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# *Foreign Relations Law on Treaty Matters from* Restatement (Third) *to* Restatement (Fourth)*: More a Filter Than a Bridge*

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## Abstract

*The remarks contained in this article are a candid reading of Part III of the* Restatement of the Law (Fourth): Foreign Relations Law of the United States *('Treaties as Law of the United States') through the lens of international lawyers who wonder about the role of international law in the US legal system. They turn essentially on the promise and peril of domesticating international law: Does foreign relations law as determined by Part III the* Restatement (Fourth) *promote compliance with international treaty law or does it rather emphasize constitutional law concerns that may limit its domestic application? To what extent do domestic judicial authorities give effect to treaties at the domestic level? Is the question of the self-executing character of a treaty provision exclusively a matter of domestic law or does it depend also on treaty interpretation? Our conclusion is that, on treaties, the* Restatement (Fourth) *marks a retreat in the engagement with international law from the* Restatement (Third).

## 1 Introduction

An incursion into US constitutional law is always an intriguing exercise for a continental international lawyer. Even after reading extensive parts of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States*,[1] one does not become a specialist of it. In discussing 'Treaties as Law of the United States' – the subject

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[1] *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018).

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covered in Part III of the *Restatement (Fourth)* – one is immediately confronted with fundamental issues of US constitutional law about federalism, separation of powers and other constitutional restraints to the treaty-making power or the reception of international treaties into domestic law. Such issues have prompted an intense debate among US specialists in the last decades, with different camps contending over alternative visions of the external relations law of the USA. Thus, the question of whether all international law qualifies as the law of the USA for the purposes of the Supremacy Clause has given rise to an opposition between 'nationalists' and 'revisionists'; more broadly, the question of whether foreign relations are best suited to federal – and, primarily, executive – control has prompted an opposition between those who defend foreign relations 'exceptionalism' and those who plead for the 'normalization' of foreign relations law.[2] It is not our intention to enter into this debate and ask whether, and to what extent, Part III of the *Restatement (Fourth)* endorses one or the other of these alternative visions. Even less do we intend to take issue with the views expressed by the *Restatement (Fourth)* about the content of the domestic rules governing the external relations of the USA.

Rather, the remarks in this article are a candid reading of the *Restatement* through the lens of international lawyers who wonder about the role of international law in the US legal system. They turn essentially on the promise and peril of domesticating international law: Does foreign relations law as determined by Part III of the *Restatement (Fourth)* promote compliance with international treaty law or does it rather emphasize constitutional law concerns that may limit its domestic application? To what extent do domestic judicial authorities give effect to treaties at the domestic level? Is the question of the self-executing character of a treaty provision exclusively a matter of domestic law or does it depend also on treaty interpretation?

What follows aims at highlighting what we perceive as some of the key choices made in the new *Restatement* as well as areas where the *Restatement*'s approach appears to reflect a distinctive US bias and a domestic evolution (or should we say involution?) of the place of treaties as US law. They concern the definition of 'treaties' – and, more generally, the place of international rules on the law of treaties – in the new *Restatement*, the multiplication of obstacles to the domestic implementation of treaties and, finally, the apparent restriction of the role of domestic judges in the enforcement of treaty obligations. Many of our remarks are prompted by a comparison between the *Restatement of the Law (Third): Foreign Relations Law of the United States*[3] and the new *Restatement (Fourth)*. Also by means of this comparison, we will seek to assess the general posture of the new *Restatement* towards the domestic application of treaties and the role

[2] On the former opposition, see Stephan, 'One Voice in Foreign Relations and Federal Common Law', 60 *Virginia Journal of International Law* (2019–2020) 1, at 5–24; on the latter one, see Sitaraman and Wuerth, 'The Normalization of Foreign Relations Law', 128 *Harvard Law Review* (2015) 1897, at 1906–1935. For a general overview of the debate of the domestic application of treaties in the USA, see G.H. Fox, P.R. Dubinsky and B.R. Roth (eds), *Supreme Law of the Land? Debating the Contemporary Effects of Treaties within the United States Legal System* (2017).

[3] *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987).

of international law in treaty matters: whether it tends to enhance the place of international law in the US legal system or whether instead it gives greater attention to domestic law considerations that may have the effect of limiting the role of international law and its domestic application. In short, is it more of a filter or more of a bridge?

## 2 Treaties in the *Restatement (Fourth)*: An Autonomous US Legal Concept

The *Restatement (Fourth)* retains a partial definition of treaties, framed by exclusively domestic considerations. The same distinctive filter is discernable in the analysis of the conditions of their entry into force as well as in the alignment of the customary rules on treaties with the position of the US authorities.

### A *Traduttore, Traditore*

While acknowledging that, '[a]s a matter of international practice, the term "treaty" includes any "international agreements concluded between States"',[4] the *Restatement (Fourth)* makes the choice to address only 'Article II treaties', on account that 'in U.S. domestic law … the term "treaties" refers more narrowly to international agreements concluded by the President with the advice and consent of two-thirds of the Senate',[5] pursuant to Article II of the Constitution. The scope of Part III of the *Restatement (Fourth)* is therefore quantitatively reduced since, as Curtis Bradley has noted, 'Article II treaties have accounted for only about 6 percent of the international agreements concluded by presidents'.[6] The other 94 per cent are presumably made of executive agreements.[7] This starting hypothesis is a filter in itself since it simply leaves out, in a constitutional limbo, a great deal of international agreements.

