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Not-so-Great Weight: Treaty Deference and the Article 10(a) Controversy

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NOT-SO-GREAT WEIGHT: TREATY DEFERENCE AND THE ARTICLE 10(a) CONTROVERSY

Abstract: For the past twenty-one years, federal courts interpreting Article 10(a) of the Hague Service Convention have arrived at opposite conclusions about whether the provision authorizes litigants to serve process on foreign defendants directly through the mail. The dispute arises because of ambiguous wording in the Article, which states that litigants may "send judicial documents" by mail, but says nothing of "service." At first blush, the dispute appears to turn on dueling principles of statutory interpretation: courts that adhere rigidly to text do not allow direct mail service, whereas courts that look past text, to intent, do. This Note argues, however, that the controversy is explained by a problem particular to treaty interpretation: when the executive branch renders its opinion on the meaning of a treaty, federal courts do not have a principled standard by which to weigh the amount of deference due to this opinion. This Note argues that the *Skidmore* standard, of administrative law, best fills the gap.

Introduction

The recent massive recall of Toyota automobiles has already begun to reach the courts.[1] As the various lawsuits progress, it is likely that many plaintiffs will want to sue not only Toyota in the United States, but also some of its suppliers in Japan.[2] Fortunately for these plaintiffs, the United States and Japan are both parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Convention" or the "Hague Service Convention"), a multilateral treaty that establishes a simplified procedure for serving process on foreign defendants.[3] In accordance with Article 5 of the Convention, the plaintiffs can simply send a copy of their summons and complaint to a designated Japanese "Central Authority,"

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[1] *See* Tatsuhito Iida, *Lawsuits Against Toyota Increase Sharply in U.S.*, Daily Yomiuri (Japan), Feb. 17, 2010, at 7.

[2] *See* Bill Vlasic, *Lawsuit Adds to Difficulties for Carmaker*, N.Y. Times, Feb. 5, 2010, at A1 (describing one plaintiff's efforts to recover damages from both Toyota and one of its Japanese suppliers, Denso).

[3] *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Convention].

who will then serve the defendants in accordance with Japanese law.[4] Unfortunately for the plaintiffs, however, the Central Authority procedure has been found to be a "time-consuming, costly, and potentially fruitless" endeavor.[5]

Because litigants in the United States must comply with the Convention whenever there is "occasion to transmit a judicial or extrajudicial document for service abroad,"[6] many have sought to save time and money by using Article 10(a), which appears to authorize direct service by registered mail.[7] Use of this method, however, has given rise to a significant amount of litigation in U.S. courts over the past twenty years.[8] Specifically, the U.S. courts of appeals are currently split over whether Article 10(a) of the Convention authorizes initial service of process by registered mail ("service by mail").[9] Article 10(a) refers to the freedom to "send judicial documents" directly by postal channels; some courts see this as permitting initial service by mail,[10] whereas others see it as permitting only the sending of subsequent judicial documents by mail.[11]

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[4] *See id.* art. 5.

[5] *In re* LDK Solar Sec. Litig., No. C 07-05182 WHA, 2008 WL 2415186, at *1 (N.D. Cal. June 12, 2008); *see also* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., concurring) (noting the potentially high cost of serving defendants through the Japanese Central Authority); *cf.* GMA Accessories, Inc. v. BOP, LLC, No. 07 Civ. 3219(PKC)(DCF), 2009 WL 2856230, at *1 (S.D.N.Y. Aug. 28, 2009) (noting that plaintiff estimates a twelve-month delay in serving defendants through the Argentine Central Authority).

[6] *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (quoting Convention, *supra* note 3, art. 1). As the name implies, the Convention only applies to civil or commercial matters. *See id.* Under U.S. Supreme Court precedent, whether the method of service requires transmittal abroad is defined by the internal law of the forum state. *See id.* at 700.

[7] *See infra* note 175 and accompanying text.

[8] *See infra* note 175 and accompanying text.

[9] Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F.3d 374, 383 (5th Cir. 2002) (recognizing a circuit split).

[10] *See, e.g.*, Brockmeyer v. May (*Brockmeyer II*), 383 F.3d 798, 802 (9th Cir. 2004); Ackermann v. Levine, 788 F.2d 830, 838–40 (2d Cir. 1986); Rae Group, Inc. v. AISEC Int'l, No. 08-10364, 2008 WL 4642849, at *3 (E.D. Mich. Oct. 20, 2008). This Note uses "initial service of process" to mean the formal delivery of documents, such as a service and complaint, that are sufficient to give the defendant legal notice of a pending action against him or her. *See Volkswagenwerk*, 486 U.S. at 700.

