Deference to the Executive

The US Debate in Global Perspective

Julian Arato

I. Introduction

As all international lawyers know, international law provides for the interpretation of treaties through a set of doctrines codified at Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT or ‘Vienna rules’). These rules are founded on the regulatory ideal that any treaty or treaty provision has one correct interpretation, to which the states parties are bound. As Lord Steyn explained in ex parte Adan, a treaty provision ‘must be given an independent meaning derivable from the sources mentioned in [VCLT] articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle there can only be one true interpretation of a treaty’. In other words, any treaty must have one true meaning, and the VCLT provides the authoritative guide to revealing it. The Vienna rules are of course not mechanical, and we can debate exactly how they work together and what may or may not go into the analysis. But the basic notion that treaty interpretation is governed by international law should be unobjectionable.

4 For present purposes I assume the VCLT to be the sole authoritative guide to the correct interpretation of a treaty, though admittedly this assumption is subject to some qualification. First, the Vienna rules can only go so far. By design, the components of the general rule, at Art 31, do not provide a fully mechanical system of interpretation. As noted by the ILC, there is no hierarchy between the elements of Art 31 VCLT, but that ‘[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give rise to the legally relevant interpretation’. ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ 1966 YB ILC, vol 2, 219–20. Further, the different components can be emphasized more or less heavily vis-à-vis one another, As Gardiner notes, the ‘key to understanding how to use the Vienna rules is grasping that the rules
However, Lord Steyn continues, ‘in practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it ... In doing so it must search, untrammeled by notions of its national legal culture, for the true autonomous international meaning of the treaty’.5 This latter insight is, perhaps, more ambivalent. In one sense it is surely right—that in seeking to determine the meaning of a treaty provision de novo, a national court should not have recourse to the canons of interpretation it employs in the interpretation of domestic statutes or contracts.6 What is less clear is whether national courts must always be the ones to interpret treaties de novo, or whether a degree of interpretive authority might lie elsewhere within the state—ie with the executive branch.

This chapter examines the practice of deference to the executive, by national courts, in the context of interpreting treaties. When faced with an issue of treaty interpretation, to what extent must a national court engage in its own independent analysis, and to what extent ought the court give weight to interpretations advanced by the executive branch? And if deference to the executive is permissible as a matter of international doctrine, what considerations ought to guide the manner of deference, and the determination of how much deference is appropriate? I argue that international law does not formally preclude national judicial deference to the executive. However the deeper question of how much weight is appropriate is more complicated, and raises serious questions of judicial policy.

On the one hand, too much deference risks opening the door to executive self-dealing, and eroding the separation of powers.7 Judicial abdication in this area would facilitate acute self-dealing in at least three ways. Deference empowers the

5 Ex parte Adan (n 3) per Lord Steyn 515–17.
6 National judicial practice is, of course, somewhat ambivalent on this point. For a recent example of slippage into domestic canons in the US, see BG Group PLC v Republic of Argentina (2014) 572 US (interpreting the bilateral investment treaty at issue on the basis of domestic canons for the interpretation of contracts). Lower federal courts occasionally do better. See eg Mora v New York (2d Cir 2008) 524 F.3d 183, 196, n 19 (‘Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies on it as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices’); and Risinger v SOC LLC (Dist NV, 2014) 2014 WL 804802, 2 (invoking the Vienna Rules for purposes of interpretation).
7 See E Criddle, ‘Chevron Deference and Treaty Interpretation’ (2003) 112 Yale LJ 1927. Further, care has to be taken not to treat the executive as a monolith. As Rebecca Ingber explains, total or very significant deference to executive litigation positions risks entrenching interpretations advanced by career litigators that would not necessarily reflect the considered and wholly deliberative views of those executive agencies with real expertise on the matter in question, or who were actually involved in the
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effective against other branches of government through enhancing its discretion to determine the scope and meaning of treaty law for internal purposes (in the extreme, enabling it to rewrite the law). It grants the executive undue advantages over foreign governments, by allowing it to advance interpretations that privilege the national interest against the interests of other treaty parties. And it unduly empowers the government over individuals in particular disputes involving issues of treaty law—insofar as the executive is a party to the litigation, or is otherwise especially interested. In this context it is worth recalling Hamilton’s cautionary assessment that the courts represent ‘the least dangerous branch’, and not the executive.8 On the other hand, a zero-deference approach risks undermining executive flexibility in the sensitive arena of foreign affairs.9 And at a minimum, Frowein notes, ‘it is certainly possible that the advice of ministries in rather detailed and technical treaty matters might be better than that which the courts could work out themselves’.10 Both extremes are undesirable—the difficulty lies in drawing the right balance.

Although this question of deference to the executive has important implications for all national judicial systems, it is by no means explicitly considered everywhere—and even more rarely answered in the same way. It has been debated most vigorously in the United States, where the usual formulation is that courts interpret treaties for themselves, but constructions by the executive branch are entitled to ‘great weight’—in other words significant deference with a degree of independent judicial supervision.11 The basic idea has long been a mainstay of Supreme Court jurisprudence.12 But the case law pulls in widely divergent directions, and has engendered a remarkable breadth of commentary and controversy. The goal of this chapter is to foster a critical reassessment of the US-centric debate on deference to the executive, and to illuminate the fundamental values at stake in apportioning interpretive authority in any national legal system.

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8 Federalist, No 78. For analogous reasons, the executive is today often portrayed as the most dangerous branch of government. See eg MS Paulsen, ‘The Most Dangerous Branch: Executive Branch Power to Say What the Law Is’ (1994) 83 Georgetown LJ 217 (emphasizing in particular the executive’s interpretive authority); M Flaherty, ‘The Most Dangerous Branch’ (1996) 105 Yale LJ 1725, 1727–8.

9 See E Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’ (1993) 4 EJIL 159, 175 (noting the prisoner’s dilemma facing national courts in this regard: in the absence of guarantees about whether the national courts of all parties to a particular treaty will act similarly, national courts have reason to hesitate before reining in their executive’s discretion in advancing interpretations of that agreement, for fear of hobbling their own executive’s diplomatic capacities). For Benvenisti this dilemma may be mitigated through enhanced cooperation across national judiciaries, but it remains a real and perennial problem; see E Benvenisti and G Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 EJIL 59, 65.