The *Restatement (Fourth)* does not explain the rationale of this important decision to concentrate upon 'Article II treaties'. Other sources suggest that the exclusion of executive agreements from the mandate of the reporters was a political choice made by the American Law Institute (ALI) on account that their domestic status was too contested to reach consensus.[8] The ambition of the *Restatement* project was thus limited from the outset, and the reporters were not required to give any guidance for the clarification of these hotly debated issues. In short, the mandate seems to have been to codify the existing solutions, as they stemmed from practice, without engaging in progressive development, which would necessarily taint the 'neutral' mindset of the *Restatement (Fourth)* by a more 'activist' one – a critique often reiterated towards the *Restatement (Third)*.

4 *Restatement (Fourth)*, *supra* note 1, at 27, quoting Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

5 *Ibid.*

6 Bradley, 'Article II Treaties and Signaling Theory', in P. Stephan and S. Cleveland (eds), *The Restatement and Beyond* (2020) 123, at 125.

7 G.S. Krutz and J.S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (2009), at 40–45.

8 See 'Remarks by S. Cleveland', 109 *Proceedings of the ASIL Annual Meeting* (*PASILAM*) (2015) 209, at 210.

The decision to focus on 'Article II treaties' leaves the continental lawyer with the impression that the *Restatement (Fourth)* promotes an autonomous, US concept of treaties, which is estranged from its meaning in international law. If such is the case, some explanations would have been all the more welcome given that the *Restatement (Third)* had no difficulty in dealing with 'international agreements' in general, without creating a hiatus between the treaties concluded pursuant to Article II of the Constitution and the others.[9] Clearly, a domestic law notion of 'treaty' takes centre stage in the *Restatement (Fourth)*, informed by a distinction based entirely on the law of the USA.

It may be that the difference between 'Article II treaties' and executive agreements reflects a dichotomy now entrenched in domestic law, which is based not only on the conditions of the entry into force of these agreements – an obvious point since the procedures are entirely different – but also on the modalities for giving them domestic effect. Yet, as far as the regime is concerned, the Vienna Convention on the Law of Treaties (VCLT) is impermeable to any domestic autonomous meaning: the 'VCLT treaties' correspond to the 'international agreements' of the *Restatement (Third)*, not to the 'Article II treaties' of *Restatement (Fourth)*.[10] By contrast, the VCLT does create a bridge with constitutional law as far as the entry into force of agreements is concerned. Indeed, no fewer than 14 provisions of the VCLT relate to the conclusion of a treaty (Articles 6–17 and Articles 46–47), and they all accommodate constitutional concerns relative to treaty-making power. However, the structure of the *Restatement (Fourth)* does not mirror the different stages in the conclusion of a treaty in the VCLT, nor does it cross the bridge to reinforce constitutional concerns by using the VCLT's toolbox. It just postulates that, in domestic law, there is a difference of nature between 'Article II treaties' and executive agreements.

To add to the perplexity, the *Restatement (Fourth)* is not always consistent in restraining itself to 'Article II treaties'. Some sections cover explicitly all 'international agreements'.[11] In other cases, the scope of application of a section appears to be limited only to Article II treaties, while, in fact, it reproduces the content of rules of international law that are valid for all types of agreements.[12] Some other examples, of lesser importance, reinforce the impression that, from time to time, the *Restatement (Fourth)* betrays the international law meaning in favour of the domestic meaning of the same concept – for instance, signature *ad referendum* seems to be conflated with definitive signature.[13] The international law distinction between reservations,

[9] One may wonder whether such an ontological distinction does not derive to some extent from a particular doctrinal perception of US practice. For instance, Paul R. Dubinsky does not raise it as such in his presentation of US practice in D. Shelton (ed.), *International Law and Domestic Legal Systems* (2011) 631, whereas this distinction is central to Curtis Bradley's approach in C. Bradley, *International Law in the U.S. Legal System* (2013), at 31–96.

[10] VCLT, *supra* note 4.

[11] See *Restatement (Fourth)*, *supra* note 1, § 302 on 'Capacity and Authority to Conclude International Agreements' and § 304 on 'Entry into Force of International Agreements'.

[12] See *Restatement (Fourth)*, supra note 1, § 306 on 'Interpretation of Treaties', which substantially reproduces the content of VCLT, *supra* note 4, Arts 31, 32.

[13] *Restatement (Fourth)*, *supra* note 1, at 28, 33. For the international definitions of these concepts, see United Nations, *Glossary of Terms Relating to Treaty Actions*, available at https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#signaturead.

interpretative declarations and treaty amendments is also lost,[14] as US domestic practice does not always care to mirror it. Again, the comments and reporters' notes generally dispel possible misunderstandings. However, since US practice is set out in a purely descriptive manner, without any critical approach of its possible incompatibilities with international law, it is not always certain that a reader unacquainted with it will cogently separate the wheat from the chaff.

## B *An Inward Focus: Treaties as Law of the USA*

Leaving aside 94 per cent of US international agreements, the *Restatement (Fourth)* makes a partial revision of the *Restatement (Third)*, although the articulation between the two is far from clear. Detlev Vagts once remarked that the partial revision of the *Restatement* is a less attractive option for reporters than a comprehensive one, as changing this or that part of a *Restatement* would limit their freedom of 'reconceptualizing it, reemphasizing it, covering new territory, and putting it in different ways'.[15] Yet, as regards Part III, a change in approach can indeed be detected. Contrary to Vagts' expectations, the new *Restatement* does 'put it in a different way'.

The *Restatement (Third)* addressed international agreements in two distinct parts. Part I dealt with the 'Status of International Law and Agreements in United States Law'. Part III, entitled 'International Agreements', focused essentially on the international law of treaties, while also considering aspects of US law concerning the conclusion, interpretation and application of treaties. For a non-US reader of the *Restatement*, this structure looked familiar and easily accessible. It reflected the distinction between agreements as a source of international law that is governed by international law rules and agreements as law applicable within the domestic legal order of a state. Each component of the foreign relations law governing treaty matters – international law and US law – was clearly identified; each was systematically addressed.

