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To: Participants in October 7, 2007 Informational Meeting Regarding Treaty Implementation

From: Kathleen Patchel

Re: Implementation of Private Law Treaties

I. Introduction

This document provides an overview of issues related to implementation of private law treaties. Part II summarizes principles of U.S. treaty law relevant to consideration of different implementation methods. Part III summarizes various possible implementation methods, and lists advantages and disadvantages of each technique. For a more detailed discussion of some of these topics, see Kathleen Patchel, Report: State Law Implementation of Private International Law Treaties. Another useful discussion of this topic is found in Curtis R. Reitz, Globalization, International Legal Developments, and Uniform State Laws, 51 Loy. L. Rev. 301 (2005). Further discussion of relevant treaty law principles can be found in David J. Bederman, Chapter 15, International Agreements in U.S. Law, in International Law Frameworks (2nd ed. 2006) and John M. Rogers, Chapter 6, Treaties as the Law of the Land, in International Law and United States Law.

II. Relevant Principles of U.S. Treaty Law

The treaty power is shared by the President and the Senate. Treaties are made by the President with the advice and consent of 2/3rds of the Senators present. Once ratified, a treaty becomes an international obligation of the United States. In most instances, the treaty also, either itself or through its implementing legislation, becomes a part of U.S. domestic law.

Internationally, once the U.S. has entered a treaty, it is bound by the treaty's terms and undertakes to carry out those terms in good faith. The impact of the treaty on domestic law depends upon the way in which it is implemented. If the treaty is self-executing, then the treaty itself becomes federal law. If the treaty is not self-executing, then the treaty itself does not become part of U.S. domestic law. Instead, it is the legislation passed to implement the treaty that becomes part of U.S. domestic law.

Under the Supremacy Clause, both self-executing treaties and federal implementing legislation for non-self-executing treaties preempt inconsistent state law. Preemption of state law can occur not only when the terms of the state law actually conflict with the terms of the federal law, but also when the state law is found to be inconsistent with "accomplishment and execution of the full purposes and objectives of Congress." In some instances, preemption doctrine may void any state law in the area regulated by federal law because the federal law is viewed as "occupying the field." Preemption is a matter of the intent of the federal lawmaker. The intent

as to whether state law is preempted, and the scope of any intended preemption, may be stated expressly in the federal law itself, or may be found by the court under the doctrine of implied preemption.

In the 1920 case of *Missouri v. Holland*, the U.S. Supreme Court held that the treaty power is an independent power of the federal government, and may be exercised with regard to any subject matter, even if that subject matter is one otherwise reserved to the states. The treaty power, however, is subject to the same constitutional restrictions that apply to the exercise of other federal powers, such as the Bill of Rights. In recent years, the U.S. Supreme Court has actively developed restraints on federal power based on federalism. It is unclear to what extent these restraints would apply in the treaty context. The Supreme Court has not yet had occasion to address the issue.

Historically, the primary federalism-based restraints on the treaty power have been political, rather than judicial. The Senate's power to withhold consent to a treaty, thus preventing its ratification, unless state interests are adequately protected, has been a powerful protection of state interests. In addition, various administrations have shown a sensitivity to the preservation of state law in considering whether to seek ratification of treaties.

III. Implementation Methods

As discussed above, when a country enters into a treaty, it undertakes an obligation to perform the treaty in good faith. The manner in which the treaty is implemented, however, is left up to each individual country, subject to this good faith obligation. Different countries implement treaties in different ways. Some countries do not employ the concept of self-executing treaties. For example, in the United Kingdom, all treaties are implemented through the enactment of implementing legislation. In other countries, all treaties are self-executing. In the United States, both implementation concepts – self-executing and non-self-executing – are recognized. Thus, there is a potential for considerable flexibility in the way in which the United States implements its treaties, and a number of implementation techniques are available.

