

The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law

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The Oxford Handbook of Comparative Foreign Relations Law, published in 2019, ambitiously sought ‘to lay the groundwork for a new field of study and teaching’.¹ The present volume usefully complements that effort by focusing, from a comparative perspective, on how foreign relations law interacts with international law. In this concluding chapter, I reflect on the relationship between these two bodies of law, drawing on examples from this volume and also from the *Handbook*. As will become evident, foreign relations law and international law have important and often underappreciated effects on each other, sometimes in ways that are constructive and mutually reinforcing, but at other times in ways that produce potential conflict.

I DEFINING FOREIGN RELATIONS LAW

As defined in the *Oxford Handbook*, foreign relations law is ‘the domestic law of each nation that governs how that nation interacts with the rest of the world’.² Such domestic law can take a variety of forms, including constitutional law, statutory law, administrative regulations, and judicial decisions. It can also include constitutional customs, or ‘conventions’, that may or may not have legal status.³ Much of this law, at least in constitutional

¹ Curtis A. Bradley, ‘Preface’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019).

² Curtis A. Bradley, ‘What Is Foreign Relations Law?’ in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 3. One can also describe certain international institutions, most notably the European Union, as having a body of foreign relations law. See Bradley, ‘Preface’.

³ For example, in Japan, the distinction between treaties that need to be submitted to the legislature for approval and agreements that can be concluded unilaterally by the executive branch is regulated by the ‘Ohira Principles’, a nonbinding set of standards promulgated by

democracies,⁴ concerns allocations of authority between political actors, such as the authority to represent the nation in diplomacy, to conclude and terminate international agreements, to recognize foreign governments and their territories, and to initiate or end the use of military force.⁵ In federal systems, these allocation issues are not only horizontal but also vertical, extending to the relations between national and subnational institutions. Foreign relations law also encompasses issues relating to the role of the courts in transnational cases, such as whether certain issues are ‘non-justiciable’ and thus subject entirely to political branch determination, whether and to what extent courts should give deference to the views of the executive branch, and the types of relief that courts are allowed to issue when they find that the executive branch has acted unlawfully.

Because foreign relations law under this definition is a type of domestic law, it is analytically distinct from a nation’s international legal obligations.⁶ This distinction between foreign relations law and international law is not meant to suggest anything about the status of international law within a domestic legal system. Nations differ in the extent to which they are positioned towards either the ‘monistic’ or ‘dualistic’ ends of the spectrum with respect to the domestic status of international law, and these differences are themselves part of their foreign relations law.

One virtue of defining foreign relations law as a form of domestic law is that it facilitates comparative analysis. Unlike international law, foreign relations

a Japanese foreign minister. See Tadaatsu Mori, ‘The Current Practice of Making and Applying International Agreements in Japan’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), ch. 11.

⁴ Comparative study may reveal differing national conceptions of what is or should be encompassed by foreign relations law. See, for example, Michael Riegner, ‘Comparative Foreign Relations Law between Centre and Periphery: Liberal and Postcolonial Perspectives’, this volume, p. 60, which suggests that postcolonial states may have a different perspective than liberal democracies about the functions of foreign relations law.

⁵ There are allocation issues even in non-democracies. For discussion of foreign relations law issues relating to China, see, for example, Ji Hua, ‘China and Global Environmental Governance: Coordination, Distribution and Compliance’, this volume, p. 317; Congyan Cai, ‘International Law in Chinese Courts’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), ch. 31.

⁶ See also Thomas Giegerich, ‘Foreign Relations Law’ (January 2011), in *Max Planck Encyclopedia of Public International Law*, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e937> (‘The concrete form and content of a State’s foreign relations law is within its domestic jurisdiction and thus beyond the range of international law.’).

law makes no claim of universality and instead accepts that nations can and will have different approaches.⁷ And there are many reasons why the content of foreign relations law might vary from nation to nation. It is not surprising, for example, to find differences between constitutional arrangements developed after World War II and those developed earlier. Parliamentary and presidential systems are also likely to reflect somewhat different approaches to questions of the separation of powers. In addition, understandings of the judicial role likely differ among countries, including as between civil law and common law countries. The particular domestic politics of a country can also have an important influence on the content of its domestic law, including its foreign relations law. Furthermore, foreign relations law may be affected by a nation's geopolitical status and sense of its national interest, and these will obviously vary, both among individual countries and over time.⁸