10 JA Frowein, ‘Federal Republic of Germany’ in FG Jacobs and S Roberts (eds), The Effect of Treaties in Domestic Law (Sweet & Maxwell 1987) 63, 85.


American scholarship in this area has tended to focus on the appropriate mechanics of deference to the executive as a matter of US constitutional and administrative law. The debate has centred around the search for a systematic approach that strikes the right balance between competing national interests, ranging from *raison d’état* (eg the perceived need for a unified national approach to foreign policy) to the separation of powers (eg concerns about expertise vs independence, and, more radically, domestic executive law-making).  

Most scholarly positions on the propriety and appropriate extent of deference to the executive can be plotted along an axis of these competing national interests. And indeed such interests reflect important values. But the debate has tended to ignore two other critical axes of interests affected by the question of deference to the executive: the interests of the international legal order, and more locally the interests of individual claimants in particular cases.

This chapter takes a different approach. Rather than assessing the propriety of deference to the executive or its appropriate forms from the internal perspective of any particular national order, I seek to draw out the three axes of interests at stake: national, international, and individual. I hope that divorcing the problem from the recent American debate may help illuminate its salience in all jurisdictions. But just as importantly, I hope that a reorientation of the problem away from the usual national concerns will shed light on both the difficulty of determining the appropriate balance, and the importance of attempting to do so.

To reiterate, as a crucial caveat: I start from the presumption that a treaty has one correct interpretation, and that the Vienna Rules provide the authoritative guide for accessing its true meaning. I do not want to suggest that the full panoply of national, international, and individual values considered here ought to inform how the VCLT analysis is conducted in the *de novo* interpretation of a treaty—and certainly not that they provide justifications for materially deviating from the Vienna Rules in order to ‘rewrite’ the treaty. These interests are rather developed here as considerations germane to the resolution of a particular separation of powers issue: who, within the state, is best placed to engage in the proper interpretation of international treaties.

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13 Some scholars have called for doctrines of deference analogous to those found in US administrative law, whereby the courts defer to agency interpretations of their organic statutes under certain conditions. See eg C Bradley, ‘Chevron Deference and Foreign Affairs’ (2000) 86 Virginia L Rev 649 (advocating the relatively lenient doctrine of *Chevron* deference); Criddle (n 7) (rejecting Bradley’s view and calling for a modified version of the more searching form of review known as *Skidmore* deference). Others have advocated for blunter ‘total-deference’ approach whereby courts would simply accept executive interpretations of treaties without engaging in independent review, see J Yoo, ‘Treaty Interpretation and the False Sirens of Delegation’ (2002) 90 Calif L Rev 1305; see generally RM Chesney, ‘Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations’ (2007) 92 Iowa L Rev 1723.

14 But see Criddle (n 7) (noting the importance of considering the position of individuals in constructing a balanced approach to deference in matters of treaty interpretation); T Franck, *Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton UP 1992) 116 (noting favourably, *mutatis mutandis*, the suspicion with which the German courts have approached the government’s determination in other foreign affairs issues where the state is an interested party in the litigation of a particular dispute, eg in matters of asylum).
In the following sections, I make two descriptive claims and propose two modest normative suggestions. I contend, first, that as a doctrinal matter deference to executives by domestic judges engaged in treaty interpretation is perfectly consistent with the law of treaties. Second, though most vigorously debated in the United States, the questions of whether and in what way deference to the executive is appropriate in the context of treaty interpretation are relevant to all countries—whether the national courts address these issues explicitly or only implicitly. Third, while the question of deference in treaty interpretation tends to be assessed by appeal to values connected to various national interests, I argue that it ought to entail consideration of two additional axes of values: international interests and the interests of individuals. Fourth, and finally, I suggest that there are no easy answers as regards the right balance. Bright-line solutions like total-deference and zero-deference prove equally problematic, but the propriety of any particular balancing scheme depends on historical, social, and political context. The most we can ask is that domestic judges take all three axes of interest into consideration in determining the appropriate balance of deference due to national executives in treaty interpretation.

II. The Doctrinal Question

The first question is whether deference to the executive is permissible under the VCLT at all, or whether domestic courts should consider themselves bound to engage in treaty interpretation *de novo*. This section suggests that on this question the international law of treaties is ambivalent, and ultimately results oriented. The state is bound by its treaty obligations, and the Vienna rules provide the authoritative guide to the correct interpretation of these primary treaty norms. If the state materially fails to comply with the treaty, as properly construed, it will be in breach and its international responsibility will be engaged. So in the abstract, and appreciating that courts have a responsibility to get the law right, we can say with Lord Steyn that a national court should follow the proper method of interpretation codified in the Vienna rules.\(^{15}\) But as a matter of international law they are under no direct obligation to interpret a treaty *de novo*. Deferring to the executive’s interpretation of a treaty does not of itself breach any obligation under the law of treaties, though it surely entails a certain abdication in favour of executive discretion.

From the perspective of the law of treaties, there is an undeniable tension between deference to the executive and the rules of interpretation codified by the VCLT.\(^{16}\) Obviously a conflict will arise where the court defers to an executive interpretation

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\(^{15}\) *Ex parte Adan* (n 3) per Lord Steyn.

\(^{16}\) D Bederman, ‘Revivalist Canons and Treaty Interpretation’ (1994) 41 UCLA L Rev 953, 973 (suggesting that the VCLT disapproves of the use of national materials for interpretive purposes including ‘executive branch representations as to the meaning of a provision’, and noting that the use of domestic canons of interpretation including deference to the executive can lead to interpretive results at odds with the Vienna rules).
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that cannot be supported by the Vienna rules. As David Bederman noted already in 1994, ‘[t]here is greater conflict today than ever before between US practice and more international approaches to treaty interpretation’—a point no less true two decades later, with the added difficulty of reconciling US judicial practice even internally. However it is important to understand that deference to the executive does not necessarily produce such divergences; where the executive proffers an interpretation consistent with the Vienna rules, judicial deference would cause no problems from the point of view of international law. The problem—if there is one—lies in the fact that so much depends on the executive branch.

