation. As

<sup>38</sup> Also referred to in various cultures as ‘broken telephone’ or ‘Chinese whispers’, telephone is a schoolyard game where one of the participants whispers a message to another who in turn whispers it to someone else until the message has been passed among a sufficient number of persons to the point where the final recipient recites the message aloud. Errors typically occur during the passage of the message and compound with each retelling, so that the final announcement is substantially different from the original message.

<sup>39</sup> Van Alstine (n 9) 786–87.

<sup>40</sup> Pauwelyn and Elsig (n 20) 457.

commercial demands shift, national interests evolve, and new governing regimes acquire authority, States are likely to develop perspectives on what they believe they have committed to in ratifying the CTC that are different from those they held at the time of adoption. No government likes to discover that its hands are tied with respect to an area of public policy, especially if the constraints are external and can be demagogued as having been imposed by foreign (largely commercial) interests. National judiciaries and administrative agencies are prone to the same sort of *amour propre* thinking. With these thoughts in mind, it is important to recognize that international law has developed some mechanisms to steer future interpretation (and discourage renationalization) when that interpretation becomes localized, as will inevitably happen with the CTC.

### B. Autonomous Interpretation

One of the most common ‘steering’ mechanisms is to include a provision in the treaty that specifically addresses how interpretation shall occur, sometimes referred to as the doctrine of ‘autonomous interpretation’.<sup>41</sup> The CTC employs that approach in Article 5, notably subparts (1) (‘In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application’<sup>42</sup>) and (2) (‘Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law’ [ie, the domestic law applied using conflict of laws rules]<sup>43</sup>). It will be noted that the CTC defaults to local law (or at least the law applied by local judges, if that happens to be the law of a third State because of conflicts rules) in the event of unsettled questions which cannot be resolved through the general principles of

<sup>41</sup> Wool and Jonovic (n 2) 71.

<sup>42</sup> Cape Town Convention, Article 5(1).

<sup>43</sup> Ibid Article 5(2).

the treaty. That formulation does represent a dilution of the strong form of autonomous interpretation, but one that may be inescapable when the treaty itself lacks a supranational interpretation authority.

These two sub-parts of the CTC do not answer all of the interpretive questions described above, but they at least offer guidance on the questions of how much weight to give to the Convention's purpose and how aggressively local officials should engage in gap-filling. The clauses suggest that the dominant interpretive mode should be intratextual: in that sense, the interpreter should search the treaty itself for clues as to its meaning, and terms should be defined using the text of the treaty as the dictionary.<sup>44</sup>

The future of how Article 5 might function is not completely opaque, however. While it is too early in the CTC's history fully to observe its effectiveness, we already have access to multiple studies of how tribunals have interpreted the older and substantively similar – as well as more litigated – Article 7 of the CISG, the transnational commercial treaty to which the CTC is sometimes compared.<sup>45</sup> In fact, the specific comparison here is not especially promising. Wool and Jonovic argue that local officials are directed by Article 5(2) of the CTC to take a broad view of their authority to fill in gaps by reference to the CTC's principles on those matters where its authority is implicit, rather than explicit, referring in this setting to the CTC's 'penumbras'.<sup>46</sup> But many officials (including judges) applying the CISG under a similar directive have reverted to national laws whenever the matter could not be settled by reference to the CISG's explicit requirements.<sup>47</sup>

The most notorious example from CISG jurisprudence is probably *Beijing Metals &*

*Minerals Import/Export Corp v American Business Center, Inc.*,<sup>48</sup> in which a US federal appeals court essentially disregarded Article 7 and held that the parole evidence rule under Texas state law was applicable to the disputed contract regardless of whether the contract was governed by the CISG. This ruling directly contradicted the text of the CISG, which expressly rejects the parole evidence rule in Article 8.<sup>49</sup>

Such dramatic departures from the CISG's text are far from uncommon, or confined to US courts with their characteristic insularity. The first Canadian court to be presented with claims under the CISG ignored the convention almost entirely and applied domestic sales law instead.<sup>50</sup> Practitioners should not be surprised if national court and administrative systems, in response to whatever local culture exists with regard to treaty compliance and interpretation, are similarly slow to embrace all features of the CTC.

