The effects of treaties in domestic law

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I. INTRODUCTION

Treaties, while operating primarily at international level, by definition require a legal connection to the national level. They cannot stand on their own feet. State organs, whether of the legislative, the executive or the judicial branch, will need to be empowered by national law to perform acts that are required by the treaty. The treaty may also require that (part of) its content is made part of national law. The connection between treaties and domestic law is particularly relevant when treaties regulate matters that are also dealt with by domestic law and determine the position of private individuals who by their very nature are (primarily) subjected to national law.

The question then is how treaties acquire effect at national level. A range of sub-questions follow. What is the influence of international law itself on the effects of a treaty at national level? What properties of a treaty may be conducive to or limiting such national effect? What techniques do States apply to determine the ways and extent in which a treaty acquires legal effect in domestic law? Under what conditions and with what effects do they allow a national court to apply the rules of a treaty?

Obviously, the domestic effect of treaties is not just a matter of technique. It serves important policy objectives and reflects deeply political questions. In the final analysis, determining whether and how a treaty has direct effect requires an answer to the question of who has, or should have, the final authority to determine the contents of the law applicable in any particular society.

This chapter will review various ways (or ‘techniques’) to moderate the effect treaties acquire in the domestic legal order of a States party to such treaties. The term ‘moderate’ is used here in a neutral way in the sense of ‘regulate’. It will also explore the dilemmas that relevant actors face in choosing whether or not to use such techniques.

1 CH Triepel, ‘Les Rapports Entre Le Droit Interne et Le Droit International’ (1923) 1 Recueil des Cours de l’Académie de Droit International 73, 106.

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150 For further discussion of administrability, formal realizability, and Herwig’s use of the latter concept, see D Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 Harv L Rev 1685, 1687–9.
151 For a classical statement on the centrality of the rights-remedies linkage to the determination of the character of the legal form, see KN Llewellyn, The Bramble Bush: On Our Law and Its Study (Oceana Publications, 1930) 82–5.
152 Carty, Decay of International Law (n 147) 79. The passage continues:

The municipal law analogy itself, the insistence that treaties be regarded as contracts, focused the attention of jurists on what were supposed to be the original intentions of the parties to the treaty, whenever any dispute arose, to the neglect of the surrounding political-diplomatic context at the moment of the dispute.

To the extent relevant, the chapter will address the various techniques both from the perspective of international law and from the perspective of national (comparative) law. As to the former, while international law is generally silent on its effects in national law, it does have something to say, and variations between the contents of treaties may help explain variations in effect. As to the latter, given the infeasibility of addressing in this chapter the wide variety of conditions under which legal orders across the world allow for domestic effects of treaties, this chapter will identify and systematize relevant patterns that we find in State practice.

To provide proper background and perspective, section II will set out the political context in which the discussion of domestic effects of treaties is to be situated. Section III will review what international law has to say on the matter. Section IV will discuss the main approaches employed by States in their national legal orders. In section V I will make some brief concluding observations and identify questions for research.

II. THE POLITICAL CONTEXT

What effect treaties acquire at the domestic level, and how they acquire such effect, are both deeply political questions. Treaties may affect the law applicable in a particular society and serve political purposes. These purposes may be reflected in the content of a treaty, that is, a treaty may further the realization of particular policy objectives. Treaties may also influence the power of public authorities.

In considering the relevance of the political context for the domestic effects of treaties, we can distinguish two interrelated dimensions: an external and an internal one. The external dimension concerns the relationship between the international and the national legal order (section II.1). The internal dimension concerns the question which actors in a particular national legal order (should) have the power to determine the effect of treaties (section II.2).

I. The External Dimension

The way in which treaties are given effect in national law reflects political decisions on the allocation of power between the international and the national sphere. Blocking domestic effect may lead to an internationally wrongful act if the State does not perform its treaty obligations, but does preserve national policy space. A decision to grant a treaty full effect in national law may facilitate effective performance of international obligations, but comes at the price of national policy space, as it fixes the law at a level where it is beyond the control of individual States.

Decisions on the ‘vertical’ allocation of power may be taken both at international and at national level. On the one hand, they may be taken (though often somewhat implicitly) by the collectivity of States party to a treaty, for example by including in a treaty particular properties that co-determine the domestic effect of the treaty and thereby shape the allocation of power between the national and the international level.

On the other hand, political decisions on the allocation of power between the international and the national sphere may be taken by individual States. Such decisions may determine the domestic effect of treaties generally, for example by means of constitutional provisions determining the status or hierarchical rank of treaties in national law. They also may relate to a single treaty in particular, for instance by attaching a reservation to a treaty as to the treaty’s domestic effect, or by deciding to withhold the direct effect of that treaty.

It may be said that eventually – at both levels – the State is in control of the domestic effect of the treaty. After all, the State that is to perform treaty obligations at national level is itself present at the negotiations and will not be bound by a treaty before it has given its consent to be bound.

However, this argument is vulnerable on three grounds. First, for weaker States, the choice to stay out of a treaty is not a perfectly free one. In particular when a treaty protects the common interests of multiple States, the pressure on States to become a party may be strong.