The fact of tension between deference to the executive and the Vienna rules thus does not mean that the latter proscribes the former. To the contrary, the VCLT does not impose any direct obligation on national courts at all. While the Vienna rules provide the best and only authoritative guidance for any interpreter of a treaty, there is no reason to conclude that they impose an independent obligation on such interpreters to approach the task of interpretation in any particular way—that is, an obligation independent of the primary obligation under interpretation. The VCLT does not bind domestic courts to follow the rules of interpretation it codifies comprehensively and exhaustively. And a state does not violate the VCLT when its courts fail to apply the canons of interpretation codified at Articles 31–32, or when they rely on other doctrines. The law of treaties is rather focused on results.

As a matter of international law, a court may come to a ‘correct’ or ‘permissible’ interpretation of a treaty provision through means other than reliance on the factors of Article 31 VCLT—including by simply abdicating in deference to an interpretation espoused by the executive. If the domestic court thereby arrives at a permissible interpretation, there is no harm done (in this particular instance). If, however, the court comes to an interpretation that cannot be supported by the Vienna rules, the risk is that the state may find itself in breach of the primary treaty rule in question.

Strictly in terms of international legal obligation it thus seems perfectly acceptable for a domestic court to defer to the executive on matters of treaty interpretation. To the extent the court defers to its judgment, the executive becomes the bearer of the state’s duty to comply with its primary obligation—the treaty under

17 Bederman (n 16) 972.
18 cf Hamdan v Rumsfeld 548 US 557 (2006) (affording no deference to the executive’s interpretation) with Sanchez-Llamas (n 12) (decided in the same term as Hamdan and reverting to the typical ‘great weight’ standard).
19 In discussions surrounding this volume, Georg Nolte raised the important point that the principle of the rule of law might require the court to give reasons, which might cut against the idea that national courts could simply adopt any approach to interpretation so long as they reach the right results. On this principle, to take the example raised by Michael Waibel in this context, simply flipping a coin would seem a deficient basis for deciding, even if it produced the right result. It may be that this principle would strongly cut against a judicial policy of blind, total deference. However, as detailed in the following sections, it may be that there are sufficient reasons in favour of a lesser degree of deference to justify refraining from engaging in a de novo VCLT analysis, without running afool of the importance of reason-giving.
interpretation. If the executive’s interpretation can be reconciled with the VCLT, then no problems arise. And if the courts defer to an executive interpretation that cannot be justified under the Vienna rules, the state may find its international responsibility engaged.

Yet, even if deference to the executive is permissible in principle, it remains to be seen whether courts or executives are better positioned to engage in treaty interpretation, or whether some level of cooperation may be most appealing. Further, it remains to be considered how such cooperation might be legitimately structured, bearing in mind the ultimate responsibility of the courts to ensure that the law is rightly applied.

III. Deference to the Executive in the United States and Beyond

As of the mid-twentieth century, the US Supreme Court has typically attached ‘great weight’ to the State Department’s views on treaty interpretation—adopting a quasi-administrative doctrine of deference based on the executive’s peculiar expertise in treaty affairs, alongside concerns grounded in raison d’état. Indeed until only recently it was possible to say that as an empirical matter, within the United States, the executive’s position was the best predictor in matters of domestic judicial treaty interpretation. But at the same time, the doctrine is remarkably under-theorized within the practice of the courts. Especially in light of recent Supreme Court jurisprudence, it is difficult to tell a coherent story about where deference to the executive is appropriate in interpreting an international treaty, and how it can be justified. Moreover, it is far from clear what kind of review the doctrine actually entails.

The 1961 Supreme Court judgment in Kolovrat v Oregon may be taken as a representative application of the ‘great weight’ doctrine. The case concerned the disposition of property left by two residents of the State of Oregon who had died intestate, with no heirs or next of kin except a handful of Yugoslav nationals residing in Yugoslavia. A particularly restrictive Oregon statute barred passage of intestate property to aliens living abroad, and the State filed petitions to take the relevant property for itself. In relevant part, the Yugoslav nationals claimed that an 1881 Treaty between the United States and Serbia—to which Yugoslavia had succeeded—should prevail over the restrictive Oregonian law by operation

20 Bederman (n 16) 1013.
21 See eg in 2006 Hamdan (n 18) (no deference) and Sanchez-Llamas (n 12) (giving ‘great weight’ to executive interpretation); and in 2014, BG Group (n 6) (stating the Court will merely ‘respect the Government’s views about the proper interpretation of treaties’ (my emphasis)). For a longer term historical perspective on the twists and turns of the Court’s jurisprudence, see D Sloss, ‘Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective’ (2007) 62 NYU Ann Surv Am L 497, 498, 505–22; Bederman (n 16).
22 Chesney (n 13).
23 Kolovrat (n 11).
of a provision providing for most favoured nation (MFN) treatment as regards either party’s nationals 'acquiring, possessing or disposing of every kind of property'.

Given that several other bilateral treaties between each party and third states explicitly included rights of inheritance in this regard, the Yugoslav nationals argued that the US-Serbia Treaty thus guaranteed their right to collect over and above Oregonian law.

The Court held in favour of the Yugoslav nationals, finding that the 1881 Treaty did indeed protect their inheritance rights via MFN treatment. However the Court did not reach its conclusion by interpreting the Treaty de novo. It stated that 'while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight'. The Court accordingly relied on the practice and statements of the US State Department for authoritative guidance, in combination with the Government's brief amicus curiae—all of which supported reading the MFN provision to encompass the Yugoslav nationals' rights to inherit. The Court justified its abdication of a degree of judicial independence on the basis of the expertise and experience of the executive branch.

The 'great weight' standard is not a total abdication. It lies somewhere in between simply adopting executive interpretations (total deference) and engaging in de novo interpretation in all instances (zero deference)—though perhaps significantly closer to the former than the latter. The doctrine reflects a cooperative approach to the interpretation of international agreements, apportioning power between the judiciary and the executive. What is more difficult to pin down is how the courts really balance the branches’ respective interpretive authority, on a long view of the jurisprudence.