Given time to accustom themselves to the new regime, most national officials looking at the CISG have avoided blatant disregard for the treaty's text and have attempted to apply its provisions where clearly applicable. But gap-filling, where the treaty is ambiguous or silent, has frequently led tribunals to apply domestic law and not to indulge in extrapolation of how the treaty might otherwise have addressed the issue. For example, in *Chicago Prime Packers, Inc v Northam Food Trading Co*<sup>51</sup> a US federal appellate court, after determining that the CISG did not expressly assign the burden of proof regarding a defective product to the buyer or seller, settled the case by analogy to the US Uniform Commercial Code (UCC), which contains language similar to the CISG. While the analogy is initially appealing given the textual similarities between the two codes, the proper interpretive procedure ordained by Article 7 of the CISG (and, in like manner, by

<sup>44</sup> Brian F Havel, 'Forensic Constitutional Interpretation' [2000] 41 *Wm & Mary L Rev* 1247, 1257-59.

<sup>45</sup> Staff (n 37).

<sup>46</sup> Wool and Jonovic (n 2) 76.

<sup>47</sup> Staff (n 37) 7-8.

<sup>48</sup> 993 F 2d 1178 (5th Cir 1993).

<sup>49</sup> CISG (n 31) Article 8.

<sup>50</sup> *Nova Tool & Mold Inc v London Indus Inc*, No. 97-GD-41311 Ontario Court (General Division) Dec 16, 1998.

<sup>51</sup> 408 F 3d 894 (7th Cir 2005).

Article 5 of the CTC) is to look first to the CISG's general principles and not to domestic law. Unfortunately, judges have struggled to resist their instinctual reliance on the domestic laws with which they are more familiar.<sup>52</sup>

Camilla Baasch Andersen attributes that judicial wariness principally to a lack of clarity about how to identify a 'gap' that the court is authorized to fill,<sup>53</sup> and the difficulty that courts have in discerning the CISG's general principles, and how those principles, once identified, translate into clear direction on how best to fill interpretive gaps.<sup>54</sup> The confusion has naturally undermined the confidence of private actors in the CISG's ability to deliver predictable results and has caused some commenters to suggest that the CISG itself detracts from, rather than advances, its goal of uniformity.<sup>55</sup>

While experience with the CISG allows us to anticipate similar difficulties for the CTC, the CISG record is less helpful in providing solutions. Expert analysis such as that of Wool and Jonovic, as well as Roy Goode's commentaries on the CTC,<sup>56</sup> would be natural sources to which local officials could turn for guidance. Indeed, Wool and Jonovic address these problems by developing a list of the CTC's 'penumbras' that might assist courts in recognizing areas where gap-filling may be necessary, including a set of 'overarching

general principles' to employ toward that end.<sup>57</sup> While theirs is a valiant effort, one that will undoubtedly prove helpful, we should always be vigilant about the hazards of the domestic interpretive process.

### C. Dispute Resolution

#### 1. Introduction: Dispute Resolution and the CTC

A second strategy to deflect renationalization of treaty norms is to provide for effective international dispute resolution, a mechanism notably absent from the CTC. This omission appears likely to have been an unfortunate oversight.<sup>58</sup> To some extent, of course, the CISG model held sway, and Cape Town was imbued with a similar self-image as a kind of 'super-domestic' law that is not the usual stuff of multiparty treaty negotiation. Conceptually, also, the CTC is built on the groundbreaking premise that it is possible to 'commandeer' domestic legal systems to enforce its provisions. The CTC not only establishes legal rules that are to be enforced in domestic courts, it sets forth explicit procedural rules and deadlines for local tribunals to follow in the administration of judicially-provided remedies. Additionally, the Convention's provision for self-help remedies stands apart, even though it can be vitiated by a State declaration, and is arguably the broadest grant of autonomy in the enforcement of an individual or business right in all of international law.<sup>59</sup> Article 15's directives to State registration authorities are also notable, demonstrating that domestic administrative agencies can also be commandeered in the service of the CTC.<sup>60</sup>