[11] *See, e.g.*, *Nuovo Pignone*, 310 F.3d at 384; *Bankston*, 889 F.2d at 174; Humble v. Gill, No. 1:08-cv-00166-JHM-ERG, 2009 WL 151668, at *2 (W.D. Ky. Jan. 22, 2009). This Note uses "subsequent judicial documents" to mean all legal documents other than those defined *supra* note 10. The distinction is obviously crucial for the purposes of U.S. procedural law, where initial service of process is used to establish personal jurisdiction over the defendant. *See* FED. R. CIV. P. 4(k).

The issue of whether service by mail is permitted under the Convention has ramifications in many areas of the law and not surprisingly has generated a significant body of scholarly literature.[12] Beyond the issues of time and expense to private litigants, resolution of the controversy also has consequences in areas such as international sovereignty[13] and the enforcement of judgments across borders.[14] Simply put, improperly serving a foreign defendant abroad can be viewed as an affront to the host country's sovereignty and can result in an inability to enforce the resulting judgment in that country's courts.[15]

U.S. courts deciding this issue have split along classic "textualist-contextualist" lines, with one side finding the Convention's text controlling, and the other side looking at the intent of the Convention's drafters.[16] One line of cases follows the 1986 decision by the U.S. Court of Appeals for the Second Circuit in *Ackermann v. Levine* and holds that the treaty's drafters intended to allow service by mail.[17] The other line of cases follows the 1989 decision by the U.S. Court of Appeals for the Eighth Circuit in *Bankston v. Toyota Motor Corp.* and holds that the treaty's text does not allow for such service.[18] Scholars analyzing the controversy generally do so along textualist-contextualist lines as well.[19]

Beyond this familiar interpretive distinction, the controversy also raises questions specific to treaty interpretation, as distinguished from

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[12] *See infra* notes 110–158 and accompanying text. For a helpful overview of the many areas of law affected by resolution of this issue, see RALPH G. STEINHARDT, *International Judicial Assistance: Service of Process and the Production of Evidence*, *in* INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW 259, 259–95 (2002).

[13] *See* Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" Under the Hague Service Convention*, 55 UCLA L. REV. 205, 209–10 (2007) (discussing the sovereignty concerns raised by service of process in a foreign country).

[14] *See id.* at 217 (discussing the difficulty of collecting a money judgment abroad if the plaintiff's method of service does not conform to the Convention).

[15] *See* STEINHARDT, *supra* note 12, at 259–60.

[16] *See generally* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009) (providing an overview of the "textualist-contextualist" debate).

[17] 788 F.2d at 838–40; *see supra* notes 48–58 and accompanying text.

[18] 889 F.2d at 174; *see supra* notes 59–72 and accompanying text.

[19] *See, e.g.*, Alexandra Amiel, Note, *Recent Developments in the Interpretation of Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 24 SUFFOLK TRANSNAT'L L. REV. 387, 396–408 (2001) (engaging in a comparative analysis according to principles of statutory construction); Christine A. Elech, Note, *A Cosmopolitan Approach to Treaty Interpretation: Why Service by Postal Channels Should Be Permitted Under the Hague Service Convention*, 36 N. KY. L. REV. 163, 167–73 (2009) (describing the debate through the lens of statutory construction); Patricia N. McCausland, Note & Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177, 189–97 (1992) (analyzing text and intent of the drafters).

statutory interpretation.[20] Whereas statutes are created by Congress, treaties are created primarily by the President under Article II of the U.S. Constitution, with the Senate giving its advice and consent by a two-thirds majority.[21] Given this fact, some scholars argue that a treaty ought to be interpreted differently from a statute, with more weight given to the meaning assigned to the treaty by the executive branch.[22] These scholars draw on the U.S. Supreme Court's 1961 decision in *Kolovrat v. Oregon*, in which the Court stated that "[w]hile 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."[23] Lower courts have used this ambiguous standard to guide their interpretation of treaties ever since.[24]

This Note charts new territory by arguing that outcomes in Article 10(a) cases are explained by the lack of a principled approach to treaty deference.[25] Courts deciding the Article 10(a) issue have split largely because they are unsure of how much deference to accord the U.S. Department of State's 1991 opinion, stating that service by mail is permitted under the Article.[26] The deference model courts are relying on, taken from the Supreme Court's decision in *Kolovrat*, is inadequate because it does not require a court to undertake a principled analysis of whether or not to defer.[27] Instead, courts that agree with the executive branch's interpretation of Article 10(a) simply defer to it, and courts that do not agree do not defer.[28] This Note argues that the U.S. Supreme Court should harmonize judicial treaty interpretation by adopting a model of treaty deference based on the Court's 1944 decision in *Skidmore v. Swift & Co*, an administrative law case.[29]

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[20] *See* Elech, *supra* note 19, at 179–80 (noting some of the interpretive difficulties raised by applying statutory construction principles to the Hague Service Convention).

[21] *See* U.S. CONST. art. II, § 2, cl. 2.