While the ‘great weight’ doctrine has long been a jurisprudential commonplace, the standards have shifted dramatically over time—even within Supreme Court case law. As David Sloss has demonstrated, throughout the early years of the Republic the courts afforded the executive no deference at all—engaging in a completely independent de novo interpretation of treaties until at least the mid-nineteenth century. And even as of the 1930s the Court was applying a significantly more tentative formulation than the ‘great weight’ standard. For example, in Factor v Laubenheimer (1933) the Court held merely that for purposes of ‘resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight’. And though the ‘great weight’ standard seemed to stabilize in the

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24 Kolovrat (n 11) at n 6.  
25 Kolovrat (n 11) 194.  
26 The Court relied, for its standard of deference, on a 1933 case that actually adopted a much weaker formulation that reserved deference only for ambiguous cases: Kolovrat (n 11) at n 11, citing Factor v Laubenheimer (n 12) 295 (‘And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight’).  
28 Sloss (n 21) 498, 505–22.  
29 Factor v Laubenheimer (n 12) 295 (my emphasis).
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late twentieth century, the doctrine has again unravelled in recent major cases. In Hamdan v Rumsfeld (2006) the Court afforded no deference to executive views at all—without even mentioning the doctrine. And yet, in a consular rights case decided later in the same term, Sanchez-Llamas v Oregon (2006), the Court declared the Kolovrat 'great weight' standard alive and well (and applicable). Thus it appears that the Court has generally applied some standard of deference since at least the turn of the twentieth century, but the precise contours and limits of its doctrine remain unclear (and may remain in a state of flux).

The American case thus shows that the question of deference to the executive is not a binary. There is rather a spectrum of options, and the courts have shifted from pole to pole over the years. A wide range of possibilities are available, which may be more or less justifiable. But at the same time, given that the choice of how to draw the balance can be decisive in particular cases, the Supreme Court’s frenetic approach in recent years is troubling. The American experience thus further demonstrates the importance of addressing this doctrinal challenge clearly and openly.

Still, to the American public lawyer, at least in principle, the idea of deference to the executive seems a natural extension of typical deference-oriented principles of our administrative law. The doctrine may be more surprising—even shocking—to foreign audiences, if not always for the same reasons.

In some countries, where treaty interpretation is the exclusive constitutional prerogative of the courts, the possibility of deference to the executive may appear as no less than an abdication of judicial independence. This seems to be the case in Austria and Canada, for example, where the courts entertain no doctrine of deference to the executive, and more or less in Germany as well—though it is not unheard of for the German courts to give executive interpretations some weight in certain cases.

30 Hamdan (n 18).
31 Sanchez-Llamas (n 12).
33 See E Handl-Petz, 'Austria' in D Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011) 84–5 (noting that ‘Austrian courts do not defer to the views of the executive branch’ but rather interpret treaties de novo, by reference to the VCLT. Handl-Petz contends that the courts follow this approach ‘because of the theory of separation of powers, which provides that the courts are independent from the executive branch and therefore are free to interpret treaties without guidance from the executive branch’).
34 See G van Ert, ‘Canada’ in D Sloss (ed), The Role of Domestic Courts in Treaty Enforcement (CUP 2009) 186–7 (noting that there is ‘no doctrine in Canadian law requiring courts to defer to the executive in questions of treaty interpretation. To the contrary, the interpretation of treaties is regarded as a legal question within the scope of the judicial function’); and S Beaulac and JH Currie, ‘Canada’ in D Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011) 132 (‘In Canada there is no established practice for government authorities to provide an official interpretation for treaties’).
35 See HP Folz, ‘Germany’ in D Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011) 244 (‘In German constitutional law there is no tradition of judicial deference to the executive in foreign policy matters’. Going further, Folz adds that ‘a[ny] intervention by the executive in favour of a quasi-authoritative interpretation of a treaty provision might be construed as incompatible with the principle of separation of powers’. But see Frowein (n 10) 85 (noting that while ‘German courts cannot ask for a binding advisory opinion from competent ministries … [t]his does not mean … that the courts do not give weight to
In other countries, at least at some times, the question of treaty interpretation is not a matter for the judiciary at all. In France, for example, from the mid-nineteenth century until as recently as 1990, the courts generally considered treaty interpretation to be the exclusive domain of the executive. Rather than engage in independent interpretation, the courts would ask the Ministry of Foreign Affairs for its advice on matters of interpretation, and consider themselves bound by the referral.  

And in some countries the practice has shifted, in recent years more commonly from a regime of deference to a regime of independent interpretation. In France the Conseil d’État changed course dramatically in 1990, deciding in the GISTI judgment that from then on it would be competent to interpret treaties for itself. While it still makes use of the referral procedure, the Conseil no longer treats the Ministry’s responses as formally binding. The shift took place while France was subject to a suit before the ECtHR challenging the independence and impartiality of the Conseil d’État (Beaumartin v France), which some have credited for the Conseil’s shift in judicial policy. A similar shift occurred in Mexico between the 1990s and 2000s, in parallel to the transition to democracy and increased regional economic integration.

Evidently practices vary widely across states, and over time. Every country makes a choice about how to apportion interpretive authority over international treaties—whether explicitly or de facto. The concept of deference to the executive represents a diverse family of judicial mechanisms for striking a balance between the branches. Its elaboration helps illuminate the myriad solutions available to states beyond the extreme options of hermetic de novo judicial interpretation and exclusive executive competence. Given that international law does not seem to proscribe or endorse any particular domestic approach, the really fundamental question is how to weigh the innumerable institutional arrangements available.

36 See E Decaux, ‘France’ in D Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011) 228; Benvenisti (n 9). The situation may not have been, even then, an absolute case of total deference—it seems that the courts were willing to interpret treaties autonomously when they determined the text to be sufficiently clear (Acte Claire). See JD de la Rochère, ‘France’ in FG Jacobs and S Roberts (eds), The Effect of Treaties in Domestic Law (Sweet & Maxwell 1987) 49.

37 See Benvenisti and Downs (n 9) (noting and exploring a general tendency of national courts to shift away from policies of deference to the executive over the last twenty years).

38 GISTI Judgment (29 June 1990), RGDP 94 (1990) 879; see Decaux (n 36) 228; and E Bjorge, “Contractual” and “Statutory” Treaty Interpretation in Domestic Courts? Convergence around the Vienna Rules? in this volume, at 49.