Nevertheless, dispute resolution – and treaty interpretation – will eventually become a closely-watched indicator of the CTC's

<sup>52</sup> Staff (n 37) 13-14 ('the most recent United States circuit court decisions interpreting the CISG support the contention that United States courts are likely to interpret the international convention by relying on domestic law, "in direct opposition to the goals of the Convention."').

<sup>53</sup> Camilla Baasch Andersen, 'General Principles of the CISG – Generally Impenetrable?' in Camilla B Anderson and Ulrich G Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmons & Hill 2008).

<sup>54</sup> *Ibid* 23-31.

<sup>55</sup> James E Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' [1999] 32 *Cornell Int'l LJ* 273.

<sup>56</sup> Sir Roy Goode, Official Commentary to the Cape Town Convention (3<sup>rd</sup> edn Unidroit 2013).

<sup>57</sup> Wool and Jonovic (n 2) 77-78.

<sup>58</sup> Charles W Mooney, Jr, 'The Cape Town Convention's Improbable-but-Possible Progeny Part Two: Bilateral Investment Treaty-like Enforcement Mechanism' [2015] *Virginia Journal of International Law* (forthcoming).

<sup>59</sup> Cape Town Convention, Article 8.

<sup>60</sup> *Ibid* Article 15.

success in establishing and maintaining an internationally recognized registered security interest in mobile equipment. The potential sites for localized enforcement and interpretation are not limited to national courts, as this comment has repeatedly emphasized.<sup>61</sup> Other actors with the power to upset the CTC's objectives after the treaty has been ratified and implemented include administrative agencies that can delay de-registration of an aircraft, and legislative and regulatory bodies that can override CTC provisions with new policies on bankruptcy, debtor relief, or restrictions on the rights of foreign investors. It is almost inevitable that creditors seeking to enforce their interests against a State-owned debtor airline will meet resistance from local actors with influence over national policy. The CTC permits a number of self-help remedies in part to respond to this concern,<sup>62</sup> but many of those remedies are at least somewhat dependent upon the cooperation of national institutions.<sup>63</sup>

## 2. Investor-State Arbitration as a Model for CTC Dispute Settlement

### a. Introduction

We could explore numerous models for dealing with emerging disputes and conflicts under the CTC that might be considered by future CTC review conferences. If State-to-State dispute settlement is in issue, recourse for CTC-related disputes probably already exists to the International Court of Justice if States wish to stipulate to its jurisdiction in the usual way.<sup>64</sup> The World Trade Organization (WTO) has a well-regarded system of arbitral tribunals that

operate on a mandate of automaticity and that have developed a coherent international trade jurisprudence that is cited and relied upon in other contexts.<sup>65</sup> But State-to-State conflicts, even if some States are acting as proxies for their own citizens,<sup>66</sup> would probably not be of much immediate value to investors engaged in day-to-day transactions. It is in that context, after all, that the CTC's drafters intended it to be continuously operational. When national institutions do not cooperate for whatever reason, or where CTC provisions are not honored in local contexts, creditors are left with no more recourse than they had prior to the existence of the CTC. States that fail to honor their obligations under the CTC may risk forfeiture of Export Credit Agency discounts,<sup>67</sup> but that is of scant comfort to the jilted creditor whose confidence had been improperly inflated by the CTC's promise. Beyond withdrawing the lure of the discount, a tactic that may lose much persuasive power if the United States carries through on its threat to dismantle the Ex-Im Bank,<sup>68</sup> it is not clear what can be done to secure faithful compliance from all State actors.

