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Treaty Law and Legal Transition Costs

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INTRODUCTION

The dominant currency in contemporary debates over legal reform is benefit. That is, and almost by definition, changes in the law most often are proposed and adopted based on perceptions of their net substantive benefit. They promise, for instance, to remedy an inequity or correct some other recognized defect in the existing legal order, modernize the law to reflect new social or technological realities, remove inefficiencies that frustrate desirable forms of human interaction, or (relatedly) harmonize inconsistent rules across jurisdictions.

This traditional focus on substantive benefits and costs—although of course important on its own plane—overlooks the transitional friction associated with legal change itself. As I argued in a recent article,[1] a legal system can experience substantial friction simply in accommodating the existence of new legal norms. Broadly, these "legal transition costs" arise from the need to learn about the content of new legal norms and the uncertainty and error costs that flow from the loss of the accrued experience with the old legal regime as well as from contending with doubts about the new one. Significantly, these costs of accommodating new legal norms will arise—although in differing degrees in different contexts—irrespective of the substantive policy goals the new norms pursue and of the particular regulatory vehicle by which they come into being—whether by statute, administrative regulation, treaty, or otherwise.

The phenomenon of legal transition costs thus applies to the adoption of new international legal norms as well. Indeed, there is reason to believe that the internationalization of the law poses special problems, in particular with regard to new multilateral treaty law

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1. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

norms designed to regulate the rights and obligations of private actors. Among other things, the complexity of the multinational lawmaking process may heighten the risk of indeterminacy with new international private law norms. As well, the interaction with the preexisting national law may spawn difficult questions of norm hierarchy. These problems are only compounded by the fact (at least in the present political configuration) that uniform international private law norms must be interpreted and applied by disparate national courts. Controversies may even arise—as is evidenced by recent scholarly debates in this country[2]—about whether private law norms properly may be the subject of an international treaty, as opposed to more traditional forms of domestic legislation.

These questions also play an integral role in the theme of this Symposium, "Constructing International Intellectual Property Law: The Role of National Courts." My goal in this Article is to offer some initial observations on the role transition cost analysis should play in the continuing development of international private law, including international intellectual property law. More specifically, I will suggest here that concerns about the transitional friction associated with the integration of new international norms into the broader web of the law also apply to the more specific subject of the Symposium, the draft treaty on jurisdiction and enforcement of intellectual property judgments prepared by Professors Rochelle Dreyfuss and Jane Ginsburg.[3]

As we shall see below, however, the message of transition cost analysis is not a negative one. That is, a recognition that the costs of legal transitions are real and can be substantial does not mean that there is something inherently inefficient about legal change. Rather, transition cost analysis focuses attention beyond the traditional currency of substantive benefits and costs to the importance of the assimilation of new legal norms as well. The analysis thus underscores for lawmakers that a sensitivity to the phenomenon of legal transition costs can facilitate both the acceptance and effectiveness of legal reforms.

As I examine in the latter half of this Article, such a sensitivity will require a more active attention to available drafting and implementation techniques that can mitigate transitional friction before it

2. I discuss this controversy in more detail *infra* note 20 and accompanying text.

3. Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002).

arises. Moreover, and more importantly for the subject of this symposium, transition cost analysis highlights for lawmakers the important role of "mediating institutions" in ameliorating the transitional impact of changes in the law, particularly in the form of new international private law norms. We will see below that by facilitating cooperation among existing national courts and creating new forms of international mediating institutions, lawmakers may substantially mitigate the learning, uncertainty, and kindred costs of new private law conventions such as that proposed by Professors Dreyfuss and Ginsburg for the recognition of international intellectual property judgments.

I. LEGAL TRANSITION COSTS: AN OVERVIEW

The notion of legal transition costs reflects a simple, but potentially significant, idea: that a legal system will experience transitional friction simply in adjusting to the existence of a new positive law norm. To set the context for an examination of the implications of transition cost analysis for the continuing internationalization of the law, this Section will first briefly review the nature of legal transition costs and why they are worthy of our attention.

I have examined in detail elsewhere the distinct sources and types of costs that arise from a change in state-created legal regimes.[4] These costs can be distilled into the following principal categories: (1) the learning costs associated with determining the content of new legal norms; (2) the uncertainty costs that arise from the absence of authoritative determinations about the meaning and effect of new norms; (3) the effects of a likely increase in error costs through mistakes in their articulation and later interpretation; (4) private adjustment costs, both intra-party and inter-party, which arise from the need of private actors to adapt their forms and practices to accommodate new law; and (5) the parallel transition costs incurred by courts and other public institutions in contending with new legal norms. Although for ease of exposition there is a value in organizing the analysis around these rough categories, as the following brief summary indicates there may be substantial interaction and overlap between the various forms of legal transition costs.

4. *See* Van Alstine, *supra* note 1, at 816–50.

A. Learning Costs

In our increasingly detailed and complicated modern legal environment, the most basic of legal transition costs are learning costs.[5] Legal actors must identify what rules of law are relevant to their affairs; they must study the scope and content of the applicable ones; and they must master the details of the law's more complex and technical provisions. Most often, of course, legal actors do not incur these costs through direct investigation; rather, they find—at least those with the resources and desire to do so[6]—that it is more efficient to consult experts (lawyers, accountants, and the like) with specialized education and experience in the law.

