Professor Paul R. Dubinsky

Deferential Treaty Interpretation After *Loper Bright Enterprises v. Raimondo*

Abstract

What happens when Loper Bright Enterprises v. Raimondo *is applied to the interpretation of treaties and treaty implementing statutes? For nearly a century, the Supreme Court has exercised "treaty deference." The term refers to judicial deference to executive branch interpretation of treaties and statutes implementing treaties. The Court's reasons for treaty deference have varied. Some are unique to foreign relations law. Some are not. The former include a constitutional design favoring executive branch primacy in foreign affairs, a need for the nation to speak internationally with one voice, and the presence of key differences between treaties and statutes. Such reasons support foreign relations "exceptionalism." In contrast, the Court also justifies treaty deference with reasons not unique to foreign relations. These include the value of technical expertise, the presence of textual ambiguities, the benefits of uniformity, and Congressional choice to delegate policymaking authority to the executive branch rather than judges. Before* Loper Bright, *the Court advanced these same reasons to justify* Chevron *deference. Applied to treaty interpretation, the* Chevron *reasons support the "normalization" of foreign relations law.*

Now that Loper Bright has overruled Chevron, *this Article argues in favor of reexamining treaty deference. The argument draws urgency from* Loper Bright's *Article III originalism and what the Court calls the "exclusive judicial function" of interpreting federal statutes, which may extend to statutes that implement treaties.* Loper Bright *calls into question the validity of executive branch regulations enacted pursuant to treaty implementing statutes. The exclusive judicial function view may also lessen the weight accorded briefs submitted by the Executive in treaty cases. Reexamining treaty deference can lead in two very different directions. The first is toward the demise of treaty deference and the distinctiveness of foreign relations law. The current article rejects this outcome. It argues in favor of a second direction, one favoring a new form of treaty deference that rests solely on foreign relations exceptionalism.*

Rebecca Ingber

The War on International Law

Abstract for ILDC, January 31, 2025

It is a truism among many American international law scholars that the U.S. Constitution originated in part in the framers' recognition that our striving new nation needed a means of upholding its treaty commitments. The Articles of Confederation had left the federal government powerless to keep the states in line. And the states' transgressions against our peace treaty with Britain were giving the British government justification to violate their own commitments and an excuse not to withdraw as promised. The impetus for a new Constitution emerged in part out of this desperate need to create a national government that would uphold its international commitments. And as one might expect of jurists and politicians who saw international law as essential to the endurance of their new nation, these early Americans were readily familiar with the substance of international law as part of their general legal knowledge. One need look no further than journal entries documenting the earliest internal government debates to find evidence of the framers' fluency in and reliance upon international law.

This embrace of international law by politicians and even the average government lawyer is unimaginable today. Many U.S. politicians openly sneer at international law and institutions, and it is exceedingly rare for a member of Congress to rely upon either. There is a trend of vocal anti-international law sentiment among politically conservative politicians, but left-leaning politicians with rare exceptions tend to provide only tepid acknowledgement of international law at best. Senate consent to ratification of treaties has run dry. And Congress has routinely passed statutes that can reasonably be described as anti-international law or institutions. An oft-cited example is the American Service-Members' Protection Act, colloquially known as the "Hague Invasion Act," because it authorizes the U.S. president to "use all means necessary and appropriate to bring about the release" of a U.S. person held by the International Criminal Court.

The visible turn against international law is also stark in the judiciary. As recently as 1900, the Supreme Court pronounced that "international law is part of our law." Yet today Supreme Court nominees find it necessary during their confirmation process to denounce any significant role for international law in their judicial decision-making. This phenomenon applies today across parties. When asked in her nomination hearing when it is appropriate for judges to consider international law when interpreting the U.S. Constitution, then-Judge Ketanji Brown Jackson responded, "I do think that the use of international law is very limited in our… judging." She mentioned that there were some rare cases where a treaty might be at issue, "but there are very very few cases I think in which international law plays any role, and certainly not in interpreting the Constitution." Moreover, would-be justices regularly conflate international law with foreign law, suggesting either ignorance about the nature of international law or a belief that such conflation and dismissal is politically necessary to their confirmation.