<sup>65</sup> Jurgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' [2009] 20 *EJIL* 749.

<sup>66</sup> States may pursue WTO dispute settlement to further the agendas of powerful private commercial interests, as revealed by current litigation relating to plain paper packaging for cigarettes. Australia, *Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Australia – Plain Packaging) (WT/DS/434). It has been suggested that a State proxy approach should be preferred over allowing private actors to bring their own claims, because the State can ensure that any potential diplomatic concerns are taken into account. Editorial, 'A Better Way to Arbitrate' *The Economist* (London, 11 October 2014).

<sup>67</sup> The Aircraft Sector Understanding to the OECD Arrangement on Officially Supported Export Credits, September 2012.

<sup>68</sup> One of the major sources of export credit financing under which the CTC discounts are available is the US Export-Import Bank. Continued funding for the bank is at present a source of political controversy within the United States. Carl Hulse, 'Future of Export-Import Bank is Wild Card in Key Senate Races', *NY Times*, August 25, 2014.

<sup>61</sup> Jeffrey Wool has also recognized the importance of administrative agencies in determining the degree of compliance that Contracting States exhibit toward the CTC's varied provisions. Wool (n 10).

<sup>62</sup> Cape Town Convention, Article 8.

<sup>63</sup> *Ibid* Article 13.

<sup>64</sup> In addition, a State that has the reputation of renegeing on commercial obligations beneficial to itself or to its citizens could find itself 'outcasted' among its fellow signatories. Oona Hathaway and Scott J Shapiro, 'Outcasting: Enforcement in Domestic and International Law' [2011] 121 *Yale LJ* 252.

But international law has not neglected the individual investor. Over the past two decades, traditional reluctance to grant standing to private persons to challenge State confiscatory action has yielded to a process of compulsory and binding investor-State arbitration in transnational commercial disputes. The process has even acquired its own ecumenical acronym, ISDS, for ‘investor-State dispute settlement’.<sup>69</sup> The field of ISDS has exploded in recent years,<sup>70</sup> permitting private commercial parties to have claims adjudicated directly against a foreign host State without relying on their home State to press claims on their behalf. Often the procedures include an international arbitral tribunal, applying an internationally agreed-upon set of arbitration rules,<sup>71</sup> and with a legal rooting in one of the proliferation of International Investment Treaties (‘IITs’)<sup>72</sup> that typically allow for these types of actions.

### b. Using Investment Treaties to Assert CTC Rights

Two questions emerge when considering this investment treaty structure in relation to CTC disputes. First, could creditors use investor-State arbitration clauses in the present directory of more than 3,000 IITs<sup>73</sup> to obtain

compensation for State violations of their rights under the CTC? And if not, or if the question remains doubtful, should future protocols or amendments to the CTC include such a mechanism?<sup>74</sup>

The latter question is beyond the scope of this comment but is the subject of a persuasive essay by Charles Mooney.<sup>75</sup> Mooney observes that the CTC is itself a form of investment treaty, but one that currently lacks ‘teeth’ in the sense of allowing creditors to bring a legal action against a noncompliant State.<sup>76</sup> He sets forth a fairly detailed proposal to amend the CTC to add such a mechanism.<sup>77</sup>

The question of whether CTC claims may be brought under existing IITs is disappointingly difficult to answer with certainty. But at least at the definitional level it is possible to imagine that security interests under the CTC would qualify for protection. The US Model Bilateral Investment Treaty, for example, defines ‘investment’ as ‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk...’.<sup>78</sup> Indeed, this compendious definition includes ‘other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges’<sup>79</sup> among the listed forms that an investment might take. Prior cases have held local securities to

<sup>69</sup> European Commission, *Fact Sheet on Investor-State Dispute Settlement*, 3 October 2013 available at [http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151791.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf), accessed 27 October 2014.