Another virtue of treating foreign relations law and international law as analytically distinct is that it allows for a consideration of the relationship between these bodies of law, including a consideration of the 'bridges' and 'boundaries' that are the focus of the present volume. As discussed below, there is an interactive dynamic between foreign relations law and international law, with each body of law having effects on the other.

Despite the benefits of using this definition for purposes of analysis, it should be emphasized that any sharp distinction between foreign relations law and international law will be artificial in practice. International law can and often is applied as domestic law, either directly or through some act of domestic incorporation. Moreover, even when international law is not applied directly, courts often construe domestic law in light of international legal obligations, and executive actors often exercise their discretion with such obligations in mind. Foreign relations law, as defined in the *Oxford Handbook*, includes the domestic rules governing such application and interpretation but not the international legal obligations themselves. The term could be defined more broadly, however, to include at least some aspects of international law.⁹

⁷ To be sure, even when nations ostensibly have the same international obligations, they may interpret them differently, and it may be fruitful to explore such differences. See, for example, Anthea Roberts et al., *Comparative International Law* (Oxford: Oxford University Press, 2018).

⁸ See also Frédéric Mégret, 'Foreign Legal Policy as the Background to Foreign Relations Law? Revisiting Guy de Lacharrière's *La politique juridique extérieure*', this volume, p. 108, which suggests that in studying differing national approaches to foreign relations, it is important to consider not only a nation's domestic law but also its particular policy orientation towards international law.

⁹ Any attempt to include international law within the definition of foreign relations law will encounter difficult line-drawing questions. Does one include all of a nation's international

Foreign relations law, however it is properly defined, has long been a more developed field of study and teaching in the United States than in most other countries. It is not entirely clear why this is so. The United States has the oldest written Constitution in the world, and accommodating that Constitution to a radically changed international environment, as well as a substantially different US role in that environment, may present unique challenges. In addition, the United States has a unique brand of federalism that tends to generate complex legal issues, especially as globalization has blurred the line between foreign and domestic affairs. Law schools in the United States also may have a more flexible structure than in many other countries, allowing faculty to more easily cross historic subject matter divides.

Whatever the reasons, there now appears to be growing interest outside the United States in foreign relations law. In 2014, Campbell McLachlan published an important and wide-ranging treatise on Commonwealth foreign relations law, a treatise cited by the UK Supreme Court in its landmark *Miller* decision concerning Brexit.¹⁰ A number of important works have also been published in recent years focusing on EU foreign relations law, addressing issues such as the process for concluding international agreements and the role of federalism that are similar to the foreign relations law issues faced by individual nations.¹¹ The *Oxford Handbook*, which has forty-six chapters by authors from around the world, will hopefully stimulate further international interest in the subject. Likewise, the present volume highlights the potential interest in foreign relations law by scholars from a wide variety of countries. As a result, this is an especially good time to be thinking both about the nature of this body of law and about similarities and differences in how nations address it.

legal obligations? Only those that have the status of domestic law? Only those that are enforceable by the courts?

¹⁰ Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), cited in *R (on the Application of Miller and another) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, para. 57, www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf, accessed September 30, 2020.

¹¹ See, for example, Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing, 2008); Piet Eeckhout, *EU External Relations Law*, 2nd ed., (Oxford: Oxford University Press, 2011); Ramses A. Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (Oxford: Hart Publishing, 2020). See also Joris Larik, 'EU Foreign Relations Law as a Field of Scholarship' (2017) 111 *AJIL Unbound* 321.