2 A von Bogdandy, ‘Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’ (2008) 6 Intl J Constitutional L 397 (arguing that it is preferable to retain ‘the capacity legally to limit the effect within the domestic legal order of a norm or an act under international law if that norm or act conflicts sharply with constitutional principles’).
3 See section III.
4 Infra section IV.
5 Infra section IV.
6 Infra section IV.
notes: 'The legitimation that comes from sovereignty is increasingly untenable. The ability to choose one's obligations has gone.'

It is to be added that most negotiating parties generally will be more concerned with the substance of a treaty and its supervision at international level, than with the modalities of its implementation domestically. Because of the large diversity in terms of implementation procedures in different States, attempts to lay down precise rules on domestic effect are generally doomed to fail, and negotiating States leave such modalities to the domestic level. But that does not mean that whatever is contained in a treaty does not affect the domestic level – particular international obligations in the sphere of domestic regulation or individual rights may circumscribe the pre-existing liberty of States to shape their domestic policies in these areas, and as such they involve a reallocation of power, even if the implementation of the treaty may be left to States.

Second, treaties evolve over time. The law that is binding on States may evolve in different directions and thus it may become significantly different when compared with the law that they originally signed on to. Treaty interpretation is only marginally controlled by individual States and may evolve in directions unforeseen, and unwanted, at the time of creation. This limits the controlling power of signatory States. States may seek to terminate their obligations under treaties that have developed in unforeseen directions by withdrawing from the relevant treaties. But States do not often do so, and they generally attach more weight to continuing involvement in the treaty.

Third, treaties may grant international institutions powers to interpret and modify the treaty. This holds for intergovernmental organizations that may have been constituted by treaties, for more informal arrangements such as meetings of the parties set up by a treaty, and for international courts that have the power to adjudicate claims and in that process will have to interpret the treaty. Such international institutions can exercise interpretative authority quite independently from the States that originally set them up.

As a result of these three points, the fact that a State is not bound by a particular treaty before it consents to it does not at all put it in control over the content of a treaty and its projected effects at domestic level. To mitigate and manage that gap, States will seek to include in the treaty safety valves that allow them to control the effect of treaties at national level.

2. The Internal Dimension

A quite different set of dynamics operates at the domestic level. The domestic application of treaties can affect and shift the power relations between domestic actors. Such shifts are particularly powerful as their effects may extend over time. Any shift in the domestic political spectrum will confront the new majority with international rules consented to by a previous regime. While this is to some extent also true for domestic law, in regard to the latter the process there is at least the possibility that a new majority rescinds or amends laws set up by a previous regime. This is not as easily done for treaties.

Treaties can affect two distinct sets of domestic power constellations: first, the horizontal relation between the government, parliament and courts, and, second, the vertical relation between the central (or federal) government and local government.

In terms of the horizontal separation of powers, treaties are primarily a source of power for the government. The government normally represents

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10 See also section III.1.
11 Under Article 54 VCLT (n 7).
the State in the negotiation and conclusion of treaties,\textsuperscript{15} and, compared to other domestic actors, has superior power in influencing and shaping the content of the treaty.\textsuperscript{16} Although formally the legislative branch may have the last word (at least in those States where parliamentary approval is a precondition for ratification), the text will be fixed, and the possibility for parliament to change anything or even to say ‘no’ is limited.\textsuperscript{17} In States where the executive negotiates and ratifies treaties, the legislative branch will be confronted with a fait accompli, as the treaty will be binding on the State whatever the legislature’s own take on it may be. The legislative organ may choose not to transform the treaty into domestic law, but even then it may not be able to preclude (some of) its domestic effects.\textsuperscript{18} Where the legislature implements the treaty domestically, it will have no influence over the content, except for the rather limited option of requiring the executive to add reservations at the stage of ratification.

Yet, at the domestic level the government (the executive branch) is only one actor, limited in its powers vis-à-vis parliament and the courts.\textsuperscript{19} Other branches of government are in competition with the executive and will naturally seek to curtail the empowering effect of the treaty on the executive branch. In so-called monist States, parliaments may do so by withholding approval of a treaty, which thus, though signed, cannot be ratified. In dualist States they may do so by declining to ‘transform’ or implement a treaty in national law.

Courts also have a role in this contestation of treaty-based power. Once a treaty is binding on the State, the courts can use it to bolster their powers by interpreting and applying it. This effectively puts the courts in a position of superiority vis-à-vis other organs, as they are in the final analysis the ones to decide on interpretation and application of the treaty in circumstances where challenges are raised. They may thereby also curtail the exercise of powers of other branches of government in the interest of preservation of democratic values.\textsuperscript{20} But here again the courts may find themselves in competition with other organs over these powers – legislatures may reserve for themselves the power to interpret and apply treaties, for instance by declaring a treaty to be non-self-executing.\textsuperscript{21}

The effect of a particular treaty on the (separation of) powers between branches of government, and the competition between these branches, is obviously not determined anew for every individual treaty. Every State will have structural (constitutional or other) provisions determining the respective powers of the various branches of government in the implementation of treaties. Doctrines such as ‘direct effect’ or non-justiciability will serve as parameters within which branches of government can carve out their role. Such moderating techniques fix the relations between the branches of government, but they are themselves not stable and may be reshaped at any point in order to reconfigure the relation between the branches of government in relation to the implementation of treaties.