<sup>70</sup> More than 500 Investor-State arbitration cases have been brought in the past 15 years, as opposed to fewer than 50 at the beginning of this century.

<sup>71</sup> The most commonly used arbitration codes include the ones used by the International Centre for Settlement of Investment Disputes (ICSID) and the UNICTRAL Arbitration Rules.

<sup>72</sup> Although a common reference is to Bilateral Investment Treaties (BITs) because so many of these instruments are bilateral agreements, the term ‘International Investment Treaties’ incorporates regional and multilateral agreements as well.

<sup>73</sup> United Nations Conference on Trade and Development, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, June 2013 available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf), accessed 27 October 2014.

<sup>74</sup> After all, the IIT solution discussed here is far from bullet-proof. There would inevitably be creditors denied access to investor-State arbitration provisions under specific IITs, or cases where creditors would have grievances against States with which their home State lacks a bilateral investment arrangement. For the CTC to flourish as a cohesive self-referential regime governing security interests in mobile equipment, it is arguable that reliance on external legal constructs should be minimized.

<sup>75</sup> Mooney (n 58).

<sup>76</sup> Ibid 19.

<sup>77</sup> Ibid 19-26.

<sup>78</sup> 2012 US Model Bilateral Investment Treaty, Article 1.

<sup>79</sup> Ibid.



constitute investments for IIT purposes.<sup>80</sup> But it is also true that possession of a secured interest in a single aircraft frame does not rise to the level of a sustained and ongoing enterprise that contributes to a State's economic development, which is the form of investment primarily facilitated by IITs.<sup>81</sup> Moreover, some arbitration tribunals, notably those convened through the International Centre for Settlement of Investment Disputes ('ICSID'), have begun exhibiting a more restrictive view regarding the definition of 'investment'.<sup>82</sup> These tribunals have insisted on requirements — that the investment be of a specified duration and contribute to the host State's economic development — which a secured interest under the CTC might not satisfy.<sup>83</sup> Further complicating matters is the plain fact that IITs were not designed to deal conceptually with investments in mobile equipment. Specifically, there exists the ever-present possibility that the State in which the aircraft is located may not be the locus of the claim. Indeed, that contingency was one of the primary motivations for creation of a convention specific to mobile equipment in the first place. Contingencies of that kind mean that IIT dispute resolution would not be available to all creditors whose CTC rights might have been abrogated by national courts, legislators, or administrative bodies.

Assuming that a creditor convinces an investment arbitration panel that its security interest qualifies as an investment protected by the applicable IIT, the creditor will need to allege a specific violation. To access the arbitration process made available by IITs, a creditor typically has to establish that the IIT was violated. A CTC violation alone does not necessarily constitute an IIT violation, as Article 5(3) of the US Model Bilateral

Investment Treaty ('BIT') makes clear: 'A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.'<sup>84</sup> But violation of treaties such as the CTC can be used as evidence to support an alleged violation of a few clauses that feature regularly in IITs. For example, many IITs require a host State to provide covered investments 'treatment in accordance with international law'.<sup>85</sup> Violating a treaty such as the CTC would be a violation of international law and therefore should enable a claim to be pursued under an IIT that uses language of that kind.

There are limitations to this approach, however. In a number of cases, such as the interpretation by arbitration tribunals of the relevant provision in the North American Free Trade Agreement,<sup>86</sup> or in the text of the US Model BIT,<sup>87</sup> this protection has been restricted only to customary international law and not to violations of other treaties. An alternative may be to rely on the so-called 'umbrella clause' also common to most IITs, which typically requires a State to 'observe any obligation that it may have entered into with regard to investments'.<sup>88</sup>

The aforementioned alternatives by no means exhaust a creditors' potential for utilizing IITs to arbitrate CTC violations. In fact, a more compelling argument might be to accuse the infringing State of having frustrated the creditor's 'legitimate expectations'.

<sup>84</sup> 2012 US Model Bilateral Investment Treaty, Article 5(3).