II FOREIGN RELATIONS LAW'S EFFECTS ON INTERNATIONAL LAW

There a variety of ways in which foreign relations law can affect international law. Most directly, a nation's foreign relations law can affect the manner in which a nation engages with international law – for example, the domestic process that it must follow in order to join or implement a treaty. Sometimes such foreign relations law will, at least as a practical matter, act as a constraint on a nation's ability to engage or comply with international law – for example, by requiring that multiple domestic institutions agree on such engagement or compliance. If so, this will have an impact on international law's development.¹² In some cases, domestic courts may even require that governmental actors take certain actions to ensure the compatibility of international law with domestic constitutional law. A noteworthy example is the Colombian Constitutional Court's 2019 decision conditioning the constitutionality of a bilateral investment treaty between Colombia and France on the issuance of a particular interpretive declaration by the two countries.¹³

Sometimes foreign relations law will affect not only international law's primary rules, but also its secondary rules that govern how international law is made. Indeed, this has long been the case. For example, when some nations began separating the treaty power between executives and legislatures after the American and French revolutions of the late eighteenth century, international law began to relax expectations that signature of a treaty carried with it an obligation to ratify the treaty.¹⁴ Similarly, in part spurred by American practice arising from its divided treaty power, international law came to allow for treaty reservations at the time of ratification (and international law on that subject has since evolved to take account of changes in the nature of treaty-making, including most notably the rise of multilateral conventions).¹⁵ Today, the

¹² In other instances, a nation might be able to use its foreign relations law to its advantage in international negotiations, as Felix Lange notes in his chapter for this volume, 'Foreign Relations Law As a Bargaining Tool?' See also Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

¹³ See Gustavo Prieto, 'The Colombian Constitutional Court Judgment C-252/19: A new frontier for reform in international investment law', EJIL: Talk!, July 29, 2019, www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/, accessed September 30, 2020. See also Angelo Jr. Golia, 'Judicial Review, Foreign Relations and Global Administrative Law. The Administrative Function of Courts in Foreign Relations', this volume, p. 130.

¹⁴ See J. Mervyn Jones, *Full Powers and Ratification* (Cambridge: Cambridge University Press, 1946), pp. 76–80.

¹⁵ See Curtis A. Bradley, *International Law in the U.S. Legal System*, 3rd ed., (Oxford: Oxford University Press, 2020), p. 38.

foreign relations laws of many countries divide the treaty power between the executive branch and the legislature, at least for certain types of agreements,¹⁶ making these international law rules even more significant.

Importantly, the normative goals of foreign relations law will not always align with the normative goals of international law. For example, there is an effort in some countries to give their legislatures a stronger role in foreign relations decision-making, such as with respect to treaty-making and the use of military force. Doing so might lead to greater deliberation and democratic input, but it will not inevitably promote greater international cooperation. It is not uncommon, for example, for legislatures to fail to approve treaties or other international law efforts favored by the executive branch. There may also be a recent trend towards making foreign relations law more 'administrative' in nature, and thus potentially subject to greater judicial oversight. But, as Angelo Jr. Golia notes in his chapter for this volume, such a shift 'does not always imply greater coordination among systems, but can rather bring more disorder, conflict and unpredictability'.¹⁷

Sometimes a greater role for legislative or judicial involvement in foreign relations law will even lead to breaches of international law that might not have occurred under executive control. This is one way of understanding the much-discussed *Medellin v. Texas* litigation in the United States. In holding that legislative action was needed in order to convert the US obligation to comply with a decision of the International Court of Justice into domestic law,¹⁸ the Supreme Court made it much more difficult for the United States to comply. Indeed, even now, many years after the decision, Congress has still not enacted the requisite legislation.¹⁹ The US experience with amendments to its sovereign immunity statute in recent years similarly highlights how legislatures may not always prioritize international law compliance. The US Congress has created various exceptions to sovereign immunity for terrorism-related conduct, despite concerns raised by the executive branch that such

¹⁶ See Pierre-Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), ch. 8.

¹⁷ See Golia, 'Judicial Review, Foreign Relations and Global Administrative Law', p. 158.

¹⁸ See *Medellin v. Texas*, 552 US 491, 525–26 (2008) ('The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.').