As announced by the title of Part III – 'The Status of Treaties in the US Law' – the *Restatement (Fourth)* appears to depart from the *Restatement (Third)* in that it takes an inward-looking approach to the topic of treaties. The title omits any reference to international law; the focus is on 'US law' – more precisely, on the allocation of the treaty-making power among US political organs and on the reception of international treaties into US law. The analysis of these issues is more detailed than in the *Restatement (Third)*. Matters relating to the status of treaties in US law that were previously covered in a single section are now addressed separately in different sections. The foreign relations law of the USA on treaty matters is largely identified with the US domestic law on the allocation of treaty-making power and the domestic reception of treaty law.

By contrast, the analysis of international law issues on the law of treaties is confined to a few selected problems or to rapid observations in the commentaries. True,

[14] *Restatement (Fourth)*, *supra* note 1, at 48.

[15] Vagts, 'The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved', 81 *PASILAM* (1987) 180, at 185.

the *Restatement (Fourth)* does not always evade contested international law issues of the law of treaties. Provisional application of treaties, for instance, is covered by Section 304 (Entry into Force of International Agreements) in a remarkably consensual spirit. This is surprising, considering the heated debates surrounding it on the international level: in some instances, provisional application has been used to bypass the conditions for the entry into force of treaties, especially when the latter requires parliamentary consent. One may only regret that the US practice described is not more developed and more recent since that would surely be of interest to the International Law Commission (ILC) for its ongoing work on this topic.

In sum, while the two *Restatements*, in their respective introductions, make clear that the foreign relations law of the USA comprises both international law and US law,[16] the respective weight they assign to these two components of foreign relations law is considerably different. Unlike the *Restatement (Third)*, the new *Restatement* concentrates its attention on the domestic component; it does not purport to provide a systematic exposition of the international law of treaties. It certainly addresses a number of international law issues on treaty matters but appears to regard its task as primarily that of determining when international law is the applicable law and not that of establishing the content of the applicable rules of international law.[17] From an internationalist perspective, this appears as a missed opportunity. The extensive and careful coverage of international law had made the *Restatement (Third)* an authoritative cognitive source of international law worldwide – a real 'subsidiary means for the determination of rules of law', in the words of the Statute of the International Court of Justice (ICJ Statute).[18] Given its narrow focus, the *Restatement (Fourth)*, to a certain extent, foregoes an opportunity to contribute to the current debate on substantial issues of international treaty law. It is also noteworthy that the *Restatement (Third)* justified the importance of restating international law rules by stressing the 'desirability of guidance in matters not likely to be familiar to the average lawyer'.[19] Spreading knowledge of international law rules can indeed facilitate the interaction between domestic and international law by contributing to a better understanding of how the two disciplines concur in regulating a given matter.

[16] See, respectively, *Restatement (Third)*, *supra* note 3, at 3 ('[t]he Foreign Relations Law of the United States, as dealt with in this Restatement, "consists of (a) international law as it applies to the United States; and (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences"') and *Restatement (Fourth)*, *supra* note 1, at 2 ('[b]ecause it deals with two distinct legal systems, namely domestic law bearing on foreign relations and relevant portions of international law, it must address both').

[17] See, e.g., *Restatement (Fourth)*, *supra* note 1, § 305(4) on 'Reservations and Other Conditions' ('[t]he extent to which a condition affects the United States' rights or obligations under the treaty is determined by international law') or § 313(2) on 'Authority to Suspend, Terminate, or Withdraw from Treaties' ('[i]nternational law determines the extent to which acts by the United States to suspend, terminate, or withdraw from a treaty will be effective in altering U.S. obligations under the treaty').

[18] Statute of the International Court of Justice 1945, 33 UNTS 993.

[19] *Restatement (Third)*, *supra* note 3, at 4.

### C *The Weight of US Practice in Determining Customary International Law on the Law of Treaties*

The way in which international rules on the law of treaties are determined is also worth mentioning. In general, the *Restatement (Fourth)*, as the *Restatement (Third)* did before it, follows the rules set forth in the VCLT, recognizing that these rules, while not binding in the USA as treaty law, largely correspond to customary international law.[20] Also in this respect, however, a change in approach can be identified. In determining international law, and, in particular, the customary nature of the rules contained in the VCLT, the *Restatement (Third)* took care to distinguish its own position from the position of the USA – be it the Executive or the case law of national courts.[21] In several cases, the *Restatement (Third)* asserted its own view about the existence of an international rule without mentioning what was the position of the USA on that rule;[22] in at least one case, it indicated that the practice of the USA did not conform to the rule set forth in the VCLT.[23] By contrast, the *Restatement (Fourth)* pays greater attention to the position held by US political or judicial bodies in determining customary rules on treaty law. This is not to say that it confines itself to presenting a sort of 'national view' on customary international law. The *Restatement* frequently supports its determination of international rules by referring to a number of traditional authorities, including decisions of the International Court of Justice (ICJ) or the works of the ILC.[24] Yet, while also relying on other authorities, it is generally careful to stress that the view it presents also reflects the position of the USA.[25] In this respect too, the general orientation of the *Restatement (Fourth)* appears to be more inward looking, a tendency entirely confirmed by the emphasis put on structural constitutional limitations to the domestic application of treaties.

## 3 Emphasis on Structural Constitutional Limitations to the Domestic Application of Treaties

This change of perspective towards an inward focus, which can be detected from a comparison between the *Restatement (Third)* and *(Fourth)*, appeared more in line with the neutral approach of foreign relations law expected from the reporters.