Of all the branches of government, the executive has in recent years remained most engaged on matters of international law. Yet it has not been a strong voice in this space and it has been anything but consistent. Some recent Republican Administrations have been aggressive in their anti-international law rhetoric, and many have withdrawn from or refused to ratify international agreements negotiated by their predecessor. Recent Democratic Administrations have leaned more heavily toward certain types of treaty negotiations, most notably on climate and nuclear nonproliferation. But neither

political party has been particularly forward leaning on pressing a strong role for international law in the U.S. system or in being a strategic force on international law and institutions in recent years. Internally, the practice of public international law at the government level is primarily left to a small cadre of expert career lawyers inside the U.S. State Department and some subject specific offices at agencies like the USTR. The agency one would assume the most responsible as a whole for upholding U.S. commitments to law, the U.S. Department of Justice, has routinely embraced positions that undermine the force of international agreements and institutions and denigrate international law as a rule of decision for courts.

How did the discourse around international law in this country evolve from the Framers routinely citing international jurists as support for their policy positions to Supreme Court nominees seeking to disclaim it at all costs? There are many potential reasons for this shift. The United States and its relationship to the world – and in particular its strength vis-à-vis other states – has of course changed dramatically since the founding. International law itself has changed. The vast scope of international law's modern reach would have been unimaginable to the early Americans. Scholars who have considered this evolution have focused primarily on the changing role of international law in Supreme Court jurisprudence. There is also a rich corresponding literature by legal scholars and historians exploring the twentieth century debates surrounding U.S. ratification of human rights treaties, efforts to employ international human rights law in the fight for civil rights, and the resulting backlash against international law.

I would like to expand the lens to seek a more comprehensive understanding of this shift. And in doing so I intend to expand the frame of the inquiry both forward and back.

Historically, there is reason to believe these anti-international-law views did not arise for the first time in conjunction with the rise of human rights law. The twentieth century Bricker Amendment-era politicians who sought to challenge human rights treaties on process grounds because they did not like the substance echo earlier efforts at the framing to challenge treaty terms by fighting the process of treaty making itself. There are many such examples throughout history where those who lost on substance regrouped to fight on process, over time chipping away at the force of international law in the U.S. system.

I would also like to direct the lens forward. Scholarship exploring the civil rights era provides some explanation for why certain segments of American society – in particular the Jim Crow south – opposed ratification of human rights treaties. But it does not tell us why the twenty-first century Senate would reject a treaty on the law of the sea. Nor does it explain the continuous assault on the role or enforcement of international law in the U.S. system over the last many decades. To understand the politics of international law today, we need to examine how the various tools deployed to fight the efficacy of human rights treaties ultimately became untethered from those purposes, and evolved and merged with populist trends and xenophobia to become what we see today: a wide range of legal doctrines and policy movements focused on keeping international law from having teeth in the U.S. legal system combined with widespread disinformation regarding what international law actually is.

Today, the role of international law in the United States does not merely meet with disdain by certain political partisans; rather the partisan antipathy has taken deeper root and may have overcome those who would be otherwise inclined to defend a strong role for international law in the U.S. system. And where prior generations of politicians may have failed to push back on U.S. ratification of treaties they did not like, or in promoting an amendment to alter the Constitution's process for making treaties and its emphasis on supremacy, they have succeeded in promoting a slower movement through political elites and the courts. From the dilution of customary international law as a rule of decision

in U.S. courts, to the erosion of treaty power through the doctrine of non-self-execution, to attacks on longstanding canons of statutory and constitutional interpretation, the U.S. judiciary is succeeding where those earlier politicians failed: it is slowly rendering international law null as law in the U.S. legal system.

Ultimately the slow denigration of international law as law in the U.S. system will have harmful effects not just for the international system, but for the United States, which has benefited from the international order not only when it was an embryonic country but more recently as the international laws and institutions that it helped shape have enabled it to retain its strength in the modern world order.

This project is first and foremost an attempt to understand the history of how we got here. Ideally, however, I hope that unraveling that history might help in working to confront the disdain for international law that has now become widespread in the U.S. system.

ABSTRACT

The Foreign Act of State Doctrine:
Unnecessary and Excessive?

Dr Hayk Kupelyants,
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My current research contrasts the foreign Act of State doctrine under English law to the positions in other jurisdictions, and crucially in the United States. The working hypothesis is that the scope of the foreign Act of State doctrine in English law is unnecessarily expansive and, thus understood, the doctrine can be said to disproportionately limit private litigants' rights. This is especially the case since the English courts do not follow the *Kirkpatrick* exception (in the way that it is understood in the US) and the remaining exceptions that effectively limit the scope of the doctrine are narrowly construed.

The foreign Act of State doctrine is said to be predicated on the twin considerations of comity of nations and the constitutional separation of powers. In my research, I want to explore whether the Act of State:

1) does actually find support in the doctrine of comity,

2) is consistent with the principle of non-intervention in international law, properly understood,

3) should be restrained in light of the above two considerations.