Over time, the learning costs for a given body of law are likely to decrease, as interpretive opinions and scholarly analyses add coherence to the law and legal actors gain familiarity with its content.[7] Moreover, as familiarity grows, the interaction among the various legal actors in a legal community can lead to a dispersion of the collective learning benefits accumulated by all.[8]

Nonetheless, even in this collective sense the process involved in learning the law involves costs, both in direct financial terms and in the dedication of time and effort. In turn, whenever the state determines to change the law—whether through the revision of existing norms or the introduction of new ones—the result will be a new round of learning costs for all affected legal actors, and in the aggregate for the legal system as a whole. Among other things, affected legal actors confronted with a new body of legal norms will have to sort out questions of scope and effect, master new complexities, and resolve the interaction both with the old legal regime and with related bodies of law. To be sure, the amount of such costs will vary in rela-

5. For a more detailed analysis of the learning costs of new law, see Van Alstine, *supra* note 1, at 816–22.

6. A failure to learn the law relevant to one's activities bears its own risks. *See id.* at 847–50 (discussing this phenomenon in terms of "ignorance costs").

7. A variety of public and private institutions also contribute to a dispersion of knowledge about the law. The most notable in this regard are the public judiciary, through their published legal opinions, and legal educators, through their publication of treatises and other scholarly works. *See id.* at 817–18 (examining in more detail the contribution of these and similar institutions in decreasing the learning costs of new law).

8. *See id.* at 818–19; *see also* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 736–40 (1997) (analyzing dispersion of accumulated learning benefits among legal actors with regard to commonly used contractual terms); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 692–93 (1999) (examining the benefits that flow from prior learning about the law).

tion to the ambition, complexity, and precision of the law reform project. Nonetheless, the learning costs of new legal norms are real and will be incurred by all participants in a legal system, from lay actors to legal professionals, and even to judges and other adjudicators.

The phenomenon of learning costs also applies with the introduction of new international private law norms. Indeed, even at this most basic form of transition costs there is reason to believe that the impact may be more pronounced in the international law context. As experience in this country with at least one existing private law treaty suggests,[9] there may be a comparative lack of familiarity by legal practitioners of the precise nature and effect of treaty law, and even of its existence.[10]

These special concerns suggest that particular care is warranted in the preparation and implementation of new international treaty law, such as that proposed by Professors Dreyfuss and Ginsburg. As mentioned in the introduction to this Article, the goal of transition cost analysis is to focus attention on the impact of undisciplined legal change, even with norms that promise significant substantive benefits. The potential for enhanced learning costs with new international private law norms only heightens for lawmakers the importance of their role at the drafting stage in addressing legal transition costs before they arise.

9. The treaty referred to here is the United Nations Convention on Contracts for the International Sale of Goods, which the United States ratified in 1986. *See* Final Act of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Conference on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980), *republished at* 52 Fed. Reg. 6264 (1987) [hereinafter CISG]. Although the Treaty has been in effect for over a decade and has been accepted by over sixty countries, there is a surprising lack of knowledge about its existence. *See, e.g.,* 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*, 32 CORNELL INT'L L.J. 273, 280 (1999) ("[M]any U.S. businesses, lawyers and courts have yet to realize that contracts they assume are governed by the Uniform Commercial Code (UCC) are actually governed by the CISG. The dearth of U.S. case law concerning the CISG despite its ten years of applicability to the majority of U.S. international sales transactions is itself evidence of the lack of awareness of the CISG in the United States." (footnote omitted)).

10. Concerns about the effect of the learning costs have even led one scholar to question whether excessive novelty in the U.N. Sales Convention may compromise its ultimate success. *See* Walt, *supra* note 8, at 698–705 (suggesting that the costs of learning the CISG as well as the inability of transactors to internalize the learning benefits they confer through public litigation—which he discusses in terms of a "learning externality"—may lead transactors to opt out of its application and thus compromise the law's goal of fostering international uniformity).

B. Uncertainty Costs

The adoption of international legal norms in the form of a treaty also may pose special concerns with regard to uncertainty costs. Although they often run in parallel with the costs of learning new law, uncertainty costs are conceptually different and ultimately more significant.[11]

Uncertainty costs arise from the simple fact that even after the most detailed and careful examination of new legal norms a variety of questions of meaning, scope, and effect are likely to remain. In other words, even after a legal system has resolved all that can be learned about the new norms, some level of uncertainty likely will remain. When, as in the case of a private law treaty, a legal reform also involves regulation at a higher level of social organization,[12] the risk of uncertainty in the interaction with the existing body of law is particularly acute.

Uncertainty costs can arise in what might be viewed as backward-looking and forward-looking forms. The former involve the loss of the accumulated certainty in a given field of law. The focus here is principally on the value of interpretive precedent. Whenever a competent court issues an interpretive ruling on a disputed issue of law, the resultant increase in certainty in the law in effect reflects a public good—a benefit that is accessible by all members of a legal system, but is exhaustible by none.[13] Interpretive precedent can clarify ambiguous legal norms, bring cohesion to a large or intricate body of law, and resolve issues of norm hierarchy.[14] The cumulative effect of this process over time is a progressive enhancement of the certainty in a given body of legal norms.[15] Thus, when the state decides to replace

11. For a more detailed analysis of the uncertainty costs of new law, see Van Alstine, *supra* note 1, at 822–35.

12. For an analysis of this point, see Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 49 (1993) (observing that cooperation among formally sovereign states at the international level "constrains horizontal competition and is equivalent to a move up the scale of social organization to institutionalization (or regulation) at a higher level of social organization").

13. For a review of these key attributes of a public good in the context of intellectual property law, see Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 261 n.96 (1998) (describing a public good as one that is "non-excludable," which means that one user cannot exclude use by others, and "non-rivalrous," which means that the use of the good by one person does not diminish its availability for others) and Clarisa Long, *Patents & Cumulative Innovation*, 2 WASH. U. J.L. & POL'Y 229, 231 (2000) (describing the same attributes).

14. For more on this point, see Van Alstine, *supra* note 1, at 824–28.

an established body of law with a new and untested one, it risks wasting a valuable societal investment.