[20] *Restatement (Fourth)*, *supra* note 1, at 7.

[21] Thus, for instance, in introducing Part III, the *Restatement (Third)*, after referring to the position of the Department of State and of US courts as regards the authority of the VCLT, observed that it 'accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements'. See *Restatement (Third)*, *supra* note 3, at 145.

[22] E.g., *ibid.*, at 185, on the question concerning the legal regime of invalid reservations.

[23] See the comments made by the *Restatement (Third)* on the rules of interpretation of treaties applied by US courts. *Ibid.*, at 198.

[24] On the customary nature of the rules set forth in Art. 46 of the VCLT, see, e.g., *Restatement (Fourth)*, *supra* note 1, at 14.

[25] For a similar remark, see Daugirdas, 'The Restatement and the Rule of Law', in Stephan and Cleveland, *supra* note 4, 528, at 538, who observes that, in determining customary international rules, 'unlike the Third Restatement, the Fourth reflects a more collaborative approach with the U.S government'.

Consequently, foreign relations law is read quasi-exclusively through the lens of constitutional constraints.

## A *Which Rule of Law?*

In the introduction to both the *Restatement (Third)* and the new *Restatement*, the project is presented as 'a reaffirmation of the rule of law: "relations between nations are not anarchic; they are governed by the law"'.[26] As legal constraints in the conduct of foreign affairs derive from both international and domestic law, one problem with this reference to the rule of law is that it leaves open the question of where to strike the balance between compliance with international law and compliance with US law. These two objectives are not always reconcilable. Facilitating the domestic application of treaties is an effective means of ensuring compliance with international obligations. Yet treaties as law in the USA are subject to constitutional principles that may limit their incorporation in domestic law. In seeking to square the circle, the two *Restatements* appear to have taken different approaches.[27] Of the *Restatement (Third*), it was said that '[i]t seems to be one of the main concerns of the new Restatement to give as much effect as possible to the basic tenets of public international law in the domestic sphere'.[28] The emphasis appeared indeed to be placed on the need to remove obstacles to the domestic application of treaties as a means for promoting compliance with international obligations. In line with recent developments in the case law of the US courts, and particularly of the US Supreme Court, the *Restatement (Fourth)* appears instead to pay greater attention to constitutional concerns based on the separation of powers or on federalism. The fact that this may have the effect of limiting the domestic application of treaties is rarely considered.

## B *Structural Constitutional Limitations and the Solutions to Conflicts between Domestic and International Law*

The *Restatement (Fourth)* recognizes that 'treaties cannot be applied as law in the United States if they conflict with constitutional prohibitions'.[29] This observation is relatively uncontroversial. It is true for practically every domestic legal order. The problem with it concerns the content and the pervasiveness of such constitutional prohibitions. The *Restatement (Fourth)* identifies two different categories of constitutional limitations: 'individual constitutional rights' and 'structural constitutional limitations'.[30] In US practice, the first category of constitutional limitations has not had an impact on the domestic application of treaties as '[t]reaties have only rarely presented conflicts with individual constitutional rights'.[31] By contrast, the impact of structural constitutional

[26] See, respectively, *Restatement (Third)*, *supra* note 3, at 5; *Restatement (Fourth)*, *supra* note 1, at 2.

[27] See also Daugirdas, *supra* note 25, at 529.

[28] Herdegen, 'Restatement Third, Restatement of the Foreign Relations Law of the United States', 39 *American Journal of Comparative Law* (1991) 207, at 211.

[29] *Restatement (Fourth)*, *supra* note 1, at 71.

[30] *Ibid.*

[31] *Ibid.*

limitations appears to be significant and increasingly so. Indeed, according to the assessment of one of the rapporteurs on the treaty section of the *Restatement (Fourth)*, there has been a greater pressure in the last decades 'for more attention to structural constitutional considerations that may limit or filter the domestic application of international law', and the US Supreme Court has been 'receptive' to such pressure.[32] The *Restatement (Fourth)* also appears to have been receptive.

The *Restatement* does not expressly specify what these structural constitutional limitations are that may impinge upon the domestic application of treaties. They appear to flow from general constitutional values, such as that of popular sovereignty, federalism and the separation of powers. The greater pervasiveness of these structural constitutional limitations is detectable in relation to different issues: the prevalence of treaties over state law, the last-in-time rule and the *Charming Betsy* canon of interpretation as well as the doctrine of self-execution, which will be examined in the next section. The overall effect is that the domestic application of treaties appears to be subjected to a higher number of potential obstacles.

Thus, limitations deriving from the Constitution's federal structure are given greater consideration in the new *Restatement*. While not devoting a specific section to the conflict between the provision of a treaty and state or local law, the *Restatement (Third)* recognized that an international agreement supersedes inconsistent state law or policy whether adopted earlier or later.[33] The authority to override state law was also recognized, at least under certain circumstances, for non-self-executing treaties.[34] Moreover, according to the *Restatement (Third)*, international agreements 'may also be held to occupy a field and preempt a subject, and supersede State law or policy even though that law or policy is not necessarily in conflict with the international agreement'.[35] By contrast, the *Restatement (Fourth)* is more cautious in admitting the prevalence of treaties over state law. Section 308 provides that, in case of conflict between a state or local law and a treaty provision, courts will apply the treaty provision only if it is self-executing.[36] On the possibility that a treaty occupies a field and pre-empts a subject, thereby superseding state law or policy, it emphasizes the fact that 'cases involving treaty preemption often involve … direct conflict preemption'.[37]

Significantly, the greater attention paid to federalism limitations by the new *Restatement* emerges also in regard to the exercise of treaty-making power. While, according to the *Restatement (Third)*, the Constitution poses no limitation on the treaty-making power of the USA, which can therefore conclude treaties 'on any subject

[32] Bradley, 'Chapter 1: What Is Foreign Relations Law?', in C. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 3, at 13; see also Bradley, 'The Supreme Court as a Filter between International Law and American Constitutionalism', 104 *California Law Review* (2016) 1567.