The second dimension of the effect of treaties on domestic power constellations relates to the vertical division of powers between a central or federal government and the federal States or local levels of government. A government may, by concluding a treaty, accord itself a new power or strengthen an existing power against lower levels of government. Cases from Australia\textsuperscript{22} and the United States\textsuperscript{23} illustrate the point. Treaty-making power and the power to implement treaties through legislation, then, is a means to influence the vertical allocation of power within States.

\textsuperscript{15} Article 7(2) VCLT (n 7).
\textsuperscript{17} Weiler, ‘The Geology of International Law …’ (n 9) 547.
\textsuperscript{18} See Australia, High Court of Justice, Baker v The Queen, Final Appeal Judgment (2004) 223 CLR 513; ILDC 515 (AU 2004); Australia, High Court of Justice, Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 (7 April 1995).
\textsuperscript{21} See, eg, the declaration of the US at the time of ratification of the International Covenant on Civil and Political Rights, stating that ‘[t]hat the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing’, http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf, accessed 22 January 2013.
\textsuperscript{22} Commonwealth v Tasmania (Tasmanian Dam case) [1985] High Court of Australia 21; (1983) 158 CLR 1 (1 July 1983).
\textsuperscript{23} State of Missouri v Holland 252 US 416, 40 S. Ct. 382 (1920). The question whether the power of Congress to implement treaties through legislation is restricted by this Amendment will be considered by the Supreme Court in Bond v United States 564 US (2011).
General techniques that govern the domestic effect of treaties may also influence this vertical contestation for power. For instance, in the US, even though the federal government does not have the power to legislate in order to implement a treaty, it may still rely on a technique such as the declaration of a treaty as self-executing in order to create 'supreme law of the land' (see Article VI clause 2 of the US Constitution) that has to be applied by the courts at all levels of government.\(^\text{24}\)

### III. THE INTERNATIONAL LEVEL

In light of the substantial impact that treaties may have on domestic law, and on the domestic allocation of powers, it is not surprising that States prefer international law to allow them great flexibility in determining how domestic effect is to be given to treaties. We can distinguish between general international law (section III.1), the law of treaties (section III.2) and the content of particular treaties (section III.3).

#### 1. General International Law

International law does not lay claim to supremacy over national law at the national level. International law traditionally also suffers from weak enforcement. These characteristics of the structure of the international legal order are reflected in the retention of power on the part of States to structure the relationship between treaties and domestic law at the domestic level. General international law leaves the domestic effect of treaties to national law.\(^\text{25}\)

One of the manifestations of this discretion that is particularly relevant for the domestic effect of treaties is that a treaty that binds a State, as a matter of international law, is binding only on the State and not directly on the organs of the State. International law does not determine the domestic organization of States and cannot directly determine the powers of the organs of the State in the national legal order to give effect to treaties.\(^\text{26}\)

It may be argued that if a treaty becomes binding upon the State 'it becomes binding upon the State as a whole, and, by derivation, upon each of its several organs and institutions, each of which becomes bound, as part of the State, to play whatever part is necessary in order to make the treaty effective'.\(^\text{27}\) Even though, formally, the obligations rest on the State, there is no dispute whatsoever that the legislature, the executive and the courts are the organs of the State and that such organs should give effect to the State's international obligations.\(^\text{28}\) However, the powers of each organ will be determined and limited by national law.


The Vienna Convention is mostly silent on the domestic effect of treaties. The two most relevant provisions are Article 26 \textit{(pacta sunt servanda)} and in particular its corollary Article 27,\(^\text{29}\) which provides that a State 'may not invoke the provisions of its internal law as justification for its failure to perform the treaty'.\(^\text{30}\) These provisions are 'fundamental to the effective operation of treaties. However, their scope and effect is limited to the international level. They do not take away or alter the right of the State 'to choose the means of implementation it sees fit according to its traditions and to the fundamental principles of its political organization'.\(^\text{31}\)

The International Law Commission did consider whether or not more detail should have been added in the eventual Convention. Special Rapporteur Fitzmaurice proposed several principles that intended to

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\(^\text{24}\) Again this question is to be considered in Bond v United States (n 23).


clarify the relevance of the domestic aspects of treaty application. For instance, draft article 29, introduced in his Fourth Report, provided:

The treaty obligation produces its effects primarily in the international field, it being the duty of the parties to carry it out in that field. The question of its effects in the domestic field is relevant only in so far as it may affect the capacity of the parties to discharge this duty.22

It was rather mysterious what the legal import of the second sentence of this provision was, if it was to have any legal effect. Obviously domestic law could be a cause of non-compliance, but it hardly seemed to be the task of the Vienna Convention to spell that out.

Fitzmaurice also proposed a draft article 30, stipulating that it is the basic duty of every State (the commentary added: ‘by the term “State” is meant the whole State, including all of its organs’) so to conduct itself in relation to its law and constitution that it is in a position to carry out its treaty obligations. It also stated in paragraph 2 that provided the object contemplated by paragraph 1 is attained, it is immaterial by what means this is done, and it is a domestic matter for each State to decide for itself what method shall be employed.33 Paragraph 3 then added that in those cases where the treaty cannot be carried out without specific legislative, administrative or other action in the domestic field, a party to the treaty which finds itself in this position is under a duty to take such action. None of these provisions made it into the VCLT.