[22] *See infra* notes 110–122 and accompanying text.

[23] 366 U.S. 187, 194 (1961).

[24] *See infra* notes 194–230 and accompanying text.

[25] *See infra* notes 194–230 and accompanying text.

[26] U.S. Dep't of State op. Regarding the *Bankston* Case, 30 I.L.M. 260, 260, 263 (1991) (citing Letter from Alan J. Kreczko, Deputy Legal Advisor, U.S. Dep't of State, to the Admin. Office of the U.S. Courts (Mar. 14, 1991)) [hereinafter Kreczko letter].

[27] *See infra* notes 258–292 and accompanying text.

[28] *See infra* notes 258–292 and accompanying text. Debates about this sort of reasoning are not unfamiliar to the Supreme Court's own jurisprudence. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment) ("When we wish to strike down a practice [the *Lemon* test] forbids, we invoke it . . . ; when we wish to uphold a practice it forbids, we ignore it entirely . . . .").

[29] 323 U.S. 134, 140 (1944); *see infra* notes 257–277 and accompanying text.

Part I discusses the purpose and text of the Hague Service Convention and the history of judicial interpretation of Article 10(a) in U.S. courts.[30] Part II examines deference to the executive branch in treaty interpretation and some of the main proposed models for deference.[31] Part III considers the circuit and district court cases deciding the Article 10(a) issue post-*Ackermann* and *Bankston*, and concludes that lack of a principled deference model is a major factor in the outcomes of these cases.[32] Finally, Part IV applies both the *Skidmore* model and a model based on the Supreme Court's 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*,[33] and argues that the *Skidmore* model is more easily adapted to treaty deference.[34]

I. History of Judicial Interpretation of the Convention

A. *Background and Text of Hague Service Convention Article 10(a)*

The Hague Service Convention entered into force in 1969, and there are currently sixty-one parties to the Convention, including the United States.[35] A primary reason for the United States' —the first nation to ratify the treaty—participation in negotiations was to create a "unitary approach" such that foreign nations would not be required to negotiate separately with each U.S. state on how to exchange judicial documents.[36]

The stated purposes of the treaty are twofold: (1) to ensure that recipients of judicial documents receive timely notice; and (2) to simplify and expedite judicial assistance for that purpose.[37] To achieve its

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[30] *See infra* notes 35–79 and accompanying text.

[31] *See infra* notes 80–158 and accompanying text.

[32] *See infra* notes 159–193 and accompanying text.

[33] 467 U.S. 837, 842–44 (1984).

[34] *See infra* notes 194–292 and accompanying text.

[35] *See* Convention, *supra* note 3; Hague Conference on Private International Law, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Apr. 25, 2010). The most recent country to ratify the treaty was Australia, on March 15, 2010. *Id.*

[36] *See* Stephen F. Downs, Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 Cornell Int'l L.J. 125, 125, 126 (1969) (citing S. Rep. No. 85-2392, at 7 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201, 5206).

[37] *See* Convention, *supra* note 3, pmbl. Manifold other purposes, however, have been identified in the literature on the treaty's creation. *See* Hawkins, *supra* note 13, at 210–13 (highlighting the various purposes of the Convention). For example, European nations with civil law systems were apparently concerned by the lack of a central authority for service of process in the United States; in those countries, service of process is generally seen as an act of the sovereign, not of private parties. *See* Downs, *supra* note 36, at 128–29. By

goals, the Convention sets out specific methods for serving process abroad.[38] Articles 2 through 6—the "heart" of the treaty[39]—establish a system by which each nation creates a "Central Authority" to receive requests for transmission of judicial documents.[40] Article 8 states that parties to the treaty may serve persons abroad directly through their diplomatic or consular agents.[41] Under Article 9, parties to the treaty are free to use consular channels to forward documents to officials in the receiving country authorized to serve process.[42] Under Article 19, litigants may forward service documents in any manner permitted by the internal law of the receiving country.[43]

Article 10 is not as straightforward.[44] It reads:

> Provided the State of destination does not object, the present Convention shall not interfere with—
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> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers . . . of the State of origin to effect service of judicial documents directly through the judicial officers . . . ;
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers . . . of the State of destination.[45]

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contrast, American lawyers generally had no problems effecting service abroad, but wished to abolish the notorious practice of *notification au parquet*, where a plaintiff could submit service of process documents to a local official, but the service was deemed valid regardless of whether the official actually sent the documents to the intended recipient. *See id.* at 129–30.

[38] *See* Convention, *supra* note 3, arts. 2–10, 19.

[39] R. Griggs Group Ltd. v. Filanto Spa, 920 F. Supp. 1100, 1104 (D. Nev. 1996).