This section discusses a range of techniques available for implementation of U.S. treaties. Which of these techniques is most appropriate must be determined on a case by case basis. Our concern is primarily one of how private international law treaties can be implemented in a fashion that creates the least disruption of the current domestic allocation of legislative competence with regard to much of the subject matter of these treaties to the states. It, therefore, is useful to think of the implementation question as a balancing of the need for the United States to fulfill its international obligation to perform its treaties in good faith (and to be able to demonstrate to other countries that it is indeed doing so) with the desire to retain to the extent possible the current federal law - state law balance with regard to regulation of these areas at the domestic level.

This section reviews possible implementation techniques, and provides a summary of

some of the advantages and disadvantages of each technique, in light of the twin goals of good faith implementation and preservation of state law.

A. Self-Executing Treaty

A self-executing treaty is one that operates of its own force to create judicially-enforceable private rights and obligations at the domestic level without any further legislative action. In order to be self-executing, a treaty obviously must be sufficiently specific in its rules so that it can be applied as law. Many private international law treaties have this degree of specificity. The goal of these treaties is to harmonize legal concepts and provide uniform rules at the international level, and those goals often are furthered by drafting treaty terms with specificity. The United Nations Convention on the International Sale of Goods, a private international law treaty that preempts U.C.C. Article 2 in the situations to which it applies, was implemented in the United States as a self-executing treaty.

1. Advantages

A self-executing treaty is the most efficient in terms of the legislative steps required for implementation. Congress does not have to pass any legislation; all that is required is Senate consent.

Because a self-executing treaty enacts into domestic law the language of the treaty, and does so at the federal level, it should make it easier for the United States to establish that it is in good faith compliance with its obligations under the treaty.

Because a self-executing treaty is federal law, it provides for uniform and instantaneous implementation of the treaty. Concerns about lack of uniformity or delay in implementation are eliminated.

2. Disadvantages

A self-executing treaty preempts inconsistent state law, and thus does not further the goal of preserving state law at the domestic level. In addition, a self-executing treaty often provides insufficient guidance as to the nature and extent of the intended preemption, thus creating more uncertainty with regard to those topics.

A self-executing treaty has the greatest potential of the possible implementation methods for creating uncertainty and unpredictability in the substantive rules in the area it covers. Private international law treaties often include many rules that are substantively the same as current U.S. domestic (state) law rules. In many instances, there may be only a handful of differences. Because, however, private international law treaties tend to use very different terminology from that used in U.S. domestic law, the extent to which the treaty rules and current U.S. law are

consistent is not readily apparent. A self-executing treaty also provides no guidance as to how the newly-federalized area of the law will fit with the related surrounding law that remains state law.

Federalization of an area formerly governed by state law brings with it collateral consequences. For example, a self-executing treaty can create federal question jurisdiction in an area where it did not previously exist. The self-executing treaty implementation method does not allow these collateral consequences to be addressed.

A self-executing treaty probably provides the least notice to practitioners that an area formally governed by state law now is governed by an international obligation. It has been suggested that one of the reasons the CISG is often ignored by parties and courts is because its self-executing status causes it to fall below the radar screen.

B. Reservations, Understandings, and Declarations (RUDs)

Reservations, understandings, and declarations (collectively referred to as “RUDs”) do not constitute an independent implementation method; however, because they can be utilized in connection with other implementation methods to ameliorate the effect of a treaty on state law, they need to be considered in discussing implementation techniques.

A reservation is a unilateral statement by a country that alters the legal effect of a treaty with regard to that country. A reservation not expressly permitted by a treaty must be accepted by the other parties to the treaty before it becomes binding on those other parties. Such a reservation is somewhat analogous to a counteroffer made by one of the parties to a contract after negotiations have finished, but before the contract is signed. Reservations not contemplated by the treaty can have a disruptive effect, and are not favored. Private international law treaties tend to limit permissible reservations to those permitted by the treaty itself or to prohibit them altogether.

As its name suggests, an understanding is a unilateral statement by a country expressing its interpretation of what a treaty means in a particular respect. In the U.S. ratification process, for example, such statements may be made by the Senate in connection with its consent to a particular treaty. The Senate also may include understandings in its resolution of consent that are not statements of interpretation of particular treaty provisions, but rather express some other basic assumption underlying the Senate’s consent. For example, the Senate can include an understanding in its resolution of consent stating its understanding that the treaty will not be self-executing.