Also, nothing came of the proposals to include provisions on the effects of treaties on private individuals and juridical entities within the State.34 While the relevant draft article raises interesting questions on the legal personality of individuals, from the perspective of the effects of treaties in domestic law it is again simply an application of the general principle that would apply even without express stipulation: if a treaty seeks to protect rights, or to impose obligations on, individuals, States parties should take the necessary measures in their internal legal order to secure that such rights or obligations will be realized.35

33 Ibid, 49 and paras 145–6.
34 Ibid, 49 (discussing Article 32 VCLT).
35 Ibid, para 157. See also ILC, ‘Third Report on the Law of Treaties by H Waldock, Special Rapporteur’ (3 March–7 July 1964) UN Doc A/CN.4/167 and Addendum 1–3, 45–7 (stating that this provision did ‘little more than repeat the pacta sunt servanda rule in the particular context of treaties affecting individuals’).

All these ‘principles’ are covered by the common sense principle that States have to do what is necessary to perform a treaty and, implicitly, also by the provision of Article 27, which after all requires States to ensure that these provisions are brought into line with treaty obligations.36 It is hard to see how these proposals would have made much of a legal difference.

Special Rapporteur Waldock indeed concluded that there was no need to include any of this in the Vienna Convention. He was of the opinion that the principles that a State must take effective measures in its internal law to fulfil its treaty obligations and that a State may not plead the deficiencies of its internal law in justification of a failure to perform its treaty obligations when general principles of State responsibility apply to any form of international obligation and belong to the responsibility of States rather than to the law of treaties. Both principles were implicit in and covered by the pacta sunt servanda rule.37

Some further suggestions were made to provide more detail on domestic effects of treaties at the Vienna Conference of 1969. Luxembourg suggested that Article 26 should be followed by an article stipulating that ‘The Parties shall take any measures of internal law that may be necessary to ensure that treaties are fully applied.’38 The proposed amendment was to ensure that States would take any measures of internal law which would allow for the full application of treaties.39 The majority at the Conference, however, opposed it on the ground that it would amount to an encroachment on State sovereignty and that it would add nothing new to the obligation already implicit in Article 26.40 These two grounds for resistance are not fully compatible, and may indicate that the principle that States shall take any domestic measures that may be necessary to ensure that treaties are fully applied is less of a common sense proposition and not as beyond controversy as may be thought.

Apart from the core provisions of Articles 26 and 27, a few other provisions of the Vienna Convention may be relevant for the domestic effect of treaties.41

36 Villiger, Commentary (n 29) 372.
39 Ibid.
40 Ibid.
41 I leave the procedures for conclusion of treaties, including Articles 46 and 47 VCLT aside here.
The provisions on conclusion and ratification\(^{42}\) are relevant, since these allow States to adjust domestic law to the requirements of a treaty and to ensure that a State is not bound as a matter of international law before it has had the opportunity to bring its national law into conformity with the international obligations to be assumed by means of the treaty to be ratified.\(^{43}\)

The provision on provisional application\(^ {44}\) is relevant, since the practice of provisional application may bypass internal law regimes, and as such limits whatever control the domestic constitutional order exercises over the domestic effect of treaties.\(^ {45}\)

Furthermore, the provisions on treaty interpretation are relevant, since national organs, notably courts, may draw on them to interpret treaty provisions in a particular way, even if the executive branch may suggest or desire a different interpretation. There is considerable practice of national courts that interpret treaties with express reference to the international principles of interpretation, and further interpret domestic law in conformity with the international obligations of the State.\(^ {46}\)

Finally, the provisions on withdrawal and termination\(^ {47}\) are relevant since, like the conclusion of a treaty, termination of treaties may directly affect domestic law. The question here again is which State organ may avail itself of the power to terminate a treaty. The Vienna Convention is silent, and it falls to domestic actors to invoke the provisions on the termination of a treaty, or abstain from doing so. There is some practice of national courts assuming a power in this regard, in effect changing the law binding on, and possibly binding in, the State.\(^ {48}\)

The VCLT does not address itself to the organs of the State directly. Only in a few places does the Convention touch upon the question of the power of State organs. Beyond that, what particular organ(s) will be burdened with or empowered to implement the treaty domestically is a question left to domestic law. However, it may be required that the State empower specific domestic organs in order to fulfil its obligation to take all measures necessary to give effect to a treaty.\(^ {49}\)

Murphy notes: 'in some circumstances perhaps the only reasonable way to apply a treaty that protects or benefits individuals is for national courts to be available for individuals to litigate claims arising from the treaty'.\(^ {50}\) And yet, this is not a requirement under the Vienna Convention. International law allows States discretion as to whether they will do so.\(^ {51}\)

### 3. Individual Treaties

To retain control over the effects of treaties in domestic law, States have at their possession a wide variety of techniques and modalities that they may introduce in particular treaties, including opting for flexibility in treaty provisions and deferential supervision. Conversely, those who seek to use a treaty as a source of power in national law will seek to include provisions that create rights for individuals which may be invoked before the courts, or provisions that allow for immediate (direct) application of the treaty rules by national courts, or even a provision to the effect 'that [the treaty’s] rules shall prevail in court over any municipal provision, including subsequent legislation'.\(^ {52}\)

Here I will focus on four properties of treaty regimes that can be relevant for the domestic effect of treaties: the precision of treaty provisions; provisions that require guarantees in national law; provisions that create individual rights; and guarantees that allow for proportional application.