This aspect of uncertainty costs may be of less concern, however, for the particular legal reforms proposed by the Dreyfuss-Ginsburg treaty. The very problem that this proposed treaty is designed to address is the absence of an effective legal infrastructure for the recognition and enforcement of intellectual property judgments.[16] The proposed treaty would not displace an established legal regime, but rather fill a gap in international intellectual property law. There is, in other words, no established body of international norms in the field that would be compromised by the adoption of the proposed Dreyfuss-Ginsburg treaty. To be sure, there exists a rough patchwork of national rules and procedures for the local enforcement of judgments; and there may be limited aspects of the existing rules that may be worthy of express adoption.[17] Nonetheless, because the existing system is beset by substantial doubts with regard to the enforcement of international intellectual property judgments, the Dreyfuss-Ginsburg treaty is unlikely to compromise in any material way the accumulated certainty in the field.

In contrast, the adoption of new legal norms through the mechanism of a treaty may risk the imposition of substantial uncertainty costs when viewed ex ante. That is, apart from the backward-looking loss of accumulated legal certainty, the adoption of new legal norms represents a new moment for uncertainty about their precise meaning and effect.

This forward-looking component of uncertainty may impose costs on legal actors in a variety of ways. Without authoritative interpretation of ambiguous provisions, legal actors will incur increased planning costs to address the expanded range of possible meanings. A similar effect on legal professionals will decrease the reliability of expert legal advice, and thus increase the risk of definitive action. Derivatively, the uncertainty associated with a new legal regime may

15. This is a well-recognized benefit of legal precedent. *See, e.g.*, Michael Klausner, *Corporations, Corporate Law, and Networks of Contract*, 81 VA. L. REV. 757, 777 (1995) (noting that "scholars writing from a variety of perspectives have observed that precedents in general reduce the uncertainty of the legal rule they interpret"). *But see* Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 10 (1983) (observing that a proliferation of bodies with the authority to issue interpretive rulings on a single issue may lead to an increase in uncertainty).

16. Dreyfuss & Ginsburg, *supra* note 3, at 1065–66 (describing the benefits of a single international jurisdiction and judgments convention).

17. *See infra* notes 42–44 and accompanying text (discussing the value of reaping the accrued certainty of the existing legal order).

lead to increased dispute resolution costs, both from an expansion of the universe of potential disputes and from a decrease in the likelihood of their extrajudicial settlement.[18]

These forward-looking uncertainty costs will vary in direct relation to the precision of the legal norm at issue. Narrow, rigid rules, for example, are likely to involve relatively limited uncertainty costs. In contrast, flexible, open-ended standards may leave considerable postadoption uncertainty. Because norms in this form take on functional content only through progressive judicial application over time, upon their initial adoption substantial room likely will remain for disputes over their intended application.[19]

The ready message from an appreciation of these uncertainty costs is that increased care in the articulation of new legal norms can provide significant benefits for affected legal actors. This point is particularly significant with regard to transjurisdictional legal reform.[20] Because responsibility for interpretation and application remains with the disparate national courts, there is, among other problems, no single institution with the power to render authoritative judgments on

18. *See* Van Alstine, *supra* note 1, at 830–32 (discussing the increased negotiation and dispute resolution costs that attend legal uncertainty).

19. This does not mean that narrow rules should always be the preferred structure for new legal norms. Among other things, a recognition of a need for situational flexibility or of the benefits of a gradual evolution and development by courts in a field of law over time may suggest that standards are the better normative model. By focusing on the relative costs of transition between the two options, transition cost analysis also may inform the continuing debate over the choice between rules and standards. For more on this point, see Van Alstine, *supra* note 1, at 832–34.

20. There is also a more fundamental concern about private law treaties, but it is one over which lawmakers may have little control. Recent and heated scholarly controversies about the precise nature of treaties in our domestic legal system create what might be called "meta-uncertainty costs." Some scholars have argued that there are important limitations on the substantive matters that properly may be the subject of treaties. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that the substantive limitations in the interstate commerce clause also limit the power of the federal government with regard to treaties). *But see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (offering a comprehensive challenge to Professor Bradley's argument). Separately, Professor John Yoo has argued that the Constitution entirely prohibits self-executing treaties (those that take effect without implementation by congressional legislation), or at least on matters within Congress's Article I, Section 8 authority. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2092 (1999) (suggesting the possibility of such an approach). As an alternative, he has suggested that there should at least be a presumption against self-execution. *Id.* at 2093–94; *see* John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2220 (1999) (describing this approach as a "soft" rule under which courts should require the treatymakers "to issue a clear statement if they want a treaty to be self-executing"). *But see* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2157–58 (1999) (disagreeing with Professor Yoo's conclusions).

uncertain provisions. As a result, there may be more serious structural impediments, as compared to domestic law norms, to a timely and effective reduction in the uncertainty costs of new multilateral treaty law. I will have more to say on this point below.[21] It suffices at this stage in the analysis to observe that an antidote to uncertainty costs is to enhance the effectiveness of "mediating institutions" in speeding the resolution of the difficult interpretive issues that arise from the adoption of new legal norms.

C. Error Costs

Another form of legal transition costs arises from the risk of error in the adoption of new legal norms. A close, but particularly pernicious, relative of uncertainty costs, such error costs issue from imperfections in the articulation or mistakes in the application of new law. Once again, this does not mean that there is something inherently suspect about legal change; it simply means that the adoption of new norms represents a new moment for error in their initial formulation or subsequent interpretation.[22]

The errors that attend legal transitions can be corrected, of course. For instance, subsequent legislative review and amendment can cure mistakes in the articulation of new legal norms—such as the commonplace formulation errors of unintended incompleteness, overbreadth, or inconsistency. Active judicial examination of background and context likewise can make sense of otherwise faulty legislative signals. In a similar way, improvident interpretive decisions by courts or administrative bodies can be corrected through subsequent reexamination or through review by superior courts. On most issues of law, legislative bodies have the power to do the same.