For our purposes, a declaration is a unilateral statement contemplated by the terms of a treaty that allows a party to the treaty to choose among specified alternative or additional rules, or to decline to be bound by certain rules. Private international law treaties often provide for declarations.

When used in conjunction with other implementation techniques, RUDs can facilitate the preservation of state law at the domestic level. For example, RUDs were used in conjunction with a non-self-executing implementation technique to preserve state law in connection with U.S. ratification of many of the major United Nations human rights treaties. The RUDs were utilized to bring these treaties into line with existing U.S. (largely state) law, which allowed the United States to then take the position that U.S. law already implemented the treaties, and, therefore no further implementation of the treaties was required for the United States to be in good faith compliance. (This concept of “pre-implementation” is discussed below.)

1. Advantages

In certain situations, RUDs can be used to alter or clarify the U.S. application of a treaty in a fashion that ameliorates its impact on state law. A reservation, if acceptable to other parties to a treaty, can prevent the application of a treaty rule that otherwise would preempt state law. A declaration can choose the rule among options allowed by the treaty that has the least impact on state law. An understanding of a treaty rule as consistent with state law can pave the way for a “pre-implementation” argument that will preserve state law.

Even in the situation when a self-executing implementation is contemplated, understandings can provide some guidance as to how the treaty relates to existing state law. For example, in the recent ULC drafting project regarding the U.N. Convention on Assignment of Receivables in International Trade, the drafting committee participated in the drafting of certain understandings stating that the U.S. interpretation of certain concepts in the treaty was that they were the same as the comparable concept contained in U.C.C. Article 9. Although these understandings will not prevent the preemption of Article 9, if the Receivables Convention is implemented as a self-executing treaty, they do provide some guidance as to how the Convention should be interpreted at the domestic level.

2. Disadvantages

By their nature, RUDs can only be used sparingly. Reservations not allowed by the treaty are departures from the presumptively agreed upon rules of the treaty, and thus are likely to draw objections from other potential parties to a treaty. Therefore, their use is disfavored. Similarly, understandings, while purporting to be only interpretations of the treaty, can create a similar impression among other potential parties to the treaty. For example, during the drafting committee discussions of possible understandings to be made in connection with the Receivables Convention, the opinion was expressed both by the State Department representative and by Canadian members of the drafting committee that the more understandings the United States made with regard to the Convention, the more likely other countries would be to think that the U.S. was trying to renegotiate the Convention at the ratification stage. Declarations are also limited, in their case by the terms of the treaty itself.

C. Federal Implementing Legislation

One option to a self-executing treaty is to have federal implementing legislation. Under the Supremacy Clause, it would then be that federal implementing legislation, rather than the treaty itself, that would preempt state law.

1. Advantages

Once passed, federal implementing legislation provides for uniform and instantaneous implementation of the treaty, thus eliminating concerns about lack of uniformity or delay in implementation.

Unlike a self-executing treaty, federal implementing legislation can expressly state the federal lawmaker's intent with regard to the nature and extent of the intended preemption, thus providing guidance on these issues.

Unlike a self-executing treaty, federal implementing legislation can provide guidance as to how the treaty interacts with existing state law. The implementing legislation can be drafted in terms more consistent with U.S. terminology, and thus can make more obvious the differences and similarities between current U.S. law and the treaty rules, thereby avoiding to a significant degree the problems of uncertainty and unpredictability associated with a self-executing treaty.

Federal implementing legislation is likely to provide more notice to practitioners that a formerly state law area is now subject to federal regulation. One can, I think, assume that practitioners in these primarily state law areas are more likely to be sensitive to federal legislation that may impact state law than they would be to international conventions that do so. Further, one can assume that the average practitioner is more likely to be familiar with the sources and methods for interpreting federal law than with the comparable sources and methods for interpreting treaty law.

The need to pass ordinary legislation through both houses of Congress is more likely to encourage consideration of the collateral consequences of federalizing an area previously governed by state law. The federal implementing legislation also can address these consequences, if Congress so chooses.