On the first point, it is unclear whether the doctrine of comity justifies the broad scope of the Act of State doctrine in English law. Currently, the doctrine of comity only acts as a foundational principle of the Act of State doctrine. The English court is not required to decide whether the adjudication of the specific claim (and the ruling over specific foreign acts of State) would run contrary to the doctrine of comity (as is the case, for instance, for anti-suit injunctions). Any such adjudication would *ipso facto* trigger the Act of State doctrine (subject to the application of any recognised exceptions), even in the circumstances where the parties have agreed to the jurisdiction of the English courts.

Further, the English court do not apply the *Kirtkpatrick* exception in the same way that the US courts do. One may wonder whether there is a true conflict with the doctrine of comity in the cases where the determination of the foreign sovereign's acts would only be incidental and/or would not challenge the validity of the acts of the foreign State, and when the parties have agreed to submit their dispute to the jurisdiction of the English court.

On the second point, it has become commonplace to state that the foreign Act of State doctrine does not follow from a rule of international law. However, I will propose to enquire whether the perimeters of the doctrine should mirror the position in international law, and specifically the principle of non-intervention into the affairs of a foreign State. The working hypothesis is that this is possible, advisable and if this course is followed, there might be room for limiting the Act of State doctrine.

I plan to propose a more nuanced multi-factorial restatement of the Act of State doctrine. Instead of applying a blanket prohibition on judicial adjudication, this approach would require courts to assess a range of factors, including whether their judgment would materially disrupt or negate a foreign state's executive policies. My paper proposes to set out the list of relevant factors, namely whether:

1. The challenge is to the validity or lawfulness of the foreign acts of State, and whether the challenge, if accepted, would materially disrupt a foreign state's policy.
2. The parties have agreed to the jurisdiction of the English courts.
3. The claimant has a viable claim in an international forum.
4. The claimant has a viable claim in the local court of the foreign sovereign.
5. The claim flows from an international agreement binding upon the UK.

The Reception of International Human Rights Law in *Charter* Litigation:
"Not a Box of Chocolates" But You Still "Never Know What You're Going to Get"