First, while the question of direct effect of treaties is a matter of national law,\(^ {53}\) the content of a treaty may have an influence on those cases where domestic law allows for direct effect.\(^ {54}\) In determining whether a treaty should be given direct effect, courts generally accord much weight to interpretation and to the intention of the parties.\(^ {55}\) The US Supreme Court in *Medellin* referred to ‘our obligation to interpret

\(^{42}\) Articles 6–18.

\(^{43}\) In particular the procedures provided for by Article 14 are relevant here.

\(^{44}\) Article 25.

\(^{45}\) Corten and Klein (eds), *The Vienna Conventions* (n 43) 643.

\(^{46}\) Ibid, 823.

\(^{47}\) Articles 54–64.

\(^{48}\) B Conforti and A Labella, ‘Invalidity and Termination of Treaties: The Role of National Courts’ (1990) 1 EJIL 44.

treaty provisions to determine whether they are self-executing. In the Netherlands the question of whether a norm has direct effect is determined by whether it is of 'such a kind that the provision can function as an objective rule in the national legal order.' This test is a matter of treaty interpretation: the notion of the self-executing treaty 'rests on a characteristic inherent in the treaty.' If that is the case, then the question of direct effect is to that extent a matter of international law.

Second, treaties may require that States make particular international obligations part of their domestic law. To be precise, international law does not require automatic validity, but a treaty may prescribe that States will have to ensure that the substance of certain treaty obligations is made part of domestic law. The European Court of Human Rights (ECtHR) has held that 'it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it.' The Inter-American Court of Human Rights held in similar vein that

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57 The Netherlands, Supreme Court, Nederlandse Spoorwegen (30 May 1986) NJ 1986/688; (1987) NYIL 392. See also the Netherlands, Council of State, Reiner van Arkel Foundation v Minister of Transport, LJN AR2181; 2004011781; AB 2005/12; ILDC 129 (NL 2004) para 2.2.6.
59 Eg, the Netherlands, Supreme Court, Hansa Chemie v Bechem Chemie (16 May 1997) NJ 1998/585; [1998] 45 Netherlands International Law Review 129.
60 Exchange of Greek and Turkish Populations (Greece v Turkey), Advisory Opinion, PCIJ Series B No 10; ICGJ 277 (PCIJ 1925) para 51; see also Greco-Bulgarian 'Communities', Advisory Opinion, PCIJ Series B No 17; ICGJ 284 (PCIJ 1930) para 84. See also in this context Article 33 proposed by Special Rapporteur Fitzmaurice in his 'Fourth Report on the Law of Treaties' (1959) II Yearbook of the ILC 49, providing that:

where a treaty provides for rights, interests or benefits to be enjoyed by private parties, or where the treaty otherwise redounds to their advantage, it is the duty of the contracting States to place no obstacle in the way of enjoyment of these rights, interests, benefits or advantages by the individuals or juristic entities concerned, and to take all such steps as may be necessary to make them effective on the internal plane.

Special Rapporteur Waldock thought that this provision was superfluous as it was inherent in the principle pacta sunt servanda. (n 35) 47.
61 Maestri v Italy App no 39748/98 (European Convention on Human Rights, 17 February 2004 (ECHR)) para 47 (discussing Article 1 of the ECHR).
65 LaGrand Case (Germany v United States of America), Merits, ICJ Rep 2001, 466, 494.
such provisions circumvent the normal procedures and the usual allocation of powers regarding the implementation of treaty provisions, shifting powers from the legislative to the executive and possibly also to the judicial branch.

IV. THE NATIONAL LEVEL

This section will examine four techniques that States have employed, and may employ, in their national law in order to moderate the domestic effects of treaties: applicability (IV.1), supremacy (IV.2), direct effect (IV.3), and consistent interpretation (IV.4). The survey is by no means complete. Techniques that are not considered here include non-justiciability, which may limit the effect of treaties in domestic courts (as these will have to defer to the executive) and the political questions doctrine, which may preclude the courts from examining whether the executive has acted in accordance with international law.

1. Applicability

A first technique to moderate the effect of treaties at the domestic level is to grant, or deny, automatic legal effect of treaties once they are binding on the State as a matter of public international law.

There are two main approaches evident in the practice of States in making international law applicable domestically, with many varieties in between. At one end of the spectrum, a significant number of States have adopted a rule (often constitutional, whether written or unwritten) of domestic law that makes all or particular treaties part of domestic law automatically, that is without there being a need for implementing legislation. This is for instance the situation in Benin, Cape Verde, (in principle) China, Côte d'Ivoire, the Czech Republic, the Dominican Republic, Egypt, Ethiopia, France, Greece, Japan, the Netherlands, Portugal, Senegal, the Russian Federation, Switzerland, Turkey and the United States.