39 Decaux (n 36) 228. 40 Decaux (n 36) 228.

41 See Aust, Rodiles, and Staubach (n 32) 92.
IV. Normative Considerations

Granting that national courts are under no obligation to forgo deferring to executives in matters of treaty interpretation as a matter of international legal doctrine, there may still be strong normative reasons to resist affording such deference—or to temper the level of deference involved. Just because a judicial practice is permissible does not mean that it is desirable—or even sensible. As noted above, there are three different axes of interests at stake: (1) national interests; (2) interests of the international legal order; and (3) interests of individual litigants in particular cases. Each axis contains varied and competing values that speak to the appropriate level of deference due to national executives. Within each axis we might think of a sliding scale from zero-deference to total-deference, with various degrees and forms of deference populating the middle. These various middle ways represent attempts to balance the competing interests at stake. This section will canvass the relevant values and considerations across each axis in turn. I suggest that each gives reason to be suspicious of too much deference—though none clearly speak in favour of de novo review across the board.

1. National interests

At least within the United States debates about the propriety of deference to the executive and its appropriate extent have tended to focus almost exclusively on the national interest. The battle lines tend to be drawn around the value of raison d’état and executive expertise in foreign affairs on the one hand, and concerns about the separation of powers, judicial independence, accountability, and democracy on the other. Few take really extreme positions, with most scholarly proposals attempting to reach some kind of balance among these concerns.

At one end of the spectrum is the view that the executive is entitled to total deference. Within the United States this view is associated with John Yoo, who grounds his case on the President’s constitutional competence in foreign affairs. Despite its purported constitutional pedigree, this view is most concerned with raison d’état, emphasizing the need for executive flexibility and the special expertise of the executive on matters of foreign affairs. Few take the total-deference view seriously, and it seems to have never gained credence in US courts (although the US has itself argued for this position before the Supreme Court, most notably—and abortively—in Hamdan). However the Supreme Court has come close to

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42 I use the term normative here not in the sense of ‘pertaining to law’ (ie to norms), but rather to connote something about how the world ought to be. A normative argument about the law does not describe the law as it is, but criticizes or proposes new configurations on the basis of particular set of values, legal or otherwise. This section thus proposes considerations for assessing whether certain national institutional arrangements, though compliant with international law, are also desirable.

43 But see Cridle (n 7).

44 Yoo (n 13).

45 Yoo (n 13).

46 Hamdan (n 18). See Sloss (n 21) 498. Other countries have more fully embraced a total deference regime at various times, whether explicitly or de facto. In France, for example, prior to [recent
this position with its ‘great weight’ standard, whereby executive interpretations are entitled to significant deference, subject only to a vague modicum of judicial supervision.\textsuperscript{47} The precise balance has fluctuated with the composition of the Court. But as Bederman suggests, under the ‘great weight’ standard the executive’s interpretation has proven far and away the best predictor of the Court’s ultimate holding.\textsuperscript{48}

At the other end of the spectrum is the idea that courts should not defer to the executive in matters of treaty interpretation at all, but rather engage in \textit{de novo} review. Few scholars have advocated this position in the United States,\textsuperscript{49} but it seems as though the Supreme Court followed a zero-deference approach in the early years of the Republic, until the mid-nineteenth century.\textsuperscript{50} More recently the Court has sporadically returned to this position, refusing to adopt a deferential approach in certain major cases without explanation (eg \textit{Hamdan} and \textit{BG Group}). Here the view tends to be grounded on a rigid conception of the separation of powers coupled with fears of executive self-dealing, or, more generally, executive law-making through the free interpretation and implementation of international engagements. Still, \textit{Hamdan} aside, the ‘no deference’ extreme has few advocates within the United States. It does, however, seem more natural in other jurisdictions like Austria,\textsuperscript{51} Canada,\textsuperscript{52} and Germany\textsuperscript{53} where judicial abdication in matters of treaty interpretation is hardly contemplated (if at all).

Most views lie somewhere in the middle, taking seriously the separation of powers concerns attending total judicial abdication while trying to find a balance with a perceived need to not undercut the executive on the international plane.\textsuperscript{54} Authors in this vein attempt to balance the competing interests in different ways, usually drawing from standards of deference already familiar in legislative reforms] the courts were not permitted to interpret treaties for themselves at all. See Bjorge (n 38) 55.

\textsuperscript{47} Kolovrat (n 11) 194; see also \textit{Sumitomo Shoji America v Avagliano} et al (n 27) (‘although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight’).

\textsuperscript{48} Bederman (n 16). As noted above, however, the predictive value of executive interpretations in the courts has ebbed somewhat in the Roberts era. See \textit{Hamdan} (n 18); Sloss (n 21) 498.


\textsuperscript{50} Sloss (n 21) 498. \textsuperscript{51} Handl-Petz (n 33) 84–5. \textsuperscript{52} Van Ert (n 34) 186–7.

\textsuperscript{53} Folz (n 35) 244.

\textsuperscript{54} For a recent example of the debate playing out in the centre, see Benvenisti and Downs (n 9) 65 (strongly questioning outsized policies of judicial deference in matters of treaty interpretation, but still noting the legitimate and perennial problem of how to rein in executive interpretive discretion ‘without damaging their executive branches’ effectiveness in the area of foreign policy and risking serious political problems for themselves domestically’); and J Katz-Cogan, ‘National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to E Benvenisti and G Downs’ (2009) 20 EJIL 1013, 1017–19 (strongly challenging Benvenisti and Down’s position that national courts ought to find ways to untether themselves from deference to the executive in matters of foreign affairs on grounds of legal and relative institutional competence, but stopping well short of dismissing a role for courts entirely).
the context of US administrative law. But in the main the level of deference these scholars consider appropriate tends to be linked to the degree of weight they give to the competing national values; *raison d’état*, expertise, and the need for executive flexibility in foreign affairs on the one hand, versus separation of powers, judicial independence, and avoiding executive self-dealing on the other.

Executive autonomy, expertise, and flexibility in foreign affairs, judicial independence, and the limitation of executive power all reflect important domestic values. Along this axis, the extreme positions of total- and zero-deference seem undesirable, and it is difficult to say in the abstract how strongly either pole should pull in drawing the balance. But these concerns populate only one particular axis of interests affected by domestic approaches to the interpretation of international treaties. Without intending to diminish the importance of debating and balancing these values, I want to suggest that the scholarly tendency to focus on domestic separation of powers concerns leaves out important interests implicated by the question of how to apportion domestic authority to interpret international treaties: the interests of the international legal order itself and the interests of individual claimants in particular cases.