Such errors associated with the adoption of new legal norms nonetheless impose costs on affected legal actors, and thus on the legal system as a whole. Most notably, legislative formulations or judicial interpretations later discovered to be faulty can cause legal actors to make wasteful investments. Moreover, error correction itself involves costs. In addition to the public resources necessary to review and correct the error, there will be increased public and private dis-

21. *See infra* notes 27–34 and accompanying text.

22. For a more detailed analysis of the error costs of new law, see Van Alstine, *supra* note 1, at 845–50.

pute resolution costs as the erroneous signals foment avoidable litigation.

Once again, there is reason to believe that the problem of error costs may be particularly acute with the adoption of new international legal regimes. First, the difficulty of formulating precise legal mandates, manifest even in our relatively stable legal system, is compounded when the mandates arise from and are intended to govern disparate legal and political cultures. The heterogeneity of the participants in the lawmaking process, the difficulty of effective communication, and the need to translate legal concepts into different official languages increase the challenges for the drafters of transnational norms.[23]

Moreover, and perhaps of greater concern, the means of effective legislative correction of drafting errors are substantially circumscribed with new multinational legal regimes because revision of an international treaty requires the renewed consent of each member state to the original treaty. As a result, even where feasible, the process for the amendment of a multilateral treaty that is already in force is likely to be a long and arduous one.

The impact of judicial error in the subsequent interpretation of multilateral treaties, in particular those of a private law nature, raises equal challenges. Unlike unified legal systems, there exists no final arbiter for the interpretation of such a treaty. (Indeed, this Symposium, which is directed to the role of national courts in constructing international intellectual property law, in no small measure arises out of a recognition of this fundamental problem.) As a result, multilateral treaties designed to unify the law in fact may carry their own seeds of potential disunity, as the means of international redress for an erroneous interpretation by one national court will be severely limited.

These concerns again highlight the importance of sensitivity to the potential for increased error costs in the adoption of new international norms such as those proposed by the Dreyfuss-Ginsburg treaty. The ready point is that the difficult lawmaking process for multinational treaties mandates increased care in formulation in order to

23. Professor John Honnold's observation about the challenges of uniform international law is particularly apt in this regard: "*[W]ords* [are] mushy, ambiguous things even for ordinary communications. . . . International unification of law raises these difficulties to a higher power." John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 207 (1988).

avoid or mitigate the impact of drafting errors. With regard to the risks of interpretive error, the difficulties that arise from a system of national courts are not insurmountable. Instead, as I will examine below, this problem only underscores the importance of examining other forms of mediating institutions designed to assist in the effective assimilation of new international legal norms.

D. Private Adjustment Costs

The costs of transition between legal regimes also include the impact on private practices that have developed within the framework of the old legal order. Any body of law designed to regulate continuing activity—if applied by authorities with consistency over time—also will facilitate the development of private conventions designed to implement, supplement, and (where allowed) adjust the positive law norms. The adoption of new substantive international norms to regulate continuing private behavior may of course also occasion this form of legal transition costs.[24] As I will note below, however, private adjustment costs may be of less concern for targeted procedural rules, such as the proposed Dreyfuss-Ginsburg treaty. A complete understanding of the phenomenon of legal transition costs nonetheless mandates a brief examination of private adjustment costs.[25]

One of the benefits of stability in the law is that it can stimulate private actors to develop efficient standardized conventions to regulate their affairs in the interstices of the law. For individuals or single firms, this standardization takes the form of cost-saving administrative practices and forms designed for multiple or repeat use. Similarly, certainty and stability in the law can speed the development of networks of efficient interparty contacts, especially standardized contractual formulations.[26] Like intraparty forms, these networks operate to complement or fine–tune the express provisions of positive law.

24. A good example of this is the United Nations Convention on Contracts for the International Sale of Goods. CISG, *supra* note 9. This international private law treaty comprehensively regulates the rights and obligations of buyers and sellers involved in defined international sales transactions. *See id.* art. 4.

25. For a more detailed analysis of the private adjustment costs often associated with a change in the law, see Van Alstine, *supra* note 1, at 836–45.

26. *See* Kahan & Klausner, *supra* note 8, at 763–64 (analyzing the role of the law in facilitating the creation of private networks of standardized contractual terms); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 286–88 (1985) (examining the value of state supplied background rules in facilitating the development of networks of standardized

Such intra- and interparty standardization is beneficial for private actors in a variety of ways. Among other things, the distillation of accumulated experience into a permanent form creates learning benefits, decreases application errors, and frees transactors from the resource costs of crafting individualized solutions for each new transaction. The development of private conventions, however, involves significant transaction costs. Most important, these include the resource costs of the time, effort, and risk associated with developing, testing, and revising a form or practice over time.

When the state decides to alter the legal environment, therefore, adjustment costs will arise from the impact on these private conventions. In other words, just as stability in the law can facilitate the development of efficient standardized forms and practices, a change in the positive law can compromise them. The net effect is the imposition of private legal transition costs from the loss of the accrued benefits of the established conventions and the resource costs of developing new ones.

It would appear that, because it is designed principally to facilitate a single legal act—the recognition and enforcement of international intellectual property judgments—the Dreyfuss-Ginsburg treaty should not raise significant concerns about private adjustment costs. Even here, to be sure, a variety of forms will need to be developed to ensure the efficient application of legal rules that the treaty would introduce, the costs of which will be borne not only by private transactors but also by public institutions.[27] Nonetheless, it is likely—in particular given that such a treaty in large measure will fill a gap in the existing legal infrastructure—that private adjustment costs should not be as significant a concern for the targeted judgments convention under consideration here.