A choice in favour of automatic incorporation of treaties may reflect the aim to secure effective performance of treaties. It may also reflect a will to control executive power. Indeed, this choice has commonly been made in post-revolutionary constitutional developments. A decision to open constitutions towards treaties so as to allow for control of the previously unassailable government was made in the Constitution of the Weimar Republic of 1919, the German Constitution of 1949, the 1946 Constitution of Japan, the 1974 Greek Constitution, the Spanish Constitution of 1978 and Eastern European constitutions after 1989.

The main alternative approach to making international law part of the applicable domestic law is to transform international obligations into domestic law. This is for instance the situation in Australia, Botswana, India, Israel, Italy, Kenya, Malawi, Nigeria, Norway, Uganda, the United Kingdom and Zambia. In these States, a treaty will not be part of national law until the legislature has acted to transform the provisions of the treaty into domestic law. For instance, it was only the Finnish legislation that had incorporated the International Covenant on Civil and Political Rights (ICCPR) into domestic law, and not the ICCPR as such, that has made the ICCPR applicable in Finnish courts.

Both avenues can lead to domestic effect of treaties. Nonetheless, some institutions have expressed a clear preference for the former method. The

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91 Botswana, Court of Appeal, *Good v Attorney-General*, Civil Appeal No 028; ILDC 8 (BW 2005) [33].
92 India, Supreme Court, *Daya Singh Lahoria v India*, AIR 2001 SC 1716; ILDC 170 (IN 2001) [A1].
93 Israel, Supreme Court sitting as a Court of Appeals, *Anonymous (Lebanese citizens) v Minister of Defence*, FCR A 7048/97; ILDC 12 (IL 2000) [20].
96 Article 211 of the Constitution of the Republic of Malawi (1994) (providing that 'an international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement').
98 See, eg, Norway, Supreme Court, *A v The Norwegian Immigration Appeals Board*, HR-2008-681-A, Norwegian Supreme Court Gazette (Rt, Restitutio) 2008, 513; ILDC 1326 (NO 2008) [35]–[36].
100 Re McFarland [2004] UKHL 17; ILDC 102 (UK 2004).
relatively limited. On the one hand, in States where treaties are automatically incorporated, multiple barriers may exist that prevent organs from actually applying them. On the other hand, it is not uncommon for courts in dualist States to rely on treaties not incorporated in national law. In Kenya, even though the system appears formally dualist, the High Court held that international law was applicable so long as it was not in conflict with existing domestic law. In such cases, the formal constitutional position only reflects part of the actual competence of organs to give effect to international law. It is to be added that this practice sits somewhat uneasily with the principles of democratic legitimacy and separation of powers.

2. Supremacy

The supremacy of international law prioritizes international law over national law. In the event of a conflict between a treaty and domestic law, international law will have to prevail in the international legal order. The principle is at the heart of the law of treaties.

In principle, the claim to supremacy of international law has no necessary legal consequences domestically. State practice shows no general acceptance of the supremacy of international law in the national legal order. What is wrong in the international law sphere may be right in the national sphere, and what is unlawful in the national legal order may be perfectly legal in international law.

Nonetheless, the principle of supremacy is key to the effect of treaties in national law. Where the principle is fully recognized, it allows courts to set aside a law adopted by the political branches, in particular the legislature, and thereby to ensure conformity of the policy and law of the State with its treaty obligations. There is substantial State practice that places treaties at the level of constitutional law, and thus accepts domestic supremacy of all or some (notably human rights) treaties.

This locks such treaty law in the constitution and provides a barrier against (easy) deviation through legislation. This, for instance, is the case in Cape Verde, the Czech Republic, Greece, Japan, the Netherlands, Bulgaria and Portugal. Some States have even done so in express recognition of the international principle of supremacy; examples can be found in cases from Argentina, Belgium, Chile, Latvia and Peru.

Such a ‘domestication of supremacy of international law’ can significantly strengthen the power of the principle of supremacy to foster the efficacy and the effectiveness of international law.

However, these practices are relatively exceptional. On the whole, States have reserved the power under domestic law to limit the performance of treaty obligations where these may conflict with domestic law. Many States determine that in the case of a conflict between a treaty and domestic law, the latest expression of the will of parliament determines