2. International interests

Though less well examined than its effects on the domestic separation of powers, the level of judicial deference afforded to national executives has important implications for the international legal order as well. Although international law may be neutral on the question of deference to the executive as a matter of doctrine, the question has important normative implications for the international legal order as a system.

The basic point is that, as interpreters of international treaties, domestic courts owe something to the treaties they interpret. By extension, they owe something to the other states parties, as well as the international legal order taken as a whole. This conclusion rests on two premises.

First, any national court has an obligation to get the law right, which means making sure that it is applying an international legal rule correctly, in accordance with the international rules of interpretation. It may be that this interpretive authority can be shared with the executive, to a degree. But the court’s duty to get the law right requires some meaningful degree of judicial supervision. Courts cannot fulfil their responsibility to ensure that they are applying treaty law—as properly construed—if they completely (or even largely) abdicate in favour of the executive’s interpretation.

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55 See Bradley (n 13) (advocating lenient *Chevron* deference); and Criddle (n 7) (advocating the more searching *Skidmore* deference). See also J Weiss, ‘Defining Executive Deference in Treaty Interpretation Cases’ (2011) 79 Geo Wash L Rev 1592.

56 *Ex parte Adan* (n 3) per Lord Steyn; *Mona v NY* (n 6).
Second, national courts have a particular responsibility to supervise the proper interpretation of treaties because their judgments have a recursive relationship to the treaty being applied. Treaty interpretation by domestic courts can have significant jurisprudential effects on the development of the treaty in question as a matter of international law. Most directly, domestic judicial opinions can contribute to the formation of subsequent state practice relevant to interpretation under Article 31(3)(b) VCLT.\(^{57}\) And more generally, under the classic doctrine of sources national judgments are sometimes treated as subsidiary sources for determining the meaning of rules of international law.\(^{58}\) As a result, domestic interpretations can have a significant impact on the meaning of a treaty over time.\(^{59}\) They not only interpret and apply international treaties, but further contribute to their meaning and affect their growth.\(^{60}\) Given their broader influence, domestic courts ought to

\(^{57}\) ILC, ‘First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’ (Georg Nolte, Special Rapporteur) (19 March 2013) UN Doc A/CN.4/660 [120–1], [144]; Gardiner (n 2) 228–9. More is of course required, in particular sufficient practice by the other treaty party or parties that the judicial interpretation in question reflects the parties’ agreement on a point of interpretation; Gardiner (n 2) 235; J Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 LPICT 443, 460. It should be further noted that for purposes of determining subsequent practice, a national court judgment may not represent the last word of the state in any particular case.

\(^{58}\) ‘Judicial opinions’ are expressly mentioned in the classical formulation of the sources of international law in the Statute of the International Court of Justice as ‘subsidiary means for the determination of rules of law’. ICJ Statute 38(1)(d). This subsidiary source is understood by some commentators to include judgments of domestic courts for purposes of determining the meaning of international legal instruments, including treaties. See eg H Thirlway ‘The Law and Procedure of the International Court of Justice 1960–1989: Part Two’ (1990) 61 BYBIL 1, 114; see contra A Pellet, ‘Article 38’ in A Zimmerman, C Tomuschat, and Karin Oellers-Frahm (eds), The Statute of the International Court of Justice: A Commentary (OUP 2006) 788 (suggesting that national judicial decisions are not envisioned by Article 38(1)(d), and that ‘these decisions should better be treated as elements of State practice in the customary process or, maybe, as being at the crossroads between evidence of practice and opinion juris’).

\(^{59}\) In some particularly extreme cases, international courts have relied on national judicial practices among the states parties to establish a thoroughgoing modification of the treaty at issue. See eg Al-Saadoon v United Kingdom ECHR 2010-II 61 (wherein various national legislative and judicial practices prohibiting the death penalty were taken as grounds for determining that clauses in the ECHR permitting recourse to capital punishment had been modified out of the convention). See J Arato, ‘Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations’ (2013) 38 Yale J Intl L 289; G Nolte, ‘Report 2. Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice’ in G Nolte (ed), Treaties and Subsequent Practice (OUP 2013) 210, 244.

\(^{60}\) Indeed even within the US, Justice Powell offered a rare reflection on the point in 1972—noting that ‘[u]ntil international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law’. First National City Bank v Banco Nacional de Cuba 406 US 759, 775 (1972). And there is reason to believe that as a matter of politics the potential of national courts in this regard is more potent than ever. Writing in 1993, Benvenisti lamented that Powell’s words seemed ‘somewhat idyllic’ in view of the extent to which national courts defer to their respective executives. Benvenisti (n 9) 159. But revisiting the point only sixteen years later, and noting in particular a tendency of national courts to rein in executive discretion in matters of foreign affairs, including interpretive authority, the same author finds dramatically increased prospects for national courts to play a robust and desirable jurisgenerative role. Benvenisti and Downs (n 9) 60 (‘In retrospect, it is now increasingly clear that the continued persistence with which national courts employed such heuristics was a mistake which has serious consequences’, among them ‘limit[ing] their influence over the design and subsequent operation of the rapidly expanding international regulatory apparatus’).
at least consider the needs of the international order with which they are engaging when determining whether and how to defer to national executives in matters of interpretation.

From this perspective it seems important that domestic courts are engaging with and enforcing international law, and as a result have a responsibility to ensure that the state applies such international legal commitments in good faith—in parallel to (or even despite) the courts’ responsibility to their own national interests. From another point of view, the basic idea of the national court’s dual responsibility to the international legal order alongside its duty to its own municipal system is classically captured by Georges Scelle’s concept of dédoublement fonctionnel (functional doubling), whereby the domestic court is reconceived as an agent of both its own national legal order as well as the international legal order, depending on the norms it is charged with applying in a particular case.61

Here again the extent to which domestic judicial deference to the executive seems appropriate will depend upon which values we emphasize: with fidelity, consistency, and coherence in the interpretation and application of international treaty norms on the one hand,62 and flexibility, dynamism, and even experimentalism on the other.63 The issue comes down to the branches’ different institutional capacities, and to an extent their divergent logics of action. On the one hand, as noted by Benvenisti and Downs, the tendency to defer to executive policy in the interpretation of international legal rules has ‘limited the influence of national courts on the design and subsequent operation of the rapidly expanding international regulatory apparatus when more active engagement on their part might have led to a more coherent and less fragmented international legal system’.64 But on the other hand there may be situations in which the executive is better positioned to advance innovative interpretations (unilaterally or by negotiation with its foreign counterparts), and where some executive flexibility to experiment would be desirable. Indeed, both the extremes of total- or zero-deference seem suspect, and better answers will have to be sought within a spectrum of legitimate possibilities in between.