E. Public Legal Transition Costs

Legal transition costs are not only a private phenomenon. Because the state is involved not only in the creation of law, but in its administration and application as well, public institutions also may incur the transition costs associated with legal change.[28] This is par-

contract terms).

27. *See infra* notes 28–34 and accompanying text.

28. For a more detailed analysis of the notion of public transition costs, see Van Alstine, *supra* note 1, at 850–52.

ticularly true with legal norms that will involve public institutions, such as the jurisdiction and judgment rules proposed by the Dreyfuss-Ginsburg treaty. Here, the focal point for disputes over the application of the law of necessity will be public institutions, specifically national court systems.

Public court systems in effect represent an elaborate state subsidy for the resolution of societal disputes. Because of this involvement in dispute resolution, the public legal transition costs associated with the adoption of new law will parallel those for private actors. Learning costs, for instance, will arise from the need of state judicial officers (especially those in courts of general jurisdiction)[29] to master the new law. A failure to do so may lead to more prolonged and error-prone proceedings. Moreover, a likely consequence of the uncertainty that often attends the introduction of new legal norms is an increase in the frequency of disputes (both legitimate and specious)[30] and a decrease in the likelihood of their extrajudicial settlement.[31] In a similar way, the likely increase in interpretive error—which is particularly problematic with multilateral treaties[32]—also will foment avoidable litigation. Through the litigation infrastructure provided by its court system, the state itself will bear an appreciable part of the costs of this increased activity.

Most often, these public transition costs are a mere second–tier consequence of the uncertainty costs that private actors must bear in contending with new legal norms. In the case of procedural rules such as the proposed Dreyfuss-Ginsburg treaty, however, the state court system is the very subject of regulation. Disputes over jurisdiction and over the propriety of the recognition or enforcement of

29. This effect may be diminished substantially when an area of the law is entrusted to courts of special jurisdiction. For example, the Federal Circuit Court of Appeals with its specialized jurisdiction for matters of patent law (among other things) and the Delaware Court of Chancery for corporate law matters are more likely to follow developments in their respective fields and thus have a shorter learning curve for relevant changes in the law. For a discussion of why a greater reliance on specialized courts might decrease the costs of legal transitions, see *infra* notes 60–61 and accompanying text.

30. Uncertainty in the law also may increase the likelihood of opportunism, for as doubt about the precise content of the law grows, so too will the latitude for dubious claims masked as legitimate argumentation. For more on this point, see Van Alstine, *supra* note 1, at 835–36. *Cf.* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521–22 (1981) (examining the phenomenon of "subtle opportunism" in contractual relationships, and noting that, because it is difficult to detect and is easily masked as legitimate conduct, it is "discoverable only at a high cost").

31. *See supra* notes 18–19 and accompanying text.

32. *See supra* notes 22–23 and accompanying text (discussing the increased likelihood and consequences of interpretive error for multilateral treaties).

judgments will necessarily involve the public court system. As a result, the adoption of such a treaty will involve direct learning, uncertainty, and error costs for state judicial officers. Moreover, because of the state court systems' direct role in application, such a jurisdiction and enforcement treaty will impose drafting and administrative adjustment costs on them that parallel the costs private actors often bear in adapting their affairs to new legal norms.[33]

In short, the Dreyfuss-Ginsburg treaty presents a particularly stark example of the public transition costs that can arise from legal change. It thus highlights the importance of a sensitivity to the phenomenon of legal transition costs for public institutions as well.[34] In other words, this public aspect again focuses attention on the need to attend not only to the substantive value of new legal norms, but also to their efficient assimilation into the broader web of the law. I now turn to this important message of transition cost analysis.

II. THE POSITIVE IMPLICATIONS OF TRANSITION COST ANALYSIS FOR THE PROPOSED IIP JUDGMENTS TREATY

The adoption of new legal norms can bring substantial societal benefits. In addition to advancing important social causes, legal change can facilitate socially desirable human activities or otherwise diminish the transaction costs that inhibit valuable economic transactions. Indeed, the uniform law movement, both domestically and internationally, represents one of the best examples of the ability of new legal norms to remove some of the impediments to valuable forms of human interchange.[35] The very purpose of uniform legal rules across jurisdictions is to minimize the learning costs concerning the content of foreign law, clear away uncertainties over the identification of applicable law, and create a uniform and stable legal frame-

33. *See supra* notes 24–27 and accompanying text.

34. One benefit of this direct state involvement in the application of the proposed treaty is that it may decrease the effect of "fiscal illusion." This describes the likely tendency of lawmakers to overestimate the benefits and underestimate the costs of legal reforms. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 567 (1989) (describing this phenomenon).

35. For more on these benefits of uniform law, see Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996) (discussing the efficiency gains potentially offered by uniform rules across different jurisdictions); David Charney, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 442, 445–46 (1991) (discussing same regarding the specific subject of international corporate law).

work to facilitate cross-border transactions. The proposed international intellectual property judgments treaty—like the broader Hague Judgments Convention under negotiation[36]—also promises to decrease the transaction costs associated with the enforcement of IIP judgments and thereby enhance the value of the substantive norms of international intellectual property law.

A recognition of the phenomenon of legal transition costs does not challenge these substantive benefits of legal change. Rather, the basic message is that without effective accommodation, transitional friction may compromise the value of new legal norms, perhaps substantially so. In the worst case, by fomenting avoidable litigation and in creating excessive legal uncertainty, substantively beneficial but undisciplined legal change may do more harm than good.

My goal in the Section to follow is to offer some initial observations on how the legal transition costs associated with the proposed international judgments convention might be mitigated, and thus how the drafters and scholars might address the source of some opposition to its adoption. As we shall see below, lawmakers have at their disposal a variety of means by which they can prospectively address the transitional impact of new law.