110 Okanda v Republic (n 95).
113 Articles 27 and 46 of the Vienna Convention on the Law of Treaties.
115 The International Court of Justice held in Elettronica Sicula SpA (ELSI) (USA v Italy), Judgment, ICJ Rep 1989 15, para 73.
116 Cassese, ‘Modern Constitutions …’ (n 87) 402.
122 Article 94 Constitution of the Kingdom of the Netherlands (1983).
124 A and B v Portuguese State (n 81).
126 Belgium, Court of Cassation, ING België v B I, Case No C.05.0154-N; ILDC 1025 (BE 2007); Belgium, Court of Cassation, Minister for Economic Affairs v Franco-Suisse ‘Le Ski’ [1972] CMLR 330.
127 Chile, Supreme Court, Peréz v Chile, Rol No 224-02; ILDC 1443 (CL 2007).
128 Latvia, Constitutional Court, Linija v Latvia, Case No 2004-01-06; ILDC 189 (LV 2004).
129 Peru, Constitutional Court, Martin Rivas v Constitutional and Social Chamber of the Supreme Court, 679-2005-PA/TC; ILDC 960 (PE 2007) [49].
which rule is supreme - whether or not that rule is contained in a treaty.\textsuperscript{130} Most States have declared their constitutions to be supreme. Such States do not accept the supremacy of treaties as a formal principle, but make the effect of international law contingent on substantive conformity with fundamental values enshrined in national law.\textsuperscript{131} In this respect it is relevant that many States restrict the precedence of international law in the domestic legal order to international human rights treaties.\textsuperscript{132}

3. Direct Effect

Direct effect is a technique that can be used to facilitate or to block domestic effect of a treaty. On the one hand, it allows a court or other organ to apply a treaty obligation irrespective of any intervening legislative step. An organ can then give effect to an international obligation even when organs of other political branches have failed to give it effect.\textsuperscript{133} This compliance-inducing potential can be caught in the notion of direct effect as a ‘sword’.

On the other hand, direct effect can function as a shield. The mere fact that a rule of international law has been made part of national law is not sufficient for it to be applied on the same footing as domestic law.\textsuperscript{134} This shield can fix the separation of powers, by protecting other branches of government from review by national courts on the basis of international law. For instance, although Article VI of the US constitution says that treaties are the supreme law of the land, the self-executing treaties doctrine imposes restrictions on judicial enforcement.\textsuperscript{135}

International law is neutral on the question of direct effect.\textsuperscript{136} It respects the right of States to determine for themselves whether or not they allow their courts to give direct effect to a treaty obligation. This liberty also means that we have to reject what Iwasawa called the ‘given-theory’: the idea that international law would determine whether or not a particular rule of international law has direct effect.\textsuperscript{137}

Whether or not treaties can have direct effect thus is a choice of domestic (constitutional) legislators and the courts. Direct effect appears possible in a considerable number of States, including Argentina,\textsuperscript{138} Bulgaria,\textsuperscript{139} the Czech Republic,\textsuperscript{140} the Dominican Republic,\textsuperscript{141} Egypt,\textsuperscript{142} France,\textsuperscript{143} Japan,\textsuperscript{144} Latvia,\textsuperscript{145} the Netherlands\textsuperscript{146} and Switzerland.\textsuperscript{147}


\textsuperscript{132} Peters, ‘The Globalization of State Constitutions’ (n 130) 260 and 269.


\textsuperscript{134} That also holds for use of the concept in EU law: see, eg, J Gerth, ‘Chapter 6 – Direct Effect in Germany and France: A Constitutional Comparison’ in J Prinsen and AAM Schrauwen (eds), \textit{Direct Effect: Rethinking a Classic EC Legal Doctrine} (Europa Law Publishing, 2002) 129.

\textsuperscript{135} Foster v Neilson, US Supreme Court, 2 Pet 253, 314 (1829).

\textsuperscript{136} 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) ICJ Rep 2009 3 para 44.


\textsuperscript{139} Bulgaria, Supreme Court of Cassation, Council of Ministers v TSD and ors, Judgment No 1177, Civil Case No 241/2007 (2007); ILDC 972 (BG 2007).

\textsuperscript{140} Article 10 Constitution of the Czech Republic (1992); see, eg, for an application, \textit{Minister of Justice v Šenk}, Supreme Court of the Czech Republic, 8 Tz 38/2000; ILDC 1444 (CZ 2000).


\textsuperscript{143} France, Court of Cassation, X v Y, Cassation Appeal, Information Bulletin of the Court of Cassation No 626 of 1 October 2005, No. 1810 (2005); ILDC 770 (FR 2005).


\textsuperscript{145} Latvia, Constitutional Court, Re Lauvian Education Law, Constitutional Review, Case No. 2004-18-0106 (2005); ILDC 190 (LV 2005).

\textsuperscript{146} Netherlands, Council of State, Reinter van Arkel Foundation and ors v Minister for Transport, Public Works and Water Management, 200401178/1 (2004); ILDC 129 (NL 2004).

\textsuperscript{147} Switzerland, Federal Supreme Court, A and B v Government of the Canton of Zurich, Appeal Judgment, Case No 2P.273/1999 (2000); ILDC 350 (CH 2000).
In the practice of these States, there seems to be a close connection between direct effect and the allocation of individual rights by treaties. For instance, the Federal Supreme Court of Switzerland held that a provision of a treaty is only self-executing if it regulates the legal position of an individual, even though the question of whether that is the case is then made dependent on the substantive completeness of the norm.

4. Consistent Interpretation

The term consistent interpretation refers to the interpretation of domestic law in conformity with international obligations. Through consistent interpretation, courts can achieve a result that is in conformity with international law and thus secure the performance of treaty obligations.

The practice of courts that engage in consistent interpretation is widespread. It includes both civil law and common law systems. It also includes States that allow for automatic incorporation and those that require transformation. The former category includes States like Austria, Ethiopia, Japan, Latvia, the Netherlands, Poland and the United States; in the latter category are States like Australia.