As with the national perspective, total judicial deference to the executive seems untenable from the perspective of international law. Recognizing that as regards treaty interpretation the issue of judicial deference generally comes up in the context of disputes where the executive is a party (or at least an amicus), the potential for executive self-dealing against the interests of the other treaty parties is simply too great to support a maximally deferential approach.65 We are here not only

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61 G Scelle, Précis de droit des gens: principes et systématique (Sirey 1932) vol 1, 43, 54–6, 217; G Scelle, Précis de droit des gens: principes et systématique (Sirey 1934) vol 2, 10, 319, 450; A Cassese, ‘Remarks on Scelle’s Theory of “Role-Splitting” (dédoublement fonctionnel) in International Law’ (1990) 1 EJIL 210; and more recently O Frishman and E Benvenisti, ‘National Courts and Interpretive Approaches to International Law: The Case Against Convergence’ in this volume, at 317, 328 (on the concept of sovereigns as trustees of humanity).


63 Frishman and Benvenisti (n 61).

64 Benvenisti and Downs (n 9) 60.

65 Criddle (n 7).
worried about executive self-dealing proper (ie interpretations shoring up the executive’s own power as an organ), but also the temptation to use interpretation as a tool to further the interest of the state as against that of the other treaty parties. And even putting self-dealing to the side, such strong judicial deference will be troubling in and of itself to those who emphasize unified and consistent approaches to interpretation across national and international courts as a feature of the international rule of law—particularly insofar as it enhances executive discretion and may obviate the executive’s need to explain interpretive choices.

But a zero-deference approach is not necessarily desirable either. First it must be recognized that judicial refusal to defer to the executive does not necessarily imply that the domestic court will actually do a better job interpreting a treaty from the perspective of the VCLT, either due to pre-commitments to domestic canons of interpretation,66 due to less familiarity with the subtleties of interpreting international treaties under the Vienna rules, or indeed less familiarity with the complexities of a highly technical treaty regime.67 Second, and likely more controversially, a degree of interpretive discretion for national executives may be a good thing for the international legal order.68 Executives may be in a better position than domestic courts to advance new or dynamic interpretations of international treaty obligations and to negotiate their interpretive positions with their foreign counterparts—as in the case of the trilateral interpretive negotiations to define the meaning of ‘fair and equitable treatment’ in the context of the NAFTA.69 Stated differently, executives may have a degree of flexibility and responsiveness necessary for experimentation in the long-term application and development of treaty regimes that domestic courts may lack.70 While total judicial deference may incentivize self-dealing or nationalistic manoeuvring, total judicial supervision may prove a bar to progress and risk stagnation.

So here again it seems like some degree of balance is appropriate—but it is much less evident, along this axis, that far-reaching deference to the executive would be particularly beneficial. There is some reason to think that a degree of executive discretion to advance and negotiate adventurous interpretations may be valuable from the international perspective, but the broader takeaway from this standpoint is that national courts should be cautious: too much deference can undermine the international treaty, the intentions of the parties, and more generally the international rule of law. Still, although the balance seems to tip more clearly toward independent review from this point of view, as compared to the national perspective, the question of how exactly to strike the right balance ultimately proves mercurial here as well.

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66 See BG Group (n 6) (Relying on domestic canons for the interpretation of contracts in interpreting the provisions of a BIT); Bederman (n 16).
67 Frowein (n 10) 85. 68 See Frishman and Benvenisti (n 61) 327.
70 But see Benvenisti and Downs (n 9) 65 (finding analogous potential in dialogue between national courts, without as much of the downsides of executive discretion).
3. Interests of individual litigants

The final axis involves the interests of individual litigants in particular cases. Often questions of treaty interpretation arise in the context of litigation by individuals (or private legal persons) against the state or state officials, or in cases where the state is a highly interested party. In such instances the court has a responsibility to the individual beyond its responsibility to the national interest and the interests of the international legal order. At a minimum, domestic courts must maintain a modicum of equality of arms among the parties to a dispute, which will strongly cut against deference to the executive where either the state or executive itself is on one side of the litigation.71 Here again the concern is self-dealing by the state, but as a short-term matter relating to the particular dispute.

From the perspective of individual litigants it seems clear that heavy deference is inappropriate. However it is not clear that this perspective calls for zero-deference either—at least not in all cases. Much will turn on the particular kind of treaty under interpretation, and the involvement of the state or state officials in the particular case. Where a dispute involves an individual claim based on clearly reciprocal treaty obligations, like certain privileges and immunities provisions, or certain provisions in diplomatic treaties, greater deference may be appropriate so as not to impair the executive’s capacity to negotiate with or secure compliance from the state’s treaty partners. But where a dispute involves integral obligations, like fundamental human rights, deference become increasingly problematic.72

This is not to say that the distinction between reciprocal and integral obligations can always be neatly drawn in the context of rights conferring treaty provisions. Certain consular rights provisions, for example, may fall somewhere in between.73 But it is crucial to bear in mind that in disputes involving the rights of individual litigants, both the risk and potential harm of executive self-dealing are particularly high. In cases of ambiguity about the kinds of obligations at issue, at least from this perspective of individual litigants, the human interests at stake would seem to weigh in favour of erring toward more independent review in cases of ambiguity.

V. Conclusion

I do not pretend to have canvassed all of the relevant values along each of these axes. I hope to have shown, however, that the relevant interests and values that ought to be considered are not merely national, but also international and individual. And along each axis they pull in both directions—sometimes toward deference and other times toward independent review.