¹⁹ Proposed legislation designed to facilitate US compliance with the obligations of consular notice that were at issue in *Medellin* was introduced in Congress in 2011, but the legislation was not adopted. See Consular Notification Compliance Act, S. 1194, introduced in Senate on June 14, 2011.

exceptions may not be consistent with international law and might expose the United States to reductions in its own sovereign immunity abroad.²⁰

Another widely discussed example is the 2014 Italian constitutional court decision issued in response to the ICJ's decision in *Germany v. Italy* concerning the international law of sovereign immunity. In holding that the international law of immunity recognized by the ICJ was incompatible with Italian constitutional law and thus inapplicable in the domestic legal order, the court contributed to placing Italy in potential breach of its international obligations. In doing so, it acted contrary to the position of both the executive and legislative branches in Italy, which were prepared to accept the ICJ's decision.²¹ In these and other examples of potential conflict between foreign relations law and international law, there can be reasonable debates about which body of law should bear more of the blame. One interesting issue for future scholarly analysis would be whether and to what extent each of the two bodies of law has some responsibility to coordinate with the other.²²

III INTERNATIONAL LAW'S EFFECTS ON FOREIGN RELATIONS LAW

Not only does foreign relations law affect international law, but international law also in turn affects foreign relations law. As an initial matter, the foreign relations powers that must be allocated under foreign relations law are

²⁰ For example, in 2016, Congress enacted the Justice Against Sponsors of Terrorism Act over President Barack Obama's veto. In his veto message, Obama expressed concern that, by creating a new exception to immunity, the Act 'would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests'. See Barack Obama, 'Veto Message from the President, S. 2040', the White House, September 23, 2016, <https://obama.whitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040>, accessed September 30, 2020. Of course, sometimes legislatures do pay close attention to international law or are otherwise influenced by it. See, for example, Veronika Fikfak, 'War, International Law and the Rise of Parliament – The Influence of International Law on UK Parliamentary Practice with Respect to the Use of Force', this volume, p. 299.

²¹ See Golia, 'Judicial Review, Foreign Relations and Global Administrative Law', p. 153 et seq. See also Andrea Bianchi, 'Jurisdictional Immunities, Constitutional Values, and System Closures', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), ch. 38.

²² Another interesting example of domestic foreign relations law imposing a limit on the implementation of an ICJ ruling is a 2014 decision from Colombia's constitutional court requiring that a treaty be concluded in order to implement an ICJ decision limiting Colombia's maritime rights. See Monica Garcia, 'Colombia Court Backs Santos in Sea Boundary Dispute with Nicaragua', Reuters, May 3, 2014, www.reuters.com/article/colombia-nicaragua-dispute/colombia-court-backs-santos-in-sea-boundary-dispute-with-nicaragua-idUSL2NoNP03L20140503, accessed September 30, 2020.

themselves often defined by international law, which regulates the rights and obligations of sovereign nations.²³ For example, if a national constitution assigns the power to 'declare war' to a particular national actor, one would need to consult international law in order to have a full understanding of the potential scope and significance of this authority. More generally, as a matter of explication, it will often be necessary to know the international law backdrop in order to understand elements of foreign relations law, such as foreign relations law relating to treaty-making and interpretation, extraterritorial regulation, and sovereign immunity.²⁴

Moreover, while international law generally purports to be agnostic about domestic constitutional arrangements, in fact it sometimes assumes or favors certain arrangements. In particular, international law tends to assume, at least as a default, executive control over aspects of foreign relations. As a result, international law can make it more difficult for nations to rein in executive authority in the foreign relations area. This is evident, as Edward Swaine notes in his chapter for this volume, in the international law governing treaty termination.²⁵ The Vienna Convention on the Law of Treaties presumes that notices of treaty withdrawal received from heads of state are valid and, unlike for treaty formation, does not provide for any domestic process justification for voiding such notice. To be sure, international law does not require that states give unilateral withdrawal authority to their executives, and it is possible that domestic institutions could resist the exercise of such authority. In recent years, national courts in both the United Kingdom and South Africa famously insisted on legislative involvement in treaty withdrawals. But the effectiveness of such domestic checks will depend on a state's

²³ See, for example, *United States v. Curtiss-Wright Export Corp.*, 299 US 304, 318 (1936) ('As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.').