The effects of treaties in domestic law

- United States (Minister of Justice) v Burns and Rafay, Supreme Court of Canada, 1 SCR 283, 2001 SCC 7; (2001) 195 DLR (4th) 1; ILDC 187 (CA 2001).
- Kurz and Letushinsky v Kirschen, Supreme Court of Israel sitting as a Court of Civil Appeal, 21 Piskei Din (ID) 20 (1967) 47 ILR 212, 214–15; Kay Lo'oved Association v Israel, Supreme Court of Israel sitting as the High Court of Justice, HCJ 4542/02; ILDC 382 (IL 2006) 37.
- Onyango-Obbo and Mwenda v Attorney-General, Supreme Court of Uganda, Case No 2 (2002); ILDC 166 (UG 2004).
- Re Order 53 of the Rules of the Supreme Court and Re Application for Leave for Judicial Review by Roy Clarke, Attorney General v Roy Clarke (n 101).
- This was suggested by the ECtHR in Jorgic v Germany ECHR (2007) 70.
- Suresh v Canada (Minister of Citizenship and Immigration) and Attorney-General of Canada [2002] 1 SCR 3; 37 Admin LR (3d) 159; ILDC 186 (CA 2002) [93]–[98]. See also Kenya, High Court, RM and Cradle v Attorney General, Civil Case 1351; ILDC 699 (KE 2006) [73].
Second, courts may engage in consistent interpretation whenever the wording of national law allows for it.169 If a term has one meaning in domestic law and another in international law, the latter should prevail, to the extent that national law allows room for that interpretation.170

Third, courts may give effect to treaty obligations in reviewing the exercise of discretion by the executive in the light of such obligations. Treaty provisions may come in as an element in the grounds for review, in particular in the principles of reasonableness and legitimate expectations.171

The relevance of consistent interpretation is particularly clear in so-called dualist States, where delays may occur between the entry into force of treaties and domestic implementation, and courts may, through a process of interpretation, ensure domestic compliance with a treaty even if the political branches are not (yet) ready for it.172

In monist States, the practice of consistent interpretation is particularly relevant since it is not contingent on the question of whether a rule of international law can be given direct effect, and thus may allow a court to circumvent the shield that the concept of direct effect may set up. While courts generally restrict direct effect to a narrow category of rules that satisfies the criterion of completeness, consistent interpretation is not dependent on any a priori qualities of a rule of international law.173

In both these situations, consistent interpretation can circumvent limitations flowing from the separation of powers. When a court can achieve through consistent interpretation a result which it could also have brought about by granting a treaty provision direct effect (and which, however, it might wish to avoid because of separation of power concerns) consistent interpretation may help subly shift powers to the courts. Indeed, the principle of separation of powers itself operates to limit the power of courts to engage in consistent interpretation. For instance, this limit has led courts to construe their interpretative use of international law in reviewing the exercise of discretion by other branches in strictly procedural terms.174

V. OUTLOOK: AN AGENDA FOR RESEARCH

To some extent the topic of domestic effects of treaties is static – not much has changed in the basic principles of international law reflecting its neutrality on domestic effects. On the other hand, if we consider the content of treaties, the (sometimes contested) role of international institutions, and in particular the evolving practice at national level, the topic appears to be in considerable flux. In relation to these dynamic dimensions, several topics can be identified that could – and perhaps should – guide further research.

A first area that has hardly been researched is how States, by including particular properties in treaties, seek to control, enhance or limit the domestic effects of treaties. What properties are relevant in this sense? What patterns, if any, can we see over time, relating to the increasing degree in which treaties substantively connect to national law?

A second, related question is whether any changes that we may identify in practice would call for a reconsideration of the largely neutral principles in general international law and the law of treaties specifically.

Turning to the domestic level, one area for research relates to the empirical question of to what extent States have opened their national legal orders to the effect of treaties, or rather have sought to limit such effect. What factors underlie such developments? Do we see a variation in subject matter of treaties and between regions? How do separation of power considerations, that themselves are in a state of flux, influence the reception of treaties?

A follow-up set of questions relates to the normative issues underlying and raised by this practice. Does the practice of treaty making, when viewed from the perspective of modern understandings of the legitimacy

171 M Allars, 'International Law and Administrative Discretion' in B Opeskin and D Rothwell (eds), International Law and Australian Federalism (Melbourne UP, 1997) 222, 256.
172 State v Metropolitan Police Commissioner, Supreme Court of Bangladesh, 60 DLR (2008) 660; ILDC 1410 (BD 2008), 28; see also Ershad v Bangladesh, Supreme Court of Bangladesh, 21 BLD (AD) (2001) 69; ILDC 476 (BD 2000) 3 (Bimolendu Bikash Roy Chowdhury).
of international law-making, justify open national legal orders allowing for full effect of treaties, or does it rather call for increasing filters?

The increasing focus of treaties on matters of domestic law calls for and necessitates a reconsideration of the rather classic field of the law of treaties from the perspective of the evolving interface between the international and the national level.

PART II

DIMENSIONS