[40] Convention, *supra* note 3, arts. 2–6. In the United States, the Central Authority is the Department of Justice, Civil Division, Office of International Judicial Assistance. Hague Conference on Private International Law, Central Authorities, http://www.hcch.net/index_en.php?act=authorities.details&aid=279 (last visited May. 20, 2010). That office has outsourced process duties to a private company: Process Forwarding International of Seattle, WA. *Id.* The privatization of service of process under the Convention raises interesting issues beyond the scope of this Note, but explored elsewhere. *See generally* Emily Fishbein Johnson, Note, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?*, 37 Geo. Wash. Int'l L. Rev. 769 (2005).

[41] Convention, *supra* note 3, art. 8.

[42] *Id.* art. 9.

[43] *Id.* art. 19.

[44] *See* Hawkins, *supra* note 13, at 220–24.

[45] Convention, *supra* note 3, art. 10.

Because Article 10(a) speaks only of the freedom to "send" judicial documents, but not to serve them, a split in U.S. courts has arisen over whether the provision permits initial service by mail, or merely permits sending subsequent judicial documents by mail.[46]

B. *Judicial Interpretations of Article 10(a)*

The purported ambiguity in Article 10(a) has given rise to two interpretive approaches, one based on the intent of the treaty's drafters and permitting service by mail, and the other based on the treaty's text and rejecting service by mail.[47]

1. Permitting Service by Mail: The *Ackermann* Case

The first approach arose in the case of *Ackermann v. Levine* in 1986, where the U.S. Court of Appeals for the Second Circuit held that service by mail is permitted under Article 10(a).[48] The *Ackermann* case involved a German plaintiff's attempts to serve process upon an American defendant for a lawsuit initiated in a German court.[49] The plaintiff, Peter Ackermann, was a German lawyer who sued to recover legal fees allegedly owed to him by Ira Levine, for work on a real estate transaction.[50] He sent a summons and complaint to the German Consulate in New York, which mailed them via registered mail,[51] first to the defendant's former address in New Jersey, and then to his apartment in Manhattan.[52]

The *Ackermann* court's ruling that service by mail is permitted under Article 10(a) was based on two rationales: honoring the intent of

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[46] Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F.3d 374, 383 (5th Cir. 2002) (acknowledging a circuit split).

[47] *See* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989); Ackermann v. Levine, 788 F.2d 830, 838–40 (2d Cir. 1986).

[48] 788 F.2d at 838.

[49] *Id.* at 834, 837.

[50] *Id.*

[51] Throughout this Note, the term "registered mail" refers to any form of mail requiring a receipt to be signed by the recipient upon delivery. Service by ordinary first class mail, not requiring such signature, is generally not permitted by any U.S. courts interpreting the Convention. *See, e.g.*, Brockmeyer v. May (*Brockmeyer II*), 383 F.3d 798, 806, 808 (9th Cir. 2004) (interpreting FED. R. CIV. P. 4(f)(2)(A) (authorizing international service by means used in the receiving country's courts of general jurisdiction)); *Ackermann*, 788 F.2d at 839 ("[S]ervice of process by registered mail remains an appropriate method of service in this country under the Convention."); Rae Group, Inc. v. AISEC Int'l, No. 08-10364, 2008 WL 4642849, at *3 (E.D. Mich. Oct. 20, 2008) (interpreting Convention to allow service by "registered international mail").

[52] *Ackermann*, 788 F.2d at 837.

the drafters, and promoting the purpose of the Convention.[53] The court noted as an initial matter that the United States had not objected to Article 10(a) when it ratified the Convention, thus satisfying that requirement of the Article.[54] The court next referred to the drafting history of the treaty by consulting two sources: (1) the *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, published by the Permanent Bureau of the Hague Conference; and (2) an analysis of the Convention's negotiating history by Bruno Ristau, a former director of the Office of Foreign Litigation at the U.S. Department of Justice.[55] The latter document examined the negotiating history of the Convention, finding that the final text of the Convention incorporated an earlier draft, which in turn incorporated an earlier report, which authorized service by mail.[56] The Ristau analysis concluded, and the court in *Ackermann* agreed, that the use of "send" rather than "service" was attributable to careless drafting; the drafters in fact intended to permit service by mail.[57] Finally, the court reasoned that because federal courts had upheld service by mail into foreign countries that, like the United States, had not objected to Article 10(a), the Convention's purpose of unifying the rules of service abroad was best served by allowing such service into the United States as well.[58]

2. Rejecting Service by Mail: The *Bankston* Case

The second approach originated in a 1989 decision by the U.S. Court of Appeals for the Eighth Circuit in *Bankston v. Toyota Motor Corp.*[59] *Bankston* involved a tort action by an American plaintiff who sought damages resulting from a truck accident that involved a Toyota

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[53] *See id.* at 839–40. The court also weighed the treaty's language against the Federal Rules of Civil Procedure. *Id.* at 840.