71 See Franck (n 14) 116.
72 See Arato (n 4); M Fitzmaurice, ‘Interpretation of International Human Rights Treaties’ in D Shelton (ed), The Oxford Handbook of International Human Rights Law (OUP 2013) 739.
73 Sanchez-Llamas (n 12); Medellin v Texas 552 US 491 (2008).
From the national perspective, there are a host of values in play, some pulling towards deference to the executive (flexibility in foreign affairs, executive expertise, and raison d’état more generally) and others just as strongly pulling towards de novo review (judicial independence, limits to executive power). These are all important values. Taken together, they caution against a zero-sum approach to apportioning interpretive authority among the branches of government.

Similarly, from the international perspective the varied values at stake pull in both directions, with some favouring deference (interpretive flexibility on the international level, dynamism, and experimentalism) and others favouring independent review grounded in the Vienna Rules (fidelity, consistency, and coherence in the interpretation and application of international treaties across parties and concerns about national self-dealing).

Even in view of the interests of individual litigants there are sometimes reasons to afford more deference to executive interpretation depending on the kind of treaty in question (as in the case of reciprocal norms where the executive may be best placed to assess the compliance of foreign treaty parties). However, in general, individual interests tend to press in favour of increased judicial independence (eg equality of arms in litigation and protection from self-dealing by an executive or state party to the litigation at hand).

The first conclusion we can draw from this canvas is that across all three of the above axes the extremes of total-deference and zero-deference seem normatively suspect. And it is important to recall that these extremes are not hypothetical straw men. As recounted above, both poles have been embodied: prior to the 1990s, in France and Mexico, judges effectively afforded total deference to executive interpretations, and arguably the US courts came close to this position during the Rehnquist era (despite adopting more balanced rhetoric); in Austria, Canada, and Germany, as in the Early American Republic, no degree of formal deference to the executive is contemplated and judges engage in (more or less) completely independent review. Though the latter is surely preferable to the former, either extreme solution would seem to abandon important values. As Louis Henkin observed, ‘[t]here is reason for due deference to the executive, but not for undue deference—for due judicial humility, but not undue humility’.74

There seems to be a real value in some degree of deference, certainly in terms of legitimate national interests, but even in light of certain international interests and along the axis of individual interests, at least with respect to certain kinds of treaty norms.

Further, we can conclude that national practices in this area are not especially static. Many of these countries have shifted their practices dramatically over the years—and not only the common law jurisdictions. Judicial practice has shifted course several times within the United States alone, but it has also changed dramatically in civil law countries like France in 1990, and Mexico between the 1990s

74 I. Henkin, Constitutionalism, Democracy, and Foreign Affairs (Columbia UP 1990) 72; see also Franck (n 14) 128.
Deference to the Executive

and the 2000s. If the reality of extreme positions makes thinking about reform desirable, the reality of change makes its prospect plausible.\footnote{Benvenisti and Downs (n 9) 60.}

We can go so far as to suggest that national courts and legislatures should avoid hewing to the extremes of zero- or total-deference at risk of undermining important national, international, and individual values. Peering further, in light of all three axes of interest, taken together, there does seem good reason to remain suspicious of deference schemes that afford a great deal of weight to executive positions on interpretation—particularly in light of the international and individual axes. But in terms of specifics, beyond rejecting the poles we can do little more than endorse a balanced, responsible approach. Even in the abstract it is difficult to find the right balance across any one of these axes, and all the more so when trying to balance all three.\footnote{It is not easy to see how to achieve a perfect balance. Differently held values will lead to different conclusions. One way to balance international and national interests would be for courts to engage in a prima facie VCLT review, and deferring to any executive interpretations permissible under the international rules on interpretation. This approach recognizes that the Vienna rules may support a wide range of permissible alternatives and tries to grant executives limited flexibility within the broad framework of the VCLT. Such a scheme may seem the perfect balance to those invested in unity among judicial approaches to interpretation, but it would likely prove much less palatable to those truly invested in executive flexibility or even dynamism in the law of treaties. For additional attempts at balance, see Criddle (n 7) (attempting to pull things together through a take on a canon of US administrative deference (\textit{Skidmore} deference) modified to take into consideration the views of treaty parties and the interests of individual litigants); Frishman and Benvenisti (n 61) 327 (arguing \textit{mutatis mutandis} against rigidly unified approaches to interpretation in domestic courts vis-à-vis the Vienna Rules in the interest of flexibility, dynamism, and experimentalism, advocating instead an approach under the rubric of sovereign's as trustees of humanity).}
The problem is that the various interests at stake are not fully reconcilable—there is a lot of leeway left to national institutions, and a lot will depend on any particular actor’s vision of national courts and executives within the international system. No matter where we stand, the picture never comes into perfect view.

But even more importantly there is good political reason to balk at making more fine-grained abstract conclusions about the ‘correct’ way to balance executive and judicial interpretive authority across space and time. The question of weighing and balancing the relevant values is extremely contextual, depending on widely different political and cultural values. In Mexico, for example, the shift from deference to \textit{de novo} judicial treaty interpretation from the 1990s to the 2000s reflects a major political transition, from authoritarian presidentialism to a more robust democracy where judicial independence has become an increasingly central value. The decline of Mexican judicial deference in treaty interpretation cannot and should not be divorced from broader political dynamics.\footnote{See Aust, Rodiles, and Staubach (n 32) 92.}

More generally, the question of balancing interpretive authority implicates fundamental socio-political and historical narratives as much as abstract questions of institutional design—and the right answers for the right time and place depend on close case-by-case analysis.

What we can say, beyond rejecting the extreme poles, is that a proper balance will entail \textit{some} consideration of all three axes of interest. By way of closing hypothesis,
the distinction between an *ethic of responsibility* and an *ethic of ultimate ends* is helpful in qualifying the appropriate judicial attitude toward weighing the interests at stake. Some form of accommodation of all of these categories of interest is necessary in apportioning interpretive authority between domestic courts and executives, and the concept of deference to the executive is an important tool for constructing a balanced regime (though it is surely not the only available tool). Since no perfect balance can be achieved in the abstract, the specifics will often be up to judges embedded in their own national milieux. All that we can insist on, and indeed all that we should insist on, is that national judicial interpreters consider all three axes of interests; the appropriate balancing mechanism will have to depend on which interests are emphasized.

79 Benvenisti (n 9) (examining avoidance doctrines as a tool for enhancing executive discretion, and advancing judicial dialogue among national courts on matters of treaty interpretation as mechanisms for reining it in).