Karinne Lantz
November 2024 Draft

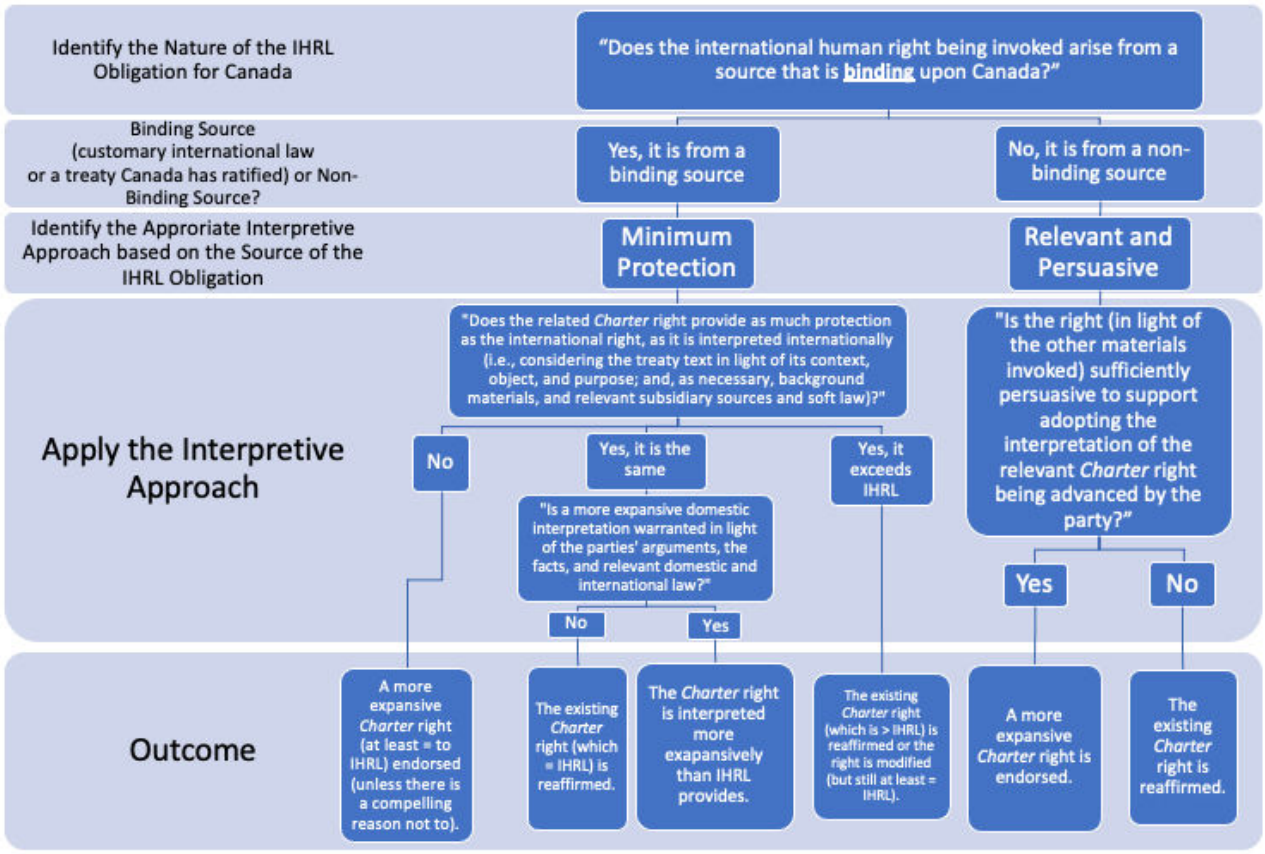
Abstract

This article explores the reception of international human rights law in Canada. Focusing on the *Charter* context and, in particular, the recent *Canada v BOLOH 1(a)* litigation—in which it was noted that, "[i]nternational law is not a box of chocolates from which one can take what one wants, leaving the rest in the box"—this article demonstrates that how IHRL applies in Canada continues to lack clarity despite repeated efforts by the Supreme Court of Canada to provide it. It demonstrates that, without a clear methodology, the selective box-of-chocolates approach taken toward legislatively implementing Canada's international human rights obligations may, to borrow the iconic words of Forrest Gump, mean that, "you never know what you are going to get" when IHRL is invoked in *Charter* litigation. This article argues that how IHRL applies to *Charter* litigation is a pressing matter for the SCC to address, particularly because IHRL is increasingly being invoked before courts around the world.

As a suitable path forward, it proposes the adoption of a methodological approach that: (i) endorses the robust application of the minimum protection approach under the "Dickson Doctrine" according to which IHRL, as a whole, would be considered for its relevance and persuasiveness when interpreting corresponding rights in Canada, but with binding IHRL providing a conceptual floor under which the domestic interpretation of corresponding rights would not fall; and, (ii) unequivocally embraces using international legal principles to interpret IHRL and determine the weight that ought to be afforded to international legal materials. In addition to reconciling and being consistent with existing jurisprudence, this approach would assist with narrowing the gap between Canada's international and domestic human rights obligations; acknowledge the binding nature of Canada's IHRL obligations; respect concerns for separation and divisions of powers; and, ultimately, contribute to maintaining the rule of law while providing additional clarity regarding the scope of fundamental rights and freedoms in Canada.

A Refined "Modified Dickson Doctrine" – In Practice

"The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must… be relevant and persuasive sources for interpretation of the *Charter's* provisions" – Dickson, CJ in *PSERA*



Lucas Mathieu
Call for papers – International Law in Domestic Courts Workshop

Abstract

The use by international courts and tribunals of domestic decisions as subsidiary means of determination of rules of international law: key challenges and persuasive value

On 9 April 2024, the European Court of Human Rights ("ECtHR") rendered its decision *Verein Klimaseniorinnen Schweiz and others v. Switzerland*[1]. The ECtHR was tasked with the interpretation of articles 2 (right to life) and 8 (right to private and family life) of the European Convention on Human Rights ("ECHR"), in light of the alleged lack of measures taken by the Swiss government to mitigate the effects of climate change[2]. In a landmark decision, the ECtHR eventually found violations by Switzerland with regard to article 8 of the ECHR[3]. Throughout its reasons, the ECtHR devoted no less than 37 paragraphs to an overview of key decisions on climate change in Council of Europe domestic courts[4]. Half of these domestic decisions, which joined the larger choir of sources that formed the background of the Court's decision, directly interpreted article 2 and 8 of the ECHR.

The *Verein Klimaseniorinnen Schweiz and others* decision reflects a growing trend of international tribunals relying on domestic decisions in support of their own reasonings[5]. This trend demonstrates willingness from international tribunals to seize opportunities offered by increased reliance on domestic courts interpretations of international law. Such opportunities include, amongst others exploiting the innovative and under-tapped potential of domestic interpretations[6] as well as strengthening vertical transjudicial dialogue[7].