[33] *Restatement (Third)*, *supra* note 3, at 66.

[34] *Ibid.*

[35] *Ibid.*

[36] *Restatement (Fourth)*, *supra* note 1, at 75. The new *Restatement* relies on recent development in the case law, including the decision of the Supreme Court in *Medellin*, in order to justify the conclusion that only self-executing provisions of a treaty prevail over state law.

[37] *Ibid.*

suggested by its national interests',[38] the *Restatement (Fourth)* 'does not take a position on whether there is some sort of subject-matter limitation on the treaty power',[39] thereby leaving open the question of whether the US federal system might entail limitations to the power of the USA to conclude treaties on matters falling within the power of the states.

With respect to the possible conflict between a treaty and a federal statute, while both address the conflict on the basis of the last-in-time rule, the commentaries and the reporters' notes reveal again a difference in emphasis. The commentary of the *Restatement (Third)* alluded to the existence of a presumption against treaty violations by statute by observing that 'courts do not favor a repudiation of an international obligation by implication and require a clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement'.[40] While recognizing that, '[s]ometimes, the Supreme Court has suggested the need for a clear evidence that Congress intended to override a treaty', the new *Restatement* 'does not seek to resolve the issue' of whether there exists a presumption against treaty violations by statute, noting that US courts have taken different views on the matter.[41]

Finally, the *Charming Betsy* seems to have aged and lost its charms. This canon of interpretation, according to which 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains',[42] was contrived to avoid violations of the law of nations. It has had a significant influence well beyond the US legal system,[43] and, in other domestic legal systems, it is known as the principle of consistent interpretation. While the *Restatement (Fourth)* still presents it as a valid canon of interpretation, it also evidences how much its force has gradually diminished ('ought never' has now become 'when fairly possible'[44]); it only applies to self-executing treaties, to the exclusion of other types of treaties,[45] and the presumption of compatibility seems to have been reversed in the sense that a treaty should not be interpreted in a way that is contrary to state law.[46]

Apart from the differences on these particular issues, it is the general outlook that appears to have changed. The *Restatement (Third)* confined to roughly 30 pages the analysis of the problems raised by the domestic implementation of international law – both customary rules and agreements. The number of pages that the new

[38] *Restatement (Third)*, *supra* note 3, at 154.

[39] *Restatement (Fourth)*, *supra* note 1, at 126.

[40] *Restatement (Third)*, *supra* note 3, at 64.

[41] *Restatement (Fourth)*, *supra* note 1, at 82–83.

[42] 6 US (2 Cranch) 64 (1804); see also Dodge, 'The *Charming Betsy* and *The Paquete Habana* (1804 and 1900)', in E. Bjorge and C. Miles (eds), *Landmark Cases in Public International Law* (2017) 11, at 11–19.

[43] See, e.g., Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review* (1990) 1103. In France, the equivalent is the 'Doctrine Matter' developed in the conclusions of General Advocate Paul Matter before the Cour de cassation in the *Sanchez* case of 22 December 1931. See the commentary by A. Foulatier in A. Miron and A. Pellet (eds), *Grandes décisions de la jurisprudence française de droit international* (2015) 31.

[44] *Restatement (Fourth)*, *supra* note 1, at 83.

[45] *Ibid.*, at 85–86.

[46] *Ibid.*, at 79.

*Restatement* dedicates to the implementation of 'Article II treaties' has almost doubled. The impact of structural constitutional principles on the domestic application of treaties with constitutional limitations is scrutinized in greater detail. The stress is on the limitations deriving from these principles on the domestication of international rules.

## 4 Self-execution as a Filter for the Domestic Effect of Treaties

Last but not least, the doctrine of self-execution has become central to the analysis and leads to the exclusion of even more treaties from full domestic implementation.

### A *Self-Execution: Dualism That Dares Not Speak Its Name?*

The US legal system was traditionally classified among the monist systems and was thus structurally perceived as being more open to international law than the systems of dualist tradition. Drawing on the supremacy clause of Article VI, Section 2, of the Constitution, domestic judges considered treaties as possible applicable law. What has changed in the past decades is the considerable development of the non-self-executing argument, which is more and more present in the legal discourse. The principle is now that '[a] treaty provision is directly enforceable in courts in the United States only if it is self-executing'.[47] In practice, the denial of self-execution has gradually translated into a requirement of incorporation – this is no longer creeping, but outright, dualism.

Unsurprisingly, the issue of the self-execution is also a central one in the *Restatement (Fourth)*, and this is clearly illustrated by the fact that the section dealing with it is the lengthiest among those in Part III. Yet, while the *Restatement (Fourth)* deals at length with the situation of self-executing treaties, it remains silent on the domestic status of non-self-executing treaties.[48] As executive agreements, treaties that are declared non-self-executing are left in a constitutional limbo. Their domestic regime is only determined in a negative manner: they are not applicable by the judges, absent Congress legislation to give effect to them (and, in that case, it would be the legislation that would become applicable),[49] and they do not enjoy the effects of the supremacy clause. In short, according to the approach retained by the *Restatement (Fourth)*, even fewer treaties are included within the purview of the supremacy clause, even if this was initially devised for 'all Treaties made, or which shall be made, under the Authority of the United States (Article VI, Section 2 of the Constitution)'.[50]

[47] *Ibid.*, § 310, para. 1.