1. Disadvantages

Unlike a self-executing treaty, a treaty implemented through federal implementing legislation requires the participation of both houses of Congress through the normal federal legislative process. Federal implementing legislation thus can delay implementation of the treaty.

Federal implementing legislation preempts inconsistent state law, and thus does not directly further the goal of preserving state law at the domestic level. As discussed above,

however, unlike self-executing implementation, federal legislative implementation can provide guidance as to both the scope of preemption and how the federalized area meshes with the area that continues to be governed by state law.

Federal law implementation raises the same collateral consequences issues as self-executing implementation, but, as discussed above, also makes it more likely that those issues will be recognized and addressed.

D. State Law Implementation and the “Canada Clause”

One way in which to preserve state law in areas covered by private international law treaties is to implement those treaties purely as a matter of state law. If a treaty is implemented through state law, then no federal preemption issue arises because the relevant domestic law continues to be state law.

The primary issue is whether state law implementation will be adequate to satisfy the international obligation that the treaty be performed in good faith. State law implementation requires that all fifty states pass implementing legislation that meets this obligation. In order to do this, state law legislation must be (1) sufficiently uniform that the good faith obligation is clearly met – and can be demonstrated to other countries as having been clearly met; and (2) passed in a sufficiently expeditious fashion to establish that the U.S. is in fact implementing in good faith the treaty to which it has given its assent. These issues of uniformity and expeditious implementation – well known to the ULC in its efforts to pass uniform laws – can create serious impediments to the use of state law implementation.

Added to these concerns is the fact that, as a matter of international law, the inability of a country to live up to its treaties obligations because of its own domestic law does not excuse it from those obligations. Thus, if the United States enters into certain obligations under a treaty and seeks to implement those obligations at the state law level, the fact that only two-thirds of the states chose to adopt the implementing legislation would not excuse the United States under international law from its duty to live up to those obligations with regard to all of its constituent parts.

The so-called Canada clause, which is a standard provision in most, if not all, private international law treaties, is designed to address this problem. A typical Canada clause provides as follows:

If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

This treaty provision allows a country by declaration to apply the treaty only to those of its political subdivisions that have agreed to be bound by the treaty and have adopted whatever implementing legislation is necessary. It thus modifies the country's international obligation of good faith implementation by making it applicable only in the territorial units designated from time to time by the country. This type of provision is generally referred to as a "Canada clause" because it was initially developed to deal with the ratification problems presented by Canada's constitutional division of power between its national and provincial governments. Under the Canadian constitution as currently interpreted, while the power to negotiate treaties is given to the national government, the power to implement them is divided between the national and provincial governments, depending upon who would have the power to legislate on the particular subject as a matter of domestic law.

The United States could use the Canada clause to limit its good faith obligation under international law in connection with state law implementation. In practice, however, the United States has rarely used any type of federal-state clause in treaty implementation. The U.S. State Department has suggested that utilizing the Canada clause would weaken the U.S. bargaining position with regard to these treaties. Unlike Canada, where provincial implementation of many private international law treaties is a constitutional imperative, under U.S. law – particularly as interpreted in *Missouri v. Holland* – federal implementing legislation is a constitutional alternative. Further, piece-meal adoption of a treaty by the United States could be a long, drawn-out process. Members of the Canadian ULC have indicated that, even in Canada, which has significantly fewer political subdivisions than the United States, achieving a critical mass of provinces willing to implement a particular treaty in a uniform manner is a daunting task.

Nevertheless, in some situations pure state law implementation of a private international law treaty could be a reasonable and feasible alternative. This could occur, for example, with regard to a treaty where timing of implementation is not a critical issue, and the treaty merely sets a general standard, so that some lack of uniformity in the details of compliance is not problematic.

1. Advantages

Pure state law implementation preserves the current domestic allocation of legislative competence to state law. Because the state implementing legislation, and not the treaty, become part of domestic law, there is no federal law preemption.