[54] *Id.* at 839; *see* Convention, *supra* note 3, art. 10 ("Provided the State of destination does not object . . . .").

[55] *See Ackermann*, 788 F.2d at 839 (citing *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 30 (1984)); *R. Griggs*, 920 F. Supp. at 1106 n.9 (providing Ristau's background); 1 B. Ristau, International Judicial Assistance (Civil and Commercial) §§ 4–10, at 132 (1984)).

[56] *See* L. Andrew Cooper, Note, *International Service of Process by Mail Under the Hague Service Convention*, 13 Mich. J. Int'l L. 698, 706–07 (1992).

[57] *See Ackermann*, 788 F.2d at 839 (citing Ristau, *supra* note 55, §§ 4–28, at 165–67).

[58] *See id.* at 839–40 (citing Sieger v. Zisman, 106 F.R.D. 194 (N.D. Ill. 1985); Weight v. Kawasaki Heavy Indus., 597 F. Supp. 1082, 1085–86 (E.D. Va. 1984); Chrysler v. Gen. Motors, 589 F. Supp. 1182, 1206 (D.D.C. 1984)).

[59] 889 F.2d at 173–74.

truck.[60] The plaintiff attempted to serve process upon Toyota by sending a summons and complaint by registered mail to the defendant in Tokyo, Japan.[61] The court held that sending process in this manner was not permitted under the Convention, and remanded with instructions to give the plaintiff a reasonable amount of time to serve process in accordance with the treaty.[62]

The Eighth Circuit's ruling in *Bankston* relied primarily on canons of statutory construction in holding that service by mail is not permitted under Article 10(a).[63] The court cited the elemental rule that where the language of a statute is clear, and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[64] Analyzing the text, the court reasoned that the drafters of the Convention used the word "service" throughout the Convention, but not in Article 10(a), where they used "send."[65] The court followed the familiar canon of construction, that where a legislative body includes language in one section, but omits it elsewhere, it is generally presumed to act intentionally in so doing.[66] Thus, the court concluded, the use of "send" was not mere careless drafting.[67] Rather, "send" must have been intentionally used to indicate that only subsequent judicial documents, and not initial service of process, were permitted to be sent directly through the mail.[68]

The *Bankston* court thus relied primarily on an analysis of the treaty's text.[69] The court's only arguable foray into intent was essentially based on text: citing a California state case, the court went on to say that Japan's failure to "not object," as the Article's text allows it to do, could not be seen as acquiescing to service by mail, because Japan's own internal law does not allow such service.[70] Furthermore, Japan registered objections to the more formal methods of service in Articles 10(b) and (c), and thus should not be seen as having agreed to the in-

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[60] *Id.* at 172.
[61] *Id.*
[62] *Id.* at 174.
[63] *See id.* at 173–74.
[64] *Id.* at 174.
[65] *See Bankston*, 889 F.2d at 173–74.
[66] *See id.* at 174 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).
[67] *See id.* at 173–74.
[68] *See id.* at 174.
[69] *See id.* at 173–74.
[70] *See id.* at 174 (citing Suzuki Motor Co. v. Superior Court, 249 Cal. Rptr. 376, 379 (Ct. App. 1988)).

formal service by mail.[71] The court thus divined Japan's intent by looking at the text.[72]

3. Circuit Court Decisions Since *Ackermann* and *Bankston*

Following *Bankston* and *Ackermann*, two additional U.S. courts of appeals have decided whether service by mail is permissible under Article 10(a), with the U.S. Court of Appeals for the Fifth Circuit coming down against such service in the 2002 decision *Nuovo Pignone, SpA v. STORMAN ASIA M/V*,[73] and the U.S. Court of Appeals for the Ninth Circuit allowing it in the 2004 decision *Brockmeyer v. May*.[74] In doing so, the Fifth and Ninth Circuits relied substantially on the reasoning in the *Bankston* and *Ackermann* cases, respectively.[75] Indeed, the Ninth Circuit seemed to go even further than *Ackermann* in permitting service under the Convention, at first ruling that even service by ordinary, non-registered mail was permissible under the Convention, before eventually withdrawing that opinion.[76] More basically, though, the Ninth Circuit continued to rely on the purposes of the Convention in allowing service by mail, whereas the Fifth Circuit looked at the treaty's text and relied on canons of statutory construction.[77]

Fundamentally then, the split between the Eighth Circuit in *Bankston* and the Second Circuit in *Ackermann* is based on differing interpretive methods: the *Bankston* court relied on the treaty's text to conclude that service by mail is not permitted under Article 10(a), and the *Ackermann* court relied on the intent of the drafters to conclude that it is permitted.[78] In the context of statutory construction, the debate between so-called textualists and contextualists (also known as intention-

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[71] *Bankston*, 889 F.2d at 174.

[72] *See id.*

[73] 310 F.3d at 384.