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[1] *Klimaseniorinnen Schweiz and others v. Switzerland*, 53600/20 (Judgment of 9 April 2024) ("*Verein Klimaseniorinnen Schweiz and others*").
[2] *Ibid,* par. 296 ff.
[3] *Ibid,* par. 573.
[4] *Ibid,* par. 236-272.
[5] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 The International and Comparative Law Quarterly 57, 57–58.
[6] D Hoadley and others, 'A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network' (2021) 9 Frontiers in Physics 2 <https://www.frontiersin.org/journals/physics/articles/10.3389/fphy.2021.665719/full> accessed 12 July 2024; Melissa A Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2004) 93 Georgetown Law Journal 487, 8. Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 117. Roberts (n 5) 80.
[7] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 132–134. Olga Frishman, 'Transnational Judicial Dialogue as an Organisational Field Special Issue: International Workshop for Young Scholars 2012. The Future of Transnational Law: The EU, USA, China and the BRICS' (2013) 19 European Law Journal 739, 749; Waters (n 6) 6.

Despite the above, the formal status of domestic decision under the theory of sources remains unclear. Domestic decisions have long been recognized as indication of their States' *opinio juris* for the purposes of elucidation of customary international law and general principles of law, as well as examples of subsequent interpretation under the *Vienna Convention*[8]. It is however still debated whether domestic judicial decisions should be formally considered subsidiary means – which is to say, whether their reasonings should be granted a value *in and of themselves,* rather than as a form of State practice and *opinio juris*[9].

As a result, while international courts and tribunals are well equipped to evaluate the reasoning and decisions of other international courts, the applicable criteria for assessing the persuasive value of domestic court decisions remain unclear[10]. My paper will address this gap by: (1) discussing the challenges arising from international courts' reliance on domestic court reasoning in matters of international law; and (2) examining the application of widely

[8] Roberts (n 5) 62; Antonios Tzanakopoulos and Christian J Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 Leiden Journal of International Law 531, 537.
[9] Antonios Tzanakopoulos, 'Domestic Judicial Lawmaking', *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 231 <https://china.elgaronline.com/edcollchap/edcoll/9781781953211/9781781953211.00021.xml> accessed 12 July 2024. For opinions in favor of formally recognizing domestic decision, see Eleni Methymaki and Antonios Tzanakopoulos, 'Another Brick in the Wall -- Reflexivity of the Sources and the Enforcement of International Law: Domestic Courts as Sources and Enforcers' (23 February 2017) 1 <https://papers.ssrn.com/abstract=2922737> accessed 15 July 2024; Rosanne Van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 Leiden Journal of International Law 559, 563; A Nollkaemper, *Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY* (Leiden [etc]Martinus Nijhoff 2003) 17 <https://dare.uva.nl/search?identifier=c9bb4d61-35f5-47e1-8bc6-d1c460bbc440> accessed 1 August 2024. For opinions against, see Alain Pellet and Daniel Müller, 'Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 38' (*Oxford Public International Law*) 934 <https://opil.ouplaw.com/display/10.1093/law/9780198814894.001.0001/law-9780198814894-chapter-50> accessed 12 July 2024 par. 323; Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in Malgosia Fitzmaurice and Vaughan Lowe (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 81 <https://www.cambridge.org/core/books/fifty-years-of-the-international-court-of-justice/international-court-of-justice-and-the-sources-of-international-law/A0D14857741706CE2FD7EB9D0B36E48E> accessed 13 July 2024.
Likewise, The *Institut de droit international* excluded decisions of domestic courts from the type of sources which may constitute non-binding "precedents" for the purposes of tribunals working on interstate litigation (see *Institut de droit international*, Session d'Angers (2023), Resolution 2 RES EN, *Precedents and case law (jurisprudence) in interstate litigation and advisory proceedings*, par. 1(a)) ("*Resolution 1.09.2023*").
[10] See notably International Law Commission, *Report of the International law Commission, 75th Session* (29 April–31 May and 1 July–2 August 2024), Chapter V, pages 30ff, Draft Conclusions 3, 4, 7 and 8, UN Doc n. A/79/10. In its 74th and 75th sessions, the International Law Commission ("ILC") offered an overview of the criteria applicable to the weighting of decisions of international tribunals when used as subsidiary means. Although the ILC found that domestic decisions did, in fact, constitute subsidiary means for the purpose of article 38(1)(d) of the ICJ Statute, it qualified its finding and noted "may be used, in certain circumstances[10]." The ILC expanded its reasoning in the subsequent commentary , noting that domestic reasoning should be considered with caution, as they may come from judges with limited expertise in international law and from domestic systems with a specific approach to international law (ibid, p.37, par. 20).

recognized criteria for assessing the persuasive value of court decisions and adapting them to domestic rulings in response to these challenges. I will argue that international courts' evaluation of the persuasive value and relevance of international decisions can largely be extended to domestic courts, with appropriate caveats.