Pure state law implementation provides the most guidance as to how the treaty rules change existing law, and how they mesh with the surrounding body of state law.

Pure state law implementation is the technique most likely to provide notice of the treaty rules to practitioners.

Pure state law implementation does not raise the collateral consequences issues

associated with federal law implementation.

2. Disadvantages

Pure state law implementation raises significant concerns regarding lack of uniformity in the implementing legislation, and thus the possibility that the treaty rules will vary from state to state. In addition, if all states do not adopt implementing legislation, then the treaty will not apply at all in some states. This lack of uniformity could not only be a concern at the level of international compliance, but could create disruption in U.S. domestic law.

Pure state law implementation is the method most likely to create significant delay in implementation of the treaty.

Pure state law implementation makes it more difficult for the United States to demonstrate to other countries that it is in good faith compliance with its treaty obligations. In addition, because state law implementation leaves legislative competence with the states, the federal government has no authority to require state compliance. (This situation can be ameliorated to some extent by use of the Canada clause.)

E. Pre-Implementation

In some situations, current U.S. law already may be sufficiently similar to the rules of a proposed treaty that the United States can demonstrate good faith compliance with the treaty without any further legislative action at either the state or the federal level. In that situation, the United States can declare the treaty non-self-executing, and refer parties to current U.S. law for enforcement of its provisions. As discussed above, this technique was used in connection with U.S. ratification of many of the major United Nations human rights treaties.

Because private international law treaties often contain many substantive rules that are consistent with current U.S. state law in the area, this technique could be a useful one in preserving the existing federal-state law balance with regard to these treaties at the domestic level.

1. Advantages

Pre-implementation preserves the status quo with regard to legislative competence at the domestic level. Because the treaty is declared non-self-executing, it does not preempt state law.

Pre-implementation allows for uniform and instantaneous implementation of the treaty.

Pre-implementation does not require any legislative action; all that is required is Senate consent to the treaty with appropriate understandings.

2. Disadvantages

Pre-implementation can only be used when current U.S. domestic law and the treaty rules are substantively the same – or at least near enough to satisfy the good faith obligation. Although private international law treaties often have many rules that meet this criterion, it is likely that there will be some differences between current U.S. law and the rules in any given treaty. This problem, however, can be ameliorated by combining pre-implementation technique with another implementation method. Other countries also must be persuaded that current U.S. law is sufficient to satisfy the treaty obligations in order for this technique to work at the international level.

F. Cooperative Federalism Techniques

The challenge in implementing private law treaties is to find an implementation technique that strikes an appropriate balance between the United States' international obligation to implement its treaties in good faith, and the desire to avoid disruption of the current federal-state balance that allocates primary legislative responsibility over much of the subject matter of these treaties at the domestic level to state law. At least since the New Deal era, the federal government has faced an analogous challenge with regard to implementation of domestic policy – how can federal policy be carried out in areas traditionally governed by state law in a fashion that will both preserve state law competence in those areas and insure effective and uniform compliance?

The two primary techniques that have evolved at the domestic level to answer this question are (1) conditional spending and (2) conditional preemption. Although, as far as I know, neither of these techniques has been used to implement a treaty, they have become a very common way to mediate the federalism issue at the domestic level. Both have in fact been used with considerable success with regard to ULC products – conditional spending with regard to UIFSA, and conditional preemption with regard to UETA. It would appear that these techniques could work equally well when the federal policy being implemented was the policy embodied in a private international law statute.

Both of these techniques involve federal action that creates an incentive for states to enact state law that implements federal policy. With conditional spending, the federal incentive is the provision of federal funds to the states, conditioned on enactment of state law that complies with federal standards. With conditional preemption, the federal incentive is the threat of preemption through enactment of federal legislation if the states do not enact state law consistent with federal guidelines.¹ The advantages and disadvantages of each technique as a treaty implementation

¹In *New York v. United States*, the U.S. Supreme Court held that the federal government cannot consistently with federalism simply command states to enact federal policy, but expressly approved of these cooperative federal techniques because, while they create a strong incentive for the states to implement federal policy at the state level, they nevertheless leave the states free to

method are summarized below.