[74] 383 F.3d at 808–09.

[75] *See id.* at 802 ("We agree with the Second Circuit that this holding is consistent with the purpose of the Convention to facilitate international service of judicial documents."); *Nuovo Pignone*, 310 F.3d at 384 ("We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail.").

[76] *See* Brockmeyer v. May (*Brockmeyer I*), 361 F.3d 1222, 1228 (9th Cir. 2004), *withdrawn*, 383 F.3d 798. After withdrawing this opinion, the Ninth Circuit issued a new opinion, and backtracked on its authorization of service by mere ordinary mail. *Brockmeyer II*, 383 F.3d at 808.

[77] *See Brockmeyer II*, 383 F.3d at 802–03; *Nuovo Pignone*, 310 F.3d at 384–85.

[78] *See Bankston*, 889 F.2d at 174; *Ackermann*, 788 F.2d at 838–40.

alists) is a familiar one, and it comes as no surprise to see judges and scholars rationalizing along these lines on a treaty issue.[79]

II. Deference in Treaty Interpretation

Treaty interpretation raises its own distinct interpretive concerns.[80] One important concern is the degree of deference that courts give to the interpretation of the executive branch, which is responsible for a treaty's negotiation and implementation.[81] Indeed, one scholar found that judicial deference to the executive branch might be the "single best predictor of interpretive outcomes in American treaty cases."[82] In the context of Article 10(a) of the Hague Service Convention, the executive branch's interpretation is clear: the U.S. Department of State issued a letter in 1991 (the "Kreczko letter") specifically disapproving of the result in the U.S. Court of Appeals for the Eighth Circuit's 1989 decision in *Bankston v. Toyota Motor Corp.*, and stating that service by mail is permitted under the Article.[83] In order to set the context for a discussion of the role of deference in interpretations of the Hague Service Convention, it is first necessary to discuss the principal rules of treaty interpretation as they now stand, the current doctrine of deference, and the proposed scholarly models for deference.[84]

A. *Treaty Interpretation Under U.S. Supreme Court Precedent*

1. Canons of Construction

Courts interpreting treaties often cite contradictory rules of construction.[85] A brief overview of U.S. Supreme Court precedent on treaty

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[79] *See* Cooper, *supra* note 56, at 705–14 (applying textualist and intentionalist methods of interpretation to Article 10(a)). *See generally* John F. Manning, *Textualism and Legislative Intent,* 91 Va. L. Rev. 419 (2005); Siegel, *supra* note 16.

[80] *See* Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 Tex. L. Rev. 777, 782 (2008) ("Treaties possess an additional layer of politics not present in statutes: the relationship of the United States, as a singular nation, with foreign states and their citizens.").

[81] *See id.* at 795 (stating that the executive branch is the primary governmental actor in the drafting and implementation of treaties); *see also* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 701–02 (2000) (explaining judicial deference in treaty interpretation).

[82] David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 1015 (1994).

[83] Kreczko letter, *supra* note 26, at 260.

[84] *See infra* notes 85–158 and accompanying text.

[85] *Compare In re* Harnischfeger Indus., Inc., 288 B.R. 79, 86 (Bankr. D. Del. 2003) ("In contrast to statutory construction, treaty provisions are to be interpreted according to context, drafting history and practical application."), *with* Knapp v. Yamaha Motor Corp.

interpretation is thus necessary as an initial matter.[86] The most basic rule of treaty construction is that in the United States, courts are the ultimate deciders of the interpretation of a treaty.[87] The effect that the Supreme Court, for example, gives to a treaty is binding upon the other branches of government.[88] No particular method of treaty interpretation is mandated by the U.S. Constitution; however, courts generally use canons of construction, as established by the Supreme Court, to guide their interpretation.[89]

The first canon of treaty construction, as with a statutory construction, is to start with a treaty's text.[90] The U.S. Supreme Court in 2008 stated this unequivocally in *Medellín v. Texas*.[91] The *Medellín* Court also described a second principal canon: because treaties are an agreement among sovereign powers, courts also consider the negotiation and drafting history of the treaty, and the post-ratification understanding of signatory nations.[92] Briefly stated, treaties should be interpreted to effectuate the intent of the parties.[93] Finally, a third basic canon of construction is that treaties should be construed liberally to protect substantial rights.[94] Which of these canons a court should apply to a treaty in a given case is a matter of substantial controversy.[95]

U.S. courts also look to the Vienna Convention on the Law of Treaties, which sets out the international rules on treaty interpretation.[96] Although the United States has never ratified the Vienna Convention,[97] and the Supreme Court only makes passing reference to it,

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U.S.A., 60 F. Supp. 2d 566, 570 (S.D. W. Va. 1999) (stating that courts interpreting treaties are governed by the text, "solemnly adopted" by signatory nations (quoting Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989))).