<sup>85</sup> See, eg, US-Turkey Bilateral Investment Treaty, entered into force 18 May 1990. This clause is sometimes also referred to as the 'full protection and security' clause. Jeswald W Salacuse, 'The Emerging Global Regime for Investment' [2010] 51 *Harvard Int'l LJ* 427, 452.

<sup>86</sup> Charles T Kotbury, Jr and Andrew B Steinberg, 'Bilateral Investment Treaties and International Air Transportation: A New Tool for Global Airlines to Redress Market Barriers' [2011] 76 *J Air L & Com* 457, 480.

<sup>87</sup> 2012 US Model Bilateral Investment Treaty, Article 5(1).

<sup>88</sup> Kotbury, Jr and Steinberg (n 86) 492.

<sup>80</sup> *Gruslin v Malaysia*, ICSID Case No. ARB/99/3 (Nov. 27, 2000).

<sup>81</sup> Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' [2010] 51 *Harvard Int'l LJ* 257.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*



Arbitral tribunals have sometimes interpreted this principle as arising from the ‘fair and equitable treatment’ clause contained in most IITs.<sup>89</sup> The legitimate expectations doctrine is controversial and has provoked criticism that tribunals are in some cases illegitimately extending the protections guaranteed under IITs to protect investors against losses from risks that they willingly assumed.<sup>90</sup> Nonetheless, even tribunals that have taken a more circumspect view of what constitutes ‘legitimate expectations’ have tended to agree that a treaty violation is strong evidence of less than fair and equitable treatment.<sup>91</sup> Read broadly, the ‘legitimate expectations’ doctrine might even allow a creditor to glide past objections that there must be a technical violation of the CTC – so long as the host State has acted contrary to the CTC’s objectives. For example, there may be cases where a national court or administrative body has not expressly deviated from one of the CTC’s procedural requirements for repossession. Instead, it has offered a CTC interpretation replete with gap-filling, or invented unanticipated methods for bureaucratic delay that prevent the creditor from exercising its rights as it understood them. In such cases, the creditor may wish to consider recourse to an arbitration tribunal to press the case that its legitimate expectations for its investment were frustrated.

Finally, nearly every IIT contains a ‘national treatment’ clause requiring that States grant foreign investors treatment ‘the same as that accorded to its own nationals or companies’.<sup>92</sup> While not all CTC violations may involve discrimination against foreign creditors, as previously mentioned most imaginable examples of violations by national bodies will presumably score some benefit for local interests. Because these non-discrimination

clauses are the heart of the IIT system, they tend to be read broadly:<sup>93</sup> arbitration tribunals find violations based on discriminatory effect, without requiring proof of discriminatory intent,<sup>94</sup> and also look unfavorably on ‘arbitrary’ measures taken against foreign investors.<sup>95</sup>

### V. Conclusion

As does the Wool and Jonovic article to which it responds, this comment dwells on how the CTC will come to interact with national law. Its gaze has been somewhat farther into the future, where the main concern of CTC proponents will no longer be the incorporation of the treaty into a swelling number of municipal legal systems, but rather ongoing compliance thereafter. As the Warsaw/Montreal system for international airline liability exposed, conferring treaty jurisdiction on national courts is fraught with the potential for renationalization of treaty norms. Reductionist forces that favor domestic law will inevitably surface, potentially undermining the CTC’s objectives of uniformity and predictability. Wool and Jonovic chart some of the dangers but also offer promising ways to rectify any adverse trends during the period of national incorporation. In looking ahead to how cultures of national application and interpretation might affect the CTC in the future, we seek to do likewise.

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<sup>89</sup> Ibid 481.

<sup>90</sup> Michele Potesta, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ [2013] 28 *ICSID Rev* 88.

<sup>91</sup> Kotbury, Jr and Steinberg (n 86) 483.

<sup>92</sup> Ibid 487.

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<sup>93</sup> Ibid 488.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.