1. Advantages of Conditional Spending

Conditional spending is a form of pure state law implementation – in order to receive federal funds, the state implements the treaty as a matter of state law. The conditional spending technique thus shares the advantages discussed above with regard to pure state law implementation – federal preemption is not an issue, the implementing legislation can be coordinated effectively with existing state law, and the lack of notice and collateral consequences concerns raised by federal implementation are removed. At the same time, it ameliorates to a significant extent the disadvantages discussed above with regard to pure state law implementation.

The incentive provided by federal funds makes it more likely that states will adopt implementing legislation in an expeditious and uniform manner.

The threat of loss of future federal funding encourages the states not to alter the implementing legislation in the future without federal consent, thus ameliorating the federal concern that state law implementation leaves the federal government without any ability to require state compliance with the treaty obligations.

2. Disadvantages of Conditional Spending

While the incentive provided by federal funding will encourage states to adopt implementing legislation in a uniform manner it does not completely eliminate these concerns. States can choose not to implement the treaty, thus leaving the possibility that there will be gaps in treaty implementation among the states.

Although the monetary incentive will encourage states to adopt implementing legislation in an expeditious manner, there still will be some delay in implementation.

The conditional spending technique is only available in situations where federal funding already exists or is contemplated in the subject matter area covered by the treaty.

1. Advantages of Conditional Preemption

Conditional preemption is a hybrid technique that combines federal and state law implementation. It gives states a choice between implementing a treaty as a matter of state law or having state law preempted by federal law implementation. Conditional preemption thus can

choose not to do so.

provide many of the advantages of both federal and state implementation discussed above. It is also a flexible technique. For example, the condition can be that states must adopt legislation within a particular period of time, or the federal implementing legislation will apply (an opt-in provision) or it can provide for immediate federal implementation with a provision that states may opt-out of the federal preemption by enacting state law implementation.

Conditional preemption provides for uniform and instantaneous implementation of the treaty. The treaty is implemented in every state through the same rules, whether at the state or the federal level, and both the opt-in and opt-out versions can be structured to provide that implementation occurs simultaneously in all states.

Conditional preemption in its opt-out form also provides the federal implementation advantage of avoiding significant delay in implementation – the treaty is implemented immediately through federal legislation. Even in its opt-in form, the incentive provided by the threat of preemption will cause states to act in a more expeditious manner than likely would be the case with pure state law implementation.

Conditional preemption should make it easier for the United States to establish that it is in compliance with its treaty obligations. Under this technique, state law must be in compliance, or federal law implementation applies.

Conditional preemption allows states to avoid the preemptive effect of a treaty by implementing it as a matter of state law. It thus allows states to avoid the disadvantages of federal implementation.

2. Disadvantages of Conditional Preemption

Conditional preemption prevents preemption of state law only to the extent that individual states choose to adopt state implementing legislation. It thus cannot guarantee that the disadvantages of federal implementation will not exist, at least in some states.

Conditional preemption can only be applied in situations when the federal government has the power to legislate in the area covered by the treaty. As long as *Missouri v. Holland*'s broad interpretation of the treaty power remains in effect, however, this should not be an issue.

IV. Conclusion

Implementation of private law treaties in the United States requires a balancing of the need to fulfill the international obligation to implement these treaties in good faith with the desire to cause as little disruption to the current domestic federal law - state law balance as possible. Fortunately, a number of implementation techniques are available. These techniques have the potential to provide considerable flexibility in implementation of private law treaties. This is

particularly true because, although each technique has been discussed separately in this memo, the techniques also can be combined in the implementation of a single treaty. The appropriate implementation method with regard to any particular treaty must be determined on a case by case basis, considering such factors as the subject matter of the treaty involved, the impact on existing state law, the extent to which that state law is consistent with the treaty, and the nature of the obligations the United States has incurred under the treaty. It seems clear, however, that with some creative thinking, it should be possible in many cases to fulfill U.S. obligations under private international law treaties while preserving to a significant extent the existing domestic allocation of competence over these subject matter areas to state law.