A. Mitigating Legal Transition Costs

Transition cost analysis underscores for lawmakers that they have a role not only in the creation of new law but also in its effective assimilation and application by the legal system as a whole. The principal means of doing so is through increased diligence at the drafting stage. The ready point here is that increased care in the structuring and articulation of new legal norms can prospectively mitigate the associated learning costs, decrease the amount of uncertainty, and avoid harmful formulation errors. In so doing, lawmakers in effect internalize the legal transition costs of new norms ex ante.

Indeed, this enhanced role of lawmakers may be particularly important with regard to new international legal norms. A simple lack of familiarity with the treaty-making process, together with the fact that treaties often reflect an amalgam of foreign legal concepts, increases the likely extent and impact of transition costs. By the same

36. *See* Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drafts *at* http://www.hcch.net/e/conventions/draft36e.html (Oct. 30, 1999) [hereinafter 1999 Draft Hague Convention].

token, these considerations increase the importance of addressing the transitional friction associated with new treaty law at the drafting stage.[37] In this light, the already long and deliberate process in the negotiation of the parallel Hague Judgments Convention may be a positive, even if for some a frustrating, sign.

The particular characteristics of new treaty law also counsels more active consideration of meta-approaches to legal transition costs. The first of these is the inclusion of express rules of interpretation. The preliminary draft of the Hague Judgments Convention—following the lead of earlier private law conventions[38]—wisely includes an express directive that in interpretive inquiries national courts must have regard for its "international character" and "the need to promote uniformity in its application."[39] I have elsewhere emphasized the importance of such express rules of interpretation in international private law conventions.[40] In the context of legal transition costs, such express directives can broaden the field of available materials in learning the law and thus lessen the likelihood and impact of interpretive error.

Separately, much is to be gained from expressly addressing the role of national courts in filling gaps in an international convention's regulatory scheme. By doing so, drafters can prospectively resolve thorny questions over the hierarchy of norms, specifically whether national courts are empowered to construct conforming additions to international legal regimes or resort to otherwise-applicable (and nonuniform) national law. Whether an expansionist or restrictive approach is chosen,[41] a failure to do so can substantially increase uncer-

37. These concerns are enhanced with complex, multilayered legal systems such as that in the United States. The uneven experience in this country with one private law convention that elsewhere has been quite successful—the United Nations Sales Law Convention—accentuates the value of clear legislative signals in the drafting and implementation of new international norms. *See supra* note 9 and accompanying text (observing the lack of familiarity with the CISG in the United States); *infra* note 54 and accompanying text (noting the difficulties courts in this country have had in understanding their interpretive role for the Convention).

38. *See, e.g.*, CISG, *supra* note 9, art. 7(1); UNIDROIT Convention on International Financial Leasing, art. 6(1), May 28, 1988, *reprinted in* 27 I.L.M. 922, 933–34 (1988); UNIDROIT Convention on International Factoring, art. 4(1), May 28, 1988, *reprinted in* 27 I.L.M. 922, 945 (1988).

39. *See* 1999 Draft Hague Convention, *supra* note 36, art. 38(1).

40. *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 731–34 (1998).

41. There may be sound reasons for a more restrictive approach for procedural rules such as those contemplated in the proposed Dreyfuss-Ginsburg treaty. For private law treaties whose purpose is to regulate the rights and obligations of private parties in specific fields in a comprehensive fashion, such as in the case of the United Nations Sales Convention, long-term success may depend substantially on the power of courts to develop existing rules to cover

tainty and error costs associated with an avoidable problem that has perennially plagued courts in this country in resolving the interaction between federal and state law.

Along the same line, transition cost analysis highlights for international norms the importance of reaping the accumulated certainty in the resolution of specific normative issues.[42] That is, where a new body of law covers the same subject matter as (or is merely a revision of) an existing one, drafters may prospectively mitigate transition costs by carefully addressing—either through express approval or rejection—the experience gained with the existing normative solutions and the related interpretive precedent. The result of such a practice is to avoid much of the learning, uncertainty, and kindred costs of the new legal norms.

At certain points, the commentary of the proposed Dreyfuss-Ginsburg treaty purports to do just that, by referring to existing national practice on certain issues.[43] From the perspective of legal transition costs, this approach is to be lauded. Indeed, such references to past experience are particularly important for legal norms structured as open-ended standards rather than narrowly tailored rules.[44] In order to reap the full benefits of the accumulated certainty on such issues, however, the commentary should make clear the extent to which the referenced past interpretive precedent is binding or merely persuasive in the interpretation of the proposed new international norms.

unforeseen technological, social, or other changes in the field. *See, e.g.*, Van Alstine, *supra* note 40, at 761–91 (arguing that an expansive approach to the general principles gap-filling methodology in the U.N. Sales Convention is appropriate to ensure its long-term success). A more restrictive approach may be appropriate, in contrast, for a more technical treaty such as the statute of limitations treaty that is a companion to the U.N. Sales Convention. *See id.*, at 730–31 n.178 (offering this observation) (citing Convention on the Limitation Period in the International Sale of Goods, *reprinted in* 13 I.L.M. 952 (1974), and Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, Annex II, *reprinted in* 19 I.L.M. 696 (1980)).

42. *See* Van Alstine, *supra* note 1, at 860 (observing that legal transition costs can be mitigated by expressly addressing the continuing effect of past interpretative precedent in the adoption of new legal norms).