[86] *See infra* notes 87–109 and accompanying text.

[87] *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[88] *See* Bederman, *supra* note 82, at 956–57 (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

[89] *See id.* at 964–72 (analyzing the canons of treaty construction).

[90] Medellín v. Texas, 552 U.S. 491, 506 (2008).

[91] *Id.* ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

[92] *See id.* at 507.

[93] *See* Bederman, *supra* note 82, at 970.

[94] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 390–91 (2006) (listing liberal construction of treaties as a "fundamental interpretive rule").

[95] *See* David J. Bederman, Medellín*'s New Paradigm for Treaty Interpretation*, 102 Am. J. Int'l L. 529, 530 (2008) (describing debates on canons of statutory construction among U.S. Supreme Court justices).

[96] Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[97] U.S. Dep't of State, Vienna Convention on the Law of Treaties, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Apr. 25, 2010). Despite not being a party to the

lower courts—including courts of appeals—routinely cite its provisions when interpreting treaties.[98] Of particular interest here are Articles 31–33, which provide international canons for treaty interpretation.[99] Article 31 articulates the basic rule that treaties should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."[100] The treaty lists certain exceptions to this rule of adherence to text, the most important being that under Article 32, recourse may be had to preparatory materials if the meaning under Article 31 is ambiguous, or leads to an absurd or unreasonable result.[101]

2. Deference to the Executive

The U.S. Supreme Court's treatment thus far of deference to the executive branch in treaty interpretation can be summed up in two words: "great weight."[102] This phrase comes from the Court's 1961 decision in *Kolovrat v. Oregon*, where the Court was called upon to review an Oregon state inheritance law that conflicted with the 1881 Treaty of Friendship between the United States and Serbia.[103] The state statute cut off inheritance rights for foreign beneficiaries of estates living in Oregon, if the beneficiary's home country interfered with the inheritance rights of U.S. citizens.[104] The Court held that the state law violated the Treaty of Friendship, which requires that the United States grant the

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Vienna Convention, the U.S. government considers many of its provisions to constitute customary international law. *Id.*

[98] *See, e.g.*, Gandara v. Bennett, 528 F.3d 823, 827–28 (11th Cir. 2008) (interpreting the Vienna Convention on Consular Relations); Continental Ins. Co. v. Fed. Express Corp., 454 F.3d 951, 956–57 (9th Cir. 2006) (interpreting the United States' ratification of Montreal Protocol No. 4); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433–34 (2d Cir. 2001) (interpreting entry into force of Hague Protocol).

[99] *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 438 (2004).

[100] Vienna Convention, *supra* note 96, art. 31.

[101] *See id.* arts. 31–33.

[102] *Kolovrat*, 366 U.S. at 194. Although the subject of this Note is judicial deference to the executive branch, there is also authority for the proposition that courts may defer to the Senate's understanding of a treaty upon ratification. *See* Bederman, *supra* note 82, at 998. The Senate produces a substantial number of documents for a court to review when it gives its advice and consent to ratification under Article II of the Constitution. U.S. CONST. art. II, § 2, cl. 2; *see* Bederman, *supra* note 82, at 997. For example, Justice Stevens, in his concurrence in *Medellín*, cited Senate materials in his analysis of the Optional Protocol. 552 U.S. at 534 n.2 (Stevens, J., concurring in the judgment) (citing U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. 8071 (1992)).

[103] 366 U.S. at 188, 190.

[104] *Id.* at 188–89 & n.1.

same inheritance rights to Yugoslavian citizens living in the United States as it does to its own citizens.[105] In doing so, the court relied on diplomatic notes exchanged between the United States and Yugoslavian governments, and diplomatic correspondence and instructions regarding the treaty from the U.S. State Department; both showed that the treaty was intended to ensure that nationals of either country would enjoy inheritance rights, regardless of nationality, while living in the other's territory.[106]

The Court stated that although courts interpret treaties for themselves, the meaning given to them by departments of government charged with their negotiation and enforcement is entitled to "great weight," and thus the diplomatic correspondence and instructions were entitled to deference.[107] The "great weight" phrasing has been relied upon heavily by lower courts.[108] The lack of specificity in the statement, though, has given rise to considerable unpredictability in treaty cases.[109]

B. *Deference to the Executive Branch in Scholarly Literature*

Scholars writing on deference to executive branch treaty interpretations generally make one of three normative arguments: (1) that deference is never or hardly ever appropriate;[110] (2) that deference is always or almost always appropriate;[111] and (3) that deference may be appropriate, depending on a variety of factors.[112] Recognizing that the current standard is unclear, this Note will examine each of these in turn, focusing particularly on the third, and most popular, option.[113]

Scholars who oppose judicial deference to the executive branch's interpretation of treaties do so because they view such deference as an abdication of the primary judicial function to "say what the law is."[114] Under this line of interpretation, courts should review treaties just as

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[105] *See id.* at 196.