In **section I,** I will identify key challenges associated with enhanced reliance by international tribunals on domestic reasonings. I will classify them in two main types. The first type covers the risks inherent to the quality and export of domestic interpretations of international norms. I will discuss limits to domestic judges' capacity and expertise regarding international law[11]; domestic bias caused by domestic allegiance of judges when assessing questions of international law[12]; and the risks of potential "losses in translation" when domesticating international law in domestic decisions[13]. The second type includes systemic challenges caused by reliance on domestic decisions by international tribunals. I will first discuss the risk of normative oligopoly between influent domestic courts[14]. I will then expand on the risks of further fragmentation of interpretations of international law caused by recognition of additional legitimate interpreters of international norms[15].

In **section II,** I will discuss the criteria identified by the literature, especially in the ILC's recent work on subsidiary means, to systematize the persuasive value of judicial decisions under international law. I will suggest that the criteria used to assess the persuasiveness of judicial decision as identified in the literature fall into three main categories: the quality and relevance of the decision, the expertise and mandate of the decision-maker, and the representativeness and consensus surrounding the view held[16].

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[11] Yuval Shany, 'An Old House with New Bricks or a New House of Old Cards? On National Courts, the International Rule of Law and the Power of Legal Imagination Book Symposium on Andre Nollkaemper's National Courts and the International Rule of Law' (2012) 4 Jerusalem Review of Legal Studies 50, 66; Alebeek (n 9) 565.
[12] Shany (n 11) 54–55.Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model The New York University - University of Virginia Conference on Exploring the Limits of International Law" (2003) 44:1 Va J Int Law 19–32 at 29
[13] Roberts (n 5) 60, 74; Alebeek (n 9) 570–571; Tzanakopoulos and Tams (n 8) 535. [13] Yuval Shany, 'Should the Implementation of International Rules by Domestic Courts Be Bolstered?' in The Late Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 59 <https://doi.org/10.1093/acprof:oso/9780199691661.003.0016> accessed 12 July 2024.
[14] Hoadley and others (n 6) 3. Waters (n 6) 19.
[15] Shany (n 13) 64.
[16] The above classification largely relies on ILC's Draft Conclusions (n 10). Further attempts at identifying systematic criteria of the persuasive value of domestic decisions include the *Institut de droit international*'s Resolution 2 RES EN (n 9) , Aldo Zammit Borda, 'The Notion of "Persuasive Value" of External Precedent in

I will then compare these criteria with the challenges identified in Section I and argue that these challenges should not lead to the disqualification of domestic decisions used as subsidiary means by international tribunals. Focusing on criteria related to the quality of reasoning and the expertise of decision-makers, I will contend that due consideration must be given to the challenges inherent in domestic interpretations of international law. At the same time, these risks should not be overstated, particularly when domestic judges interpret "consubstantial"[17] norms of international law or act as designated interpreters of international norms[18]. In fact, it may be, in part, the "loss in translation" resulting from domestication that makes domestic decisions particularly valuable as subsidiary means, offering innovative perspectives on international interpretation. Lastly, I will argue that the criteria of representativeness and the pursuit of norm convergence may play a distinct role when assessing the persuasive value of domestic court decisions, considering the risk of fragmentation from expanding the pool of authorized interpreters at the domestic level.

Author Bio

Lucas Mathieu is a Ph.D. Candidate at the Geneva Graduate Institute. His research focuses on the interplay and rules of public international law and strategic litigation against transnational companies. He holds an LL.M. from the Graduate Institute (*Summa Cum Laude*), a B.C.L./J.D. from McGill University (*Dean's Honor List*), and a B.A. from Sciences Po. A member of the Quebec Bar since 2020, he previously served as a Judicial Fellow for H.E. Judge Ronny Abraham at the International Court of Justice and as a dispute resolution lawyer at a leading Canadian law firm. Lucas currently assists Ambassador Mario Oyarzàbal in his work at the International Law Commission.