43. *See, e.g.*, Dreyfuss & Ginsburg, *supra* note 16, cmt. at 1115 (noting that the approach in article 9 "is derived from US federal jurisdiction law, 28 U.S.C. § 1367"); *id.* arts. 1, 2 & cmt. at 1096 (stating that "line drawing" with regard to scope of the Draft Convention would be difficult but noting that "experiences in national judicial systems may be helpful" and citing certain precedent from the United States); *id.* at 1070–71 (noting with regard to consolidation that "[b]oth US and European laws have mechanisms to promote consolidation, and the techniques of both systems are invoked here").

44. *See* Van Alstine, *supra* note 1, at 833–35 (discussing the special value of interpretive precedent for legal norms structured as standards).

This brings us to the potentially important role of the Dreyfuss-Ginsburg commentary itself. For purposes of transition cost analysis, there is much to recommend an official commentary to guide the interpretation and application of a new body of law. The official comments appended to each of the sections of the Uniform Commercial Code in this country provide a positive model in this regard.[45] Though only persuasive, these official comments have served to assist in the learning of the law, decrease uncertainty costs, and limit instances of interpretive error. Given the complexities inherent in interpretation by disparate national courts, a concern for the effects of legal transition costs counsels strongly in favor of a similar instrument (along the lines of the Dreyfuss-Ginsburg commentary) for a new international private law treaty.[46]

B. Enhancing the Role of Mediating Institutions in the Development of International Private Law

A final step in understanding the true impact of legal transition costs is to recognize the important role of "mediating institutions" in the assimilation of new legal norms.[47] Traditionally, the most prominent mediating institution has been the public court system. Through their published (and thus public) interpretive opinions, state courts can assist in the learning of the law by the public at large, speed the clarification of legal uncertainties, and add coherence to comprehensive or complicated bodies of law. Indeed, as we have seen, by clarifying and disseminating knowledge about the law, state court interpretive decisions in effect represent public goods.[48] As should be readily apparent at this point in the analysis, the net effect of these functions of state courts is to diminish the learning, uncertainty, and kindred costs associated with the adoption of new legal norms.

45. For a discussion of the role of the Official Comments to the U.C.C., see generally Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 (discussing the background and purpose for the Official Comments). *See also* Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 565–66 (2000) (noting that the purpose of the comments was to provide detailed guidance to the courts in applying the Code).

46. Interests of certainty suggest, however, that the drafters expressly resolve the precise force of such a commentary. Specifically, the drafters should clarify whether the "official" commentary should operate in lieu of, or merely as a hierarchically superior supplement to, the drafting history (commonly known as the travaux preparatoires).

47. *See* Van Alstine, *supra* note 1, at 862–68 (comprehensively addressing the role of mediating institutions with regard to legal transition costs).

48. *See supra* note 13 and accompanying text.

The effectiveness of state courts in their traditional role as mediating institutions may be diminished, however, for multilateral private law treaties. Because responsibility for the application of such treaties rests with the disparate national courts of the member states, there is no single institution empowered to render final, authoritative interpretations on disputed issues. This problem is compounded in this country because the already overburdened national Supreme Court is unlikely to have the capacity or inclination to provide final national guidance on such private law issues except in rare circumstances.[49] Moreover, the presence of multiple equally authoritative interpretations increases the likelihood of inconsistent interpretations for multilateral private law treaties.[50] These special complications for multilateral treaties suggest a need to enhance the effectiveness of existing mediating institutions and consider the creation of new ones.

The first, and perhaps easiest, measure in this regard would be to mandate more effective interaction between national courts on interpretive inquiries. This mandate could take the form of an express directive—such as the one contemplated in the preliminary draft of the proposed Hague Judgments Convention[51]—directing national courts to give appropriate deference to prior interpretive decisions by courts in other member states. Such an express directive is an important supplement to the common instruction in private law treaties that courts should have regard for the interests of uniformity of interpretation.[52] Although the deference to prior interpretive decisions is implicit in such a uniformity directive,[53] the record of courts in this country has been less than exemplary in this regard.[54] An express di-

49. I have more to say on this point *infra* notes 60–61 and accompanying text.

50. *Cf.* D'Amato, *supra* note 15, at 10 (suggesting that an increase in potentially inconsistent interpretive precedent can lead to an increase in uncertainty).

51. *See* 1999 Draft Hague Convention, *supra* note 36, art. 38(2) ("The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.").

52. *See supra* note 38 (citing the uniformity directive in other private law treaties).

53. *See* Van Alstine, *supra* note 40, at 732 (arguing with regard to a similar provision in the UN Sales Convention that "[i]mplicit in the required deference to uniformity is an instruction to adjudicators to give mutual deference to prior interpretive decisions by courts of other member states"); *id.* at 786–91 (exploring this point in greater detail).

54. With regard to the United Nations Sales Convention, for example, there are already over 850 reported decisions on its application and interpretation by courts in the various member states. For a compilation of such cases, see the CISG Case Schedule at http://www.cisg.law.pace.edu/cisg/text/-casesschedule.html (last visited March 13, 2002). In spite of this, courts in the United States continue to express the view that "there is virtually no case law under the Convention." *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995); *see also* Supermicro Computer, Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001) (stating that "[t]he case law interpreting and applying the CISG is sparse"); Claudia,

rective of appropriate deference, therefore, should enhance the effectiveness of the disparate national courts as mediating institutions for multilateral treaties.

To support this interaction between national courts, the international institution under whose auspices a new treaty is adopted—the Hague Conference on Private International Law in the case of the proposed Hague Judgments Convention and the Dreyfuss-Ginsburg Draft Convention on Recognition of Judgments in Intellectual Property Matters—should consider the creation of a mechanism for the dissemination of knowledge about interpretive decisions by courts in the various member states. A model of such a system is the so-called "CLOUT" system (Case Law On UNCITRAL Texts) established by the United Nations Commission on International Trade Law for private law conventions created under its auspices. Under the CLOUT system, the Secretariat of UNCITRAL arranges for the collection of interpretive decisions, and for the preparation, translation, and dissemination of abstracts of the decisions.[55] A preliminary draft of the Hague Judgments Convention proposes a similar, if less ambitious, system.[56] A sensitivity to legal transition costs suggests that such a system should be adopted for the proposed Dreyfuss-Ginsburg treaty, as well as for similar private law conventions.