[48] See also 'Remarks by S. Cleveland', *supra* note 8, at 210–211.

[49] *Restatement (Fourth)*, *supra* note 1, § 310, para. 1.

[50] Wuerth, *inter alia*, expresses such concerns. Wuerth, 'Self-execution', in Fox, Dubinsky and Roth, *supra* note 2, 92.

## B *Self-execution: An Act of Political Will?*

The criteria for assessing the self-executing character of a treaty are neither stable nor codified, despite the importance the argument has gained in the past 30 years. As the *Restatement (Fourth)* notes, courts 'did not attempt to develop a general standard for determining when a treaty provision is self-executing or non-self-executing'.[51] At the same time, it notes that, in US practice, declarations by the political branches (the Executive or Senate) as to the self-executing character of a treaty have become authoritative for judges.[52] In turn, the Senate has multiplied the declarations of (non-) self-execution.[53] The conjunction of the two phenomena inevitably leads to a diminution of the effect of treaties in US law.[54]

The decisive character of the political declarations within this context is in line with the more general perception according to which the domestic status of treaties depends on structural constitutional limitations relating to the separation of powers.[55] The US Supreme Court's decision in the *Medellin* case has been a turning point for a system that closes itself to international sources.[56] Yet one may wonder if this is the right precedent. In that case, the Supreme Court decided on the non-self-executing character of Article 94 of the Charter of the United Nations, of the ICJ Statute and of the ICJ judgment in the *Avena* case[57] in a context in which a presidential memorandum was seen to bypass the constitutional role of judges. The *Restatement (Fourth)* notes *en passant* this peculiar context but draws no conclusion from it.[58] Similarly, it refers to other judicial decisions that deny the self-executing character of international agreements, which in fact do not concern treaties but, rather, resolutions of international organizations – in particular, of the United Nations (UN) Security Council.[59]

Within this context, some critical discussion in the *Restatement (Fourth)* of the relevance of these precedents might have built a bridge between international law and domestic law. Indeed, international law considerations also argue against self-execution of ICJ judgments and UN resolutions. Unlike treaty obligations, resolutions of international organizations trigger their possible binding force from their constitutive treaty, not from immediate state consent. The same considerations arise for ICJ judgments. Their binding force does not stem from immediate consent by states but, rather, from the ICJ Statute and the principle of *res judicata*. Neither the resolutions[60] nor the

51 *Ibid.*, at 94.

52 *Ibid.*, at 100–104.

53 *Restatement (Fourth)*, *supra* note 1, § 310, Reporters' Note 9, at 102–104.

54 Estreicher, 'Taking Treaty- Implementing Statutes Seriously', in Stephan and Cleveland, *supra* note 4, at 197ff; Stewart, 'Recent Trends in U.S. Treaty implementation', in Fox, Dubinsky and Roth, *supra* note 2, 179.

55 See section 3.B above.

56 *Restatement (Fourth)*, *supra* note 1, at 94–96.

57 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 12.

58 *Restatement (Fourth)*, *supra* note 1, at 96.

59 *Ibid.*, at 94.

60 A. Miron, *Le droit dérivé des organisations internationales de coopération dans les ordres juridiques internes* (2014), available at www.theses.fr/2014PA100165.

ICJ judgments[61] purport to be self-executing (or to enjoy direct effect),[62] which would imply that they pierce the constitutional veil to address domestic authorities directly and to empower them regardless of the principle of constitutional autonomy.

Admittedly, the increase of these types of secondary international obligations challenges the domestic constitutional framework set out around the most classical source of international law, which are treaties. The Executive, which enjoys treaty-making power, gives its consent and makes treaties binding upon the USA – in some cases, after having obtained consent and advice from the Senate. Afterwards, the judiciary applies such treaties as 'the supreme law of the land'. When state consent and parliament consent are indirect, mediated and remote, the structural constitutional limitations are put under stress. And, in the absence of a specific constitutional framework for secondary sources of international law, the judiciary will fill the gap by relying on analogies, while keeping in mind the meta-principles of its Constitution. In restricting the domestic applicability of these secondary sources, the judiciary plays its role as guardian of the balance of powers. But if these restrictive filters then have a boomerang effect on the status of treaties (which seems to be the case in US case law), then it is the original constitutional framework that is undermined.

## C *Self-execution and Individual Rights*

Neither the *Restatement (Third)* nor the *(Fourth)* consider self-execution to be a question of whether a treaty confers rights to an individual that may be invoked before domestic courts. On the contrary, '[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies'.[63] At the same time, it is well known that the US Senate gave its consent to most multilateral human rights treaties with the condition that they are not considered self-executing.[64] Accordingly, the treaties that are most prone to domestic application by the judges are also those that are denied this effect, pursuant to an act of political will. And, therefore, private persons found under the jurisdiction of the USA cannot rely on international instruments, even when they are more protective of their fundamental rights than domestic law.

From this point of view, the US concept of self-execution appears to be distinct from cognate theories in other domestic legal systems, such as the one of direct effect, which is indissociable from the rights an individual may enjoy pursuant to international law.[65] In France, for instance, courts consider that direct effect is to be determined

[61] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 19 January 2009, ICJ Reports (2009) 17, paras 43–44.

[62] On the difference between the two concepts, see section 4.C below.

[63] *Restatement (Third)*, *supra* note 3, § 111, para. h; see also *Restatement (Fourth)*, *supra* note 1, § 311.

[64] *Restatement (Fourth)*, *supra* note 1, at 102; see also Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties', 24 *Yale Journal of International Law* 129 (1999).