International Criminal Law' (2015) 84 Nordic Journal of International Law 29, 51., Harlan Grant Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 278–279 <https://doi.org/10.1093/acprof:oso/9780198725749.003.0013> accessed 12 July 2024., An Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law New Voices: A Selection from the Sixth Annual Junior Faculty Forum for International Law' (2018) 29 European Journal of International Law 1127, 1133.. Joaquín Reyes Barros, "Reasoning with persuasive precedent: the role of persuasive authority in the law" (2016) 1:2 Teor Juríd Contemp 194–213 at 198; Hernández, *supra* note 15 at 168.

[17] Methymaki and Tzanakopoulos (n 9) 85. Tzanakopoulos and Tams (n 8) 535.

[18] Tzanakopoulos (n 9) 17. See also Cohen, (n 16) at 277.

RYAN SCOVILLE

CHAPTER 4: TWO VIEWS OF THE ARTICLE I TREATY CLAUSE

Having established that CIL defers to national constitutional law to resolve whether the subnational regions of a State possess the capacity for treatymaking, we turn now to begin the process of applying that rule to the United States. The basic question is straightforward: Does U.S. constitution law recognize, to any extent, a U.S. state power to enter agreements that qualify as treaties under international law?

It is tempting to think that the answer is obvious. Article II of the Constitution confers on the president alone the power to "make Treaties" with the advice and consent of the Senate. No provision expressly recognizes a state power to enter treaties per se. And the Article I Treaty Clause specifies that "No State shall enter into any Treaty, Alliance, or Confederation." A quick look at the text thus appears to leave no room for state treaties of any kind.

Yet a duality haunts this facial simplicity. There is no question that the states cannot enter any commitment that qualifies as a treaty for constitutional purposes. "Treaty," however, is a term of art in both U.S. constitutional law and CIL. In the former, its contours depend on standard domestic sources of legal authority and carry significant implications for federalism. In the latter, its contours depend on global practice and legal reasoning and determine the applicability of a rich body of international law on treaty adoption, validity, interpretation, withdrawal, and breach.

It is possible for the Article I Treaty Clause to embrace either of two alternative approaches to this duality. First, under what I will refer to as the Congruence Thesis, the constitutional meaning of "Treaty" might simply channel the definition of "treaty" that prevails in CIL at the time of interpretation, whatever that definition might be or become, without modification for internal U.S. purposes. This would be a form of living constitutionalism because any expansion or contraction in definitional scope under general international law since the Founding would produce an automatic, lockstep shift in the breadth of the Article I prohibition. Second, under what I will refer to as the Divergence Thesis, constitutional meaning might be detached from and different than its counterpart in CIL. This detachment could arise from an interpretive methodology that espouses an idiosyncratic constitutional meaning as a mechanism for optimizing the balance of practical risks and benefits from state engagement in foreign relations, honoring an eighteenth-century understanding, or deferring to a settled domestic custom.

These two approaches carry radically different implications. If the Congruence Thesis is correct, the states lack treatymaking capacity under the rule of renvoi because the Article I Treaty Clause establishes an airtight prohibition against any state commitment that CIL would recognize as a treaty. In contrast, if the Divergence Thesis is correct, the states might possess a degree of treatymaking capacity under the rule of renvoi because at least some state agreements with foreign governments can qualify as treaties under international law without also qualifying as treaties in the constitutional sense. The Article I Treaty Clause might prohibit a mere subset of CIL treaties, for example, or disallow certain types of agreements that CIL does not recognize as treaties in the first place.

Surprisingly, however, U.S. courts and academic commentators have neither expressly recognized these approaches nor settled upon either of them. On the one hand, a long line of Supreme Court precedent and academic analysis—much of it from the nineteenth century—posits an absolute prohibition on any kind of state involvement in foreign relations. This authority is most consistent with the possibility of semantic congruence because it implies the unconstitutionality of a treaty in any sense of the word. On the other hand, the leading notional approaches to the Article

I Treaty Clause in recent decades have implied a disconnection from modern international legal meaning. The result is substantial uncertainty about whether international law regards U.S. states as possessing the capacity for treatymaking.