²⁴ The American Law Institute's (2018) *Restatement (Fourth) of the Foreign Relations Law of the United States 2*, observes that, because it 'deals with two distinct legal systems, namely domestic law bearing on foreign relations and relevant portions of international law, it must address both'.

²⁵ See Edward Swaine, 'International Foreign Relations Law: Executive Authority in Entering and Exiting Treaties', this volume, p. 46. See also Hannah Woolaver, 'State Engagement with Treaties: Interactions Between International and Domestic Law', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) ch. 24; Hannah Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *European Journal of International Law* 73.

particular laws and institutions.²⁶ International law, as currently structured, does not itself facilitate legislative involvement in treaty withdrawals.

Executive authority is favored under international law in other ways as well. The Vienna Convention sets forth only very narrow grounds for invalidating treaties concluded in violation of domestic law: according to article 46 of the Convention, the violation must not only concern ‘a rule of [the nation’s] internal law of fundamental importance’, but the rule must also be ‘manifest’. In part because of this provision, the US Senate did not approve the Convention when President Nixon submitted it in the 1970s: the Senate Foreign Relations Committee was concerned that this provision might bind the United States to international agreements made by the president without the two-thirds Senate consent required by article II of the Constitution, because that requirement might not be considered ‘manifest’ given the extensive US practice of concluding agreements outside of this process.²⁷ Again, of course, national institutions could resist executive aggrandizement in this area. In 2017, for example, the Ghanaian Supreme Court held that Ghana’s president had acted unconstitutionally in concluding an agreement with the United States without obtaining parliamentary approval, and it specifically declined to follow the US practice of allowing executive agreements.²⁸ But, as for treaty withdrawal, any such domestic resistance will obtain little support from international law.

Yet another way that the Vienna Convention may empower executives is its treatment of signing obligations. Under article 18 of the Convention, a nation that signs an international agreement is ‘obliged to refrain from acts which would defeat the object and purpose’ of the treaty ‘until it shall have made its intention clear not to become a party to the treaty’. This is true even for nations that require legislative approval prior to the ratification of treaties. As a result, executives in such nations can potentially create treaty-related obligations through unilateral action. In the United States, this may have happened when the Clinton administration signed the Rome Statute for the International Criminal Court in 1999, knowing that the incoming Bush

²⁶ For an explanation of why the United Kingdom and South African decisions are unlikely to have much relevance to US law, see Curtis A. Bradley and Laurence R. Helfer, ‘Treaty Exit in the United States: Insights from the United Kingdom or South Africa?’ (2017) 111 *AJIL Unbound* 428.

²⁷ See Anna M. Frankowska, ‘The Vienna Convention on the Law of Treaties before United States Courts’ (1988) 28 *Virginia Journal of International Law* 281 at 296–98.

²⁸ See *Banful v. Attorney General and Another*, (J17/2016) [2017] GHASC 21 (June 22, 2017), available at <https://ghalii.org/gh/judgment/supreme-court/2017/21>, accessed September 30, 2020.

administration was not supportive of the Statute. The Bush administration then ‘unsigned’ the Convention by announcing that it had no intention of ratifying it.²⁹

These examples also suggest that, especially in nations in which the scope of executive authority over foreign relations is unclear, executives may be able to leverage international law as a way around domestic constraints. Another potential example of this phenomenon concerns the use of military force. Even in nations that require legislative approval for some uses of force, executives may seek to rely on international law, such as UN Security Council authorization, as an alternative or supplementary source of authority. This happened in the United States, for example, in connection with the Korean War.³⁰

Another example of international law’s potential effect on foreign relations law concerns the increasingly administrative nature of international law. A significant amount of international law is made today not through high-level negotiations between foreign ministries but rather through international institutions, lower-level negotiations between domestic administrative agencies, and various forms of ‘soft law’.³¹ This development tends to further enhance executive authority over foreign relations, for a number of reasons: executive agents tend to represent nations in international institutions, administrative law tends to be centered in the executive branch, and less formal agreement-making may not be subject to the usual domestic requirements for treaty-making.³² In response to this development, as Jean Galbraith notes in her chapter for this volume, legislatures may need to enhance process-based constraints on the exercise of executive authority.³³

²⁹ See Curtis A. Bradley, ‘Unratified Treaties, Domestic Politics, and the U.S. Constitution’ (2007) 48 *Harvard International Law Journal* 307 at 311–12.