[65] The concept of 'direct effect', relying on the ability of private persons to invoke before a domestic judge provisions of an international treaty, is to be distinguished from the one of 'immediate application', which refers to the ability of an international instrument to become a source of domestic law and is based on structural constitutional limitations.

by judges, through treaty interpretation. The judges then follow the guidelines established by the Conseil d'État in 2012, which have at their core the subject matter of the treaty (that is, the rights conferred to individuals) and the intent of the parties:

> [A] treaty provision must be recognized as having direct effect … when, having regard to the expressed intention of the parties and to the general economy of the treaty invoked, as well as to its content and terms, it does not have the exclusive purpose of governing relations between States and does not require the intervention of any additional act to produce effects with regard to individuals; the absence of such effects cannot be inferred solely from the fact that the stipulation designates the States parties as the subjects of the obligation it defines.[66]

The methodology and the rationale of direct effect in France are therefore substantially different from the assessment of self-execution in the US system: while the latter relies on the unilateral political will of the Senate (or sometimes of the Executive), the former relies on the international instrument itself, which it interprets following internationalist logic. If both approaches seek to preserve room for some intervention of the political bodies and to avoid judge-made law, the French approach does it through requiring judges to assess whether the treaty contemplates additional measures, whereas the US practice relies on deference to the political will. The *Restatement (Fourth)* endorses again this filtering trend in the US practice as a *fait accompli*, with no critical discussion as to its consequences.

## D *Self-execution and Compliance with International Obligations*

Self-execution is not only a question of the domestic status of treaties but also a tool of compliance with international obligations. The two *Restatements* diverge on the existence of a presumption in favour of self-execution. The *Restatement (Third)* admitted that, in the case of inaction of the Executive and the Congress, 'there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts'.[67] The existence of such presumption was motivated by a very simple consideration: 'Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing.'[68]

The *Restatement (Fourth)*, by contrast, denies the existence of any presumption in favour of self-execution, while no mention is made of the risk that, absent any implementing legislation, the USA may not comply with its treaty obligations. To reach this conclusion, it relies on the fact that the case law of US courts does not support this presumption and that its existence 'is difficult to reconcile with the Supreme Court's decision in *Medellin*',[69] regardless of the fact that this precedent may not be the most apposite for the status of treaties.[70] The new *Restatement* directly questions the

[66] France, Conseil d'État, *GISTI et FAPIL*, Case no. 322326, 11 April 2012; see a critique by F. Latty in Miron and Pellet, *supra* note 43, at 674–695.

[67] *Restatement (Third)*, *supra* note 3, at 53.

[68] *Ibid.*

[69] *Restatement (Fourth)*, *supra* note 1, at 109.

[70] See Section 4.B above.

analysis developed by the *Restatement (Third)* to support the presumption, noting that, if the president and the Senate do not contemplate implementing legislation, 'this will not necessarily reflect an expectation that the treaty will be directly judicially enforceable'.[71] As a consequence, there is no guarantee that treaties will be implemented by US judges, even when there is no outright opposition from the political bodies.

## 5 Domestic Courts as Agents of Resistance to International Law?

The emphasis placed by the *Restatement (Third)* on promoting compliance with international obligations was generally associated with a recognition of the important role of domestic courts in enforcing such obligations. In the *Restatement*'s view, '[t]he proposition that international law and agreements are law in the United States is addressed largely to courts'.[72] The recognition of a presumption in favour of the self-execution of treaties also aimed at promoting compliance with treaty obligations through the action of domestic courts. Reliance on domestic courts was not an isolated stance at the time when the *Restatement (Third)* was adopted. In many respects, its position reflected the renewed attention paid, within and outside the USA, towards the role of domestic courts as enforcers of international obligation, an attention partly dictated by the growing judicial practice in the application of international law. As a sign of the times, one could refer to the resolution of the Institut de droit international on '[t]he activities of national judges and the international relations of their State', adopted a few years after the *Restatement (Third)*. Article I of this resolution could not be clearer in promoting the role of domestic judges, as it provides that '[n]ational courts should be empowered by their domestic legal order to interpret and apply international law with full independence'.[73]

The fact that, as shown above, the new *Restatement* appears to accord a greater role to the structural constitutional considerations that may limit the effect of treaties in the US legal system is not without consequence for courts. By limiting the domestic application of treaties, it renders it more difficult for them to act as agents for ensuring compliance with treaty obligations. The same can be said about the assessment of the self-executing character of a treaty.[74] In sum, it is hard to escape the impression that

71 *Restatement (Fourth)*, *supra* note 1, at 109.

72 *Restatement (Third)*, *supra* note 3, at 43.

73 See *Annuaire de l'Institut de droit international* (1993), vol. 1, at 321. For an overview of the debate on this issue at the beginning of the 1990s, see Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *European Journal of International Law* (*EJIL*) (1993) 159; Schermers, 'The Role of Domestic Courts in Effectuating International Law', 3 *Leiden Journal of International Law* (1990) 77.

74 See Sections 4.C and 4.D above. Admittedly, not all the elements coming from the *Restatement (Fourth)* on the role of judges in the application of treaties uniformly point to the same direction. When it comes to treaty interpretation, for instance, the new *Restatement* seems to recognize greater autonomy to the domestic courts *vis-à-vis* the Executive. Compare *Restatement (Third)*, *supra* note 3, at 202, with *Restatement (Fourth)*, *supra* note 1, at 56.

the overall tendency emerging from the new *Restatement* is towards limiting the role of domestic courts. To the extent that this reflects developments brought about in the judicial practice of US courts in the last decades, the current situation, particularly if compared to the one described in the *Restatement (Third)*, appears to reveal a phenomenon of greater judicial resistance to international law.