This Chapter documents the uncertainty by collecting evidence of Congruence and Divergence in U.S. judicial opinions, the practices of Congress and the executive branch, and academic commentary. Part I provides context by identifying different ways in which the definitional scope of "treaty" in international law has expanded since 1789. This expansion has created a gap between historical and modern meanings and now raises the question of which if any applies to the Article I Treaty Clause. The answer, at least for now, is that positive law and academic commentary provide no clear answer. Part II identifies authority that has implicitly tethered constitutional meaning to CIL and thus favored Congruence. Part III identifies a competing body of authority that has implicitly favored Divergence. The existence of these two competing collections suggests that de novo review of constitutional meaning is necessary to ascertain the implications of international law's rule of renvoi for the United States. Later chapters will undertake that review by documenting the original understanding of the Article I Treaty Clause and examining functionalist arguments for and against definitional congruence.

Ruowen Shi

Challenging Entity List Designations in U.S. Courts

With the paralysis of the WTO dispute settlement mechanism, legal disputes arising from the extraterritorial application of regulatory laws have increasingly shifted to domestic courts, where judicial intervention has begun to yield tangible effects. For example, affected entities have sought injunctions to prohibit administrative agencies from placing them on restrictive lists, a strategy that has led to judicial intervention in some cases. Meanwhile, China's WTO dispute consultations with the United States, initiated in 2022 to address export control restrictions, remain unresolved. This trend underscores a growing reliance on domestic judicial remedies as an alternative to multilateral mechanisms, signaling a transformation in the governance of international trade disputes.

The entity list designation under U.S. export control laws presents significant barriers to international business transactions. Affected entities often perceive removal from the list as their primary legal remedy. The feasibility of challenging such designations in U.S. courts mainly depends on the executive transparency, constitutional and administrative protection, and standards for reviewing national security determinations.

First, U.S. administrative agencies sometimes fail to provide sufficient evidence or reasonable justification when placing entities on restricted lists, creating an information asymmetry that limits corporate defenses. To address this issue, affected entities may request to obtain the government's evidentiary basis for designation based on the Freedom of Information Act. Courts reviewing these cases may invalidate a listing decision if they find a lack of substantive evidence or procedural fairness, as demonstrated in *Xiaomi v. U.S. Department of Defense* (CMCC list).

Second, under the Administrative Procedure Act, entities may argue that agency actions are ultra vires or arbitrary and capricious, particularly when the government fails to establish a reasonable link between the designation and national security threats within the administrative record. Courts are more likely to intervene in limiting executive power when such deficiencies exist. Although Export Administration Regulation explicitly excludes courts from reviewing entity list decisions based on APA, entities may still seek judicial review on constitutional grounds, particularly under the due process clause.

While courts traditionally defer to executive determinations on national security matters, the overruling of the Chevron Doctrine has enhanced judicial independence in statutory interpretation, reducing the presumption of agency discretion. This development may increase judicial scrutiny of executive actions, requiring agencies to provide concrete evidence and justification before imposing export control restrictions.

ASSET JURISDICTION UNBOUND

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Abstract

Since 2012, the U.S. Supreme Court has repeatedly narrowed the power of courts over persons, usually called personal jurisdiction. But it has not touched the power of courts over things, usually called asset or *in rem* jurisdiction. The power of asset jurisdiction has only grown as the world has shifted more and more decisively toward intangible assets, things that have no physical location. That lack of a tangible presence leaves others, including legislatures and courts, to define the location of massively valuable assets. The unlimited nature of asset jurisdiction then confers broad power on courts to adjudicate all claims rooted in those assets.

Modern civil procedure courses devote about one day to the subject of asset jurisdiction. Asset jurisdiction includes so-called *in rem* jurisdiction, a court's power to decide all claims to a thing located within its territorial jurisdiction. That seems a modest power. The reality is far different. *In rem* jurisdiction has grown into one of the biggest tools of court power in their arsenal, a tool that–unlike personal jurisdiction–seems open for use by legislatures, unconstrained by constitutional scrutiny.

In rem jurisdiction has grown in importance for two distinct reasons. First, we are now material people living in an immaterial world: A majority of the value of all personal property is held in intangible assets. Second, the U.S. Supreme Court has repeatedly narrowed other bases of courts' adjudicative jurisdiction. *In rem* jurisdiction now looms as a larger—indeed, a necessary—part of courts' adjudicative jurisdiction, particularly in transnational litigation, where jurisdiction may otherwise by unavailable in American courts. Meanwhile, new classes of intangible assets are skyrocketing in value. These new types of assets, particularly assets maintained through distributed ledger technology, challenge old ways of thinking about *in rem* jurisdiction while at the same time demonstrating its continued importance. Frameworks developed for choice-of-law, such as the UCC Article 12 and the UNIDROIT Principles on Digital Assets and Private Law, will help to inform the question of which courts have power over these new classes of assets.