A more ambitious measure to address the special obstacles of multilateral treaties is the creation of entirely new mediating institutions. One promising option—which follows the model of the Permanent Editorial Board for the Uniform Commercial Code, and has already been proposed for the U.N. Sales Convention[57]—is the establishment of a standing committee of experts to oversee the operation of a new multilateral treaty after adoption. The purpose of such a body would be to monitor developments in the interpretation of the treaty, identify particularly contentious interpretive issues, propose

S.N.C. v. Olivieri Footware, Ltd., No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, *4 (S.D.N.Y. Apr. 7, 1998) (stating same); Helen Kaminski Pty., Ltd. v. Mktg. Australian Prods., Inc., Nos. M-47 (DLC), 96B46519, 97-8072A, 1997 WL 414137, at *3 (S.D.N.Y. Jul. 23, 1997) (asserting that there is "little to no case law on the CISG in general").

55. The information collected under the CLOUT system can be found at the homepage of UNCITRAL at http://www.uncitral.org/english/clout/index.htm (last visited March 13, 2002).

56. *See* 1999 Draft Hague Convention, *supra* note 36, art. 39(1).

57. *See* Michael Joachim Bonell, *A Proposal for the Establishment of a Permanent Editorial Board for the Vienna Sales Convention, in* INTERNATIONAL UNIFORM LAW IN PRACTICE 241 (1988); *see also* John E. Murray, Jr., *The Neglect of CISG—A Workable Solution*, 17 J.L. & COM. 365 (1998) (supporting this suggestion).

solutions, and, where appropriate, offer nonbinding interpretive opinions.[58]

Another option in the same vein is the creation of ad hoc panels of experts to respond to inquiries in specific disputes. An innovative proposal in this regard is contained in a preliminary draft of the proposed Hague Judgments Convention. Article 40 of that convention empowers the permanent bureau of the Hague Conference to establish a "committee of experts" to respond to inquiries by the parties to a dispute or by courts of a member state regarding the interpretation of the Convention.[59] If such interpretive decisions are made publicly available, these ad hoc committees of experts in effect will function as a new form of mediating institutions.

The net effect of all of these suggestions is to assist in the assimilation of new multilateral treaties. By enhancing the cooperation among existing national courts and creating new forms of international mediating institutions, lawmakers in effect expand the storehouse of source material for learning about the content of new international law, speed the resolution of uncertainties about its precise meaning and effect, and decrease the likelihood of interpretive error. In other words, these new and enhanced forms of mediating institutions can more effectively ameliorate the impact of legal transition costs for new multilateral private law conventions such as that proposed by Professors Dreyfuss and Ginsburg for the recognition of international intellectual property judgments.

One final note is appropriate about the effectiveness of mediating institutions on international law issues in the United States. Because treaty law is federal law, the only body with the authority to provide final, national interpretations on disputed issues is the United States Supreme Court. With the continuing expansion of federal law in this and other fields, however, the Supreme Court is now increas-

58. A preliminary draft of the proposed Hague Judgments Convention suggests that the Secretary General of the Hague Conference establish such a body. *See* 1999 Draft Hague Convention, *supra* note 36, art. 39(2) (proposing a "special commission" to meet "at regular intervals . . . to review the operation of the Convention"). Under the proposal, the special commission would be empowered to make recommendations "on the application or interpretation" of the Hague Judgments Convention and to "propose modifications or revisions of the Convention or the addition of protocols," presumably for later consideration by the Hague Conference as a whole. *See id.* art. 39(3).

59. *See* 1999 Draft Hague Convention, *supra* note 36, art. 40 (authorizing the permanent bureau, "[u]pon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State" to assist in the establishment of a "committee of experts to make recommendations to such parties or such court").

ingly unlikely to be able to fulfill this function.[60] As scholars of intellectual property are well aware, the one notable exception to this rule is the specialized jurisdiction of the Federal Circuit Court of Appeals.[61] In matters outside the jurisdiction of the Federal Circuit, however, one consequence of the continuing expansion of federal law (including treaty law) is a likely increase in legal transition costs from the increased delay in the national resolution of intercircuit interpretive conflicts. As I argued in *The Costs of Legal Change*, a fuller appreciation of the impact of legal transition costs should spur more active consideration of structural changes to enhance the effectiveness of national mediating institutions in this country, including in particular in the field of treaty law.[62]

CONCLUSION

Like the broader uniform international law movement in general, the proposed treaty on jurisdiction and judgments in intellectual property matters promises substantial benefits for participants in the field. Indeed, by clearing away existing uncertainties and otherwise facilitating the enforcement of judgments, the treaty also promises to enhance the value of the underlying principles of international intellectual property law itself. As we have seen, however, the adoption of new legal norms—in particular in the form of a multilateral treaty—also may involve serious transitional costs for the international legal system. The message of transition cost analysis is that an appropriate sensitivity to these real and potentially substantial legal transition costs may ease the assimilation of such beneficial legal reforms, and as a result facilitate their acceptance in the first place.

60. *See* Van Alstine, *supra* note 1, at 864–65 (examining this point in greater detail).

61. The federal circuit has sole appellate authority, among other things, over matters of patent law. *See* 28 U.S.C. § 1295 (2000). Professor Dreyfuss has offered one of the leading examinations of this experiment. *See* Rochelle Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

62. *See* Van Alstine, *supra* note 1, at 864–66.