As a general phenomenon, instances of judicial resistance and contestation against the domestic application of international law – be it in the form of customs, treaties, judgments of international courts or resolutions of the UN Security Council – have increased everywhere in the last decades. The phenomenon is particularly visible in Europe following a string of recent decisions, such as the judgment of the Court of Justice of the European Union (CJEU) in *Kadi* or *Judgment 238/2014* of the Italian Constitutional Court,[75] as well as the increasing confrontation between national courts and the European Court of Human Rights or between national courts and European Union courts. In sum, a greater judicial resistance to international law, or at least a less open and more inward-looking attitude, is not a prerogative of the USA but is also present in Europe and probably elsewhere.[76]

What appear to be different – and the risk of oversimplifying a complex and varied reality must be flagged – are the forms and patterns of this judicial resistance. In *Kadi* or in *Judgment 238/2014*, the CJEU and the Italian Constitutional Court actively engaged with international law. While, in the end, both decisions gave priority to individual constitutional rights over international law, one could also regard these decisions as an attempt to prompt a development in international law by reforming the targeted sanctions regime of the UN (*Kadi*) or by setting in motion a process for the formation of a new customary international rule on immunity (*Judgment 238/2014*). Moreover, the fact that the individual constitutional right at stake in both cases – the right to access to justice – is one that is guaranteed also under international law is significant. The contestation is not based on principles and values extraneous to international law; it is an 'internationally-minded contestation', to use the categorization employed by the International Law Association's Study Group on Principles on the Engagement of Domestic Courts with International Law.[77]

The kind of judicial resistance to international law that is reflected in the *Restatement (Fourth)* takes a different form. As already observed, restrictions to the judicial enforcement of international treaties are mainly a consequence of the greater importance assigned to structural constitutional considerations – notably, those arising from the separation of powers and from federalism – that limit the possibility for treaties to override domestic law or to have direct effect. Reliance on these structural

[75] Cases C-402/05 and C-415/05, *Kadi v. Council of the European Union* (EU:C:2008:461); Italian Constitutional Court, Judgment no. 238, 22 October 2014.

[76] For an analysis of this phenomenon, see Lustig and Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective', 16 *International Journal of Constitutional Law* (2018) 315; Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts', 30 *EJIL* (2019) 1129.

[77] See the report of the study group of the International Law Association, Principles of the Engagement of Domestic Courts with International Law (2016), available at https://bit.ly/3F791jn (last visited 13 December 2021).

constitutional limitations does not favour an active engagement of domestic courts with international law. Rather, it appears to favour a posture of avoidance: the international rule is not 'contested' eventually for the purpose of changing it; simply, it is not applied because it conflicts with federal or (in the case of non-self-executing treaties) with state law or because it is non-self-executing. In sum, resistance to international law mainly takes the form of a diminution of the role of domestic courts in favour of political organs, to which the task of ensuring compliance with the US treaty obligation is in fact transferred.

## 6 Concluding Remarks

On treaties, the *Restatement (Fourth)* marks a retreat in the engagement with international law from the *Restatement (Third)*. The mandate set out by the Council of the ALI promoted from the outset a modest approach: faced with the uncertainties of practice regarding the status of executive agreements and of non-self-executing treaties, it was decided that the reporters should avoid such contested issues and not put forward proposals for resolving them, even if those might have been inspired not by personal reflections but, rather, by international law. This limits the scope of the *Restatement (Fourth)*. At the same time, it marks a significant departure from the *Restatement (Third)*'s overall framework and creates a hiatus in the international category of treaties, based solely on domestic considerations.

The *Restatement (Fourth)* is a presentation of the law of foreign relations on treaties that is entirely inward focused. The domestic status of treaties is analysed through the lens of structural constitutional limitations. International considerations, including those that promote compliance with US international obligations, play no significant role. By contrast, the *Restatement (Fourth)* shows deference to the views of US political and judicial organs, which are equated with positive law, even when they lead in practice to a multiplication of obstacles to the domestic implementation of treaties. One may consider that such a neutral approach is consubstantial to an objective presentation of the law, from which doctrinal preferences and activist, value-oriented positions are banned. Yet the treaty part is itself based on *a priori* choices, which undermine to some extent the neutral profession of faith. Furthermore, can we indeed ignore the fact that any work of codification, especially when it is done by such an authority like the ALI, has a performative function? The *Restatement (Fourth)* not only describes a normative stance but also influences and orientates its subsequent application by judges and, therefore, its further development.

The departures from the *Restatement (Third)* are said to be prompted by the 'profound changes' that the world and the USA have witnessed in the past 30 years.[78] No doubt, there have been profound changes: the increase of political and economic interdependency, the triumph of liberalism promoted by Western democracies and its limits underscored by multiple global crises (security, economic and now sanitary), the USA's unique position as the sole superpower for at least 20 decades, undermined now

[78] *Restatement (Fourth)*, *supra* note 1, at 2.

by China's rise, the weakening of the traditional alliance between Western Europe and the USA and, more generally, of permanent alliances in favour of more ad hoc ones, the rise of civil society and the rising awareness of climate and environmental challenges are among the most obvious on our side of the Atlantic. Yet what appears less obvious is how retreat from – and wariness, if not defiance, towards – international law should help in responding to these changes. If the *Restatement (Fourth)* translates a more general self-isolationist trend of US domestic authorities regarding multilateral law, coupled with an augmentation of unilateralist positions on the scope of their power and jurisdiction, is it not the duty of scholars, including the reporters, to warn against its side effects? If, on the contrary, the *Restatement (Fourth)* mirrors some particular tendencies, but leaves open the possibility for a more cosmopolite approach of law, we are waiting eagerly for its next edition.