³⁰ See Curtis A. Bradley and Jean Galbraith, ‘Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change’ (2016) 91 *New York University Law Review* 689 at 735–36.

³¹ See Anna Petrig, ‘Democratic Participation in International Law-Making in Switzerland after the “Age of Treaties”’, this volume, p. 180 (discussing how ‘informal law-making greatly complicates the relationship between sovereignty (including domestic democratic self-determination) and international cooperation’).

³² For an account of increased executive branch control over international law in the United States, see Curtis A. Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (2018) 131 *Harvard Law Review* 1201.

³³ See Jean Galbraith, ‘From Scope to Process: The Evolution of Checks on Presidential Power in U.S. Foreign Relations Law’, this volume, p. 239. For discussion of a legislative effort in Spain along these lines, see Carlos Espositó, ‘Spanish Foreign Relations Law and the Process for Making Treaties and Other International Agreements’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), ch. 12.

Sometimes international law itself requires or favors certain processes of decision-making, and when it does so this can also affect foreign relations law. In their introductory chapter for this volume, Helmut Aust and Thomas Kleinlein give the example of a requirement of environmental impact assessments,³⁴ a requirement that may as a practical matter empower certain administrative agencies at the domestic level. Investment law is another example where international law may in effect mandate certain domestic processes, as well as the substance of some aspects of the domestic law applied in these processes.³⁵ The ICJ's 2004 decision in *Avena*, which was at issue in the *Medellin* litigation referenced above, is also an example of international law being construed to impose a domestic process requirement, namely judicial review of the convictions and sentences of certain individuals who had been imprisoned without proper consular notice,³⁶ although the United States still has not implemented the requirement.

In addition to these horizontal separation of powers effects, international law may also affect vertical issues relating to federalism. In a variety of ways, international law tends to favor national over subnational control over foreign relations. For example, unless a treaty provides otherwise, it is deemed, as noted in article 29 of the Vienna Convention, to apply throughout the entire territory of a party. Similarly, under the international law of state responsibility, nations are viewed as responsible for the conduct of their territorial units, and they are not allowed to rely on their internal law, including internal law relating to federalism, as a justification for a failure to comply with their obligations.³⁷ Although these presumptions in favor of national rather than subnational control of foreign relations law are understandable in a system of Westphalian nation-states, they can make it more difficult for constitutional values relating to federalism to be maintained, especially as international law increasingly overlaps with matters of traditional domestic regulation.

³⁴ See Helmut Philipp Aust and Thomas Kleinlein, 'Introduction', this volume, p. 3.

³⁵ See, for example, Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 *American Journal of International Law* 1 at 50 (arguing that '[international investment law] and [investor-state dispute settlement] have together generated rudimentary, but surprisingly broad, swathes of international private law – disciplining domestic policy space in underappreciated ways, and distorting the logic and functions of whole fields of domestic private law in relation to foreign investors').

³⁶ See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, para. 140. ('[T]he legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.')

³⁷ See International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', 2001, arts. 4(1), 32, United Nations Office of Legal Affairs, 2005, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, accessed September 30, 2020.

IV CONCLUSION

One of the virtues of studying foreign relations law, as noted at the outset of this chapter, is that it allows for an exploration of the rich and evolutionary relationship between foreign relations law and international law, a topic that has been under-explored in the literature. The present volume makes an important contribution in addressing that relationship from a range of perspectives, and it will undoubtedly spur additional scholarship on the topic. In addition to its scholarly value, the volume should be of interest to lawyers and policy-makers in both the domestic and international domains because it highlights how legal rules developed in one of these domains can have important, and not always beneficial, effects in the other.