[106] *See id.* at 194–95.

[107] *Id.*

[108] *Id.*; *see* Sullivan, *supra* note 80, at 778.

[109] *See* Sullivan, *supra* note 80, at 778.

[110] *See* Michael J. Glennon, Constitutional Diplomacy 313–21 (1990).

[111] *See* John C. Yoo, Rejoinder, *Treaty Interpretation and the False Sirens of Delegation*, 90 Cal. L. Rev. 1305, 1309 (2002) ("[T]he treaty power as a whole . . . ought to be regarded as an exclusively executive power.").

[112] *See* Bradley, *supra* note 81, at 702–07 (applying the *Chevron* doctrine to treaty interpretation).

[113] *See infra* notes 114–158 and accompanying text.

[114] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see, e.g.*, Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 Vill. L. Rev. 25, 42–44 (2005).

they review statutes.[115] Anything short of full judicial review is inconsistent with our system of checks and balances, the argument goes, and is tantamount to abnegating the judicial role.[116]

Scholars in favor of broad or total deference to the executive branch on treaty interpretation counter that the treaty power is located in Article II of the Constitution, the section enumerating the powers of the Executive.[117] Therefore, *not* deferring to the executive branch's interpretation constitutes an improper delegation of the Executive's Article II powers to the judiciary.[118] Furthermore, the nature of international relations, a "fast-moving, dangerous environment," makes the Executive functionally best suited to interpret the United States' treaty obligations.[119] At least one scholar who advocates this approach buttresses his argument with historical materials, some of which indicate that the framers of the Constitution viewed the treaty power as executive in nature.[120]

Perhaps not surprisingly, the middle ground between the "no deference" and "absolute deference" views has gained the most favor amongst academics.[121] Within this middle ground, there are two main theories that purport to establish when a court should properly grant deference to the executive branch's interpretation of a treaty.[122]

1. The *Chevron* Model: A Two-Step Test

The first main theory of interpretation applies the *Chevron* doctrine, of administrative law, to the realm of treaty interpretation.[123] Named after the 1984 U.S. Supreme Court decision *Chevron U.S.A. v.*

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[115] *See* Glaushausser, *supra* note 114, at 42–44.

[116] *See id.* at 42 ("Federal courts' primary obligation, whether one labels it legal or moral, is to render opinions in the cases before them, not to abnegate that role in the name of unity.").

[117] *See, e.g.*, Yoo, *supra* note 111, at 1309.

[118] *See id.* at 1308.

[119] *Id.* at 1309.

[120] *See* John Yoo, Review Essay, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 882–95 (2001) (analyzing historical materials and concluding that the framers saw the treaty power as related to the Executive's general authority over foreign affairs).

[121] *See* Sullivan, *supra* note 80, at 779 (describing the popularity of *Chevron* deference among academics).

[122] *See id.*

[123] *See* Bradley, *supra* note 81, at 702–07 (advocating for use of the *Chevron* doctrine in treaty interpretation). *Chevron U.S.A. v. Natural Resources Defense Council* dealt with the Environmental Protection Agency's interpretation of a statute, the Clean Air Act. 467 U.S. 837, 839–40 (1984).

Natural Resources Defense Council,[124] the doctrine asserts that courts should engage in a two-part analysis to decide whether deference to the executive branch is warranted in a particular statute.[125] The first step is to ask whether Congress has clearly spoken on the issue; if it has, the reviewing court must conclude its inquiry and give effect to the unambiguous text.[126] If not, the next step is to determine whether the agency's interpretation is based on a reasonable or permissible reading of the statute.[127] If the agency's interpretation is indeed reasonable, the court must defer to that interpretation.[128] Courts, in practice, are more likely to find an agency's interpretation permissible when: (1) congressional delegation of authority can be inferred; (2) agency specialization is evident; and (3) procedural safeguards have been respected.[129]

The main argument for applying *Chevron* deference in the treaty context appears to be that it fits; it explains why courts come out a certain way in interpreting a given treaty.[130] There are three ways in which the *Chevron* doctrine explains the current practice of treaty deference.[131] First, in interpreting treaties, judges generally do not defer if the plain language of the treaty is clear on the issue,[132] or if the executive branch's position is unreasonable; [133] the same result would obtain under *Chevron*.[134] Second, under both current practice and the *Chevron* doctrine, deference is only due if the particular agency is charged with administering the treaty.[135] Finally, the *Chevron* doctrine accounts for why judges defer to executive branch interpretations even when the executive branch has changed its position—permissible under *Chevron*—and why courts do not defer on issues less likely to be delegated to an agency, such as whether a treaty prevails over an earlier federal statute.[136] The

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[124] 467 U.S. at 837.

[125] *See* Bradley, *supra* note 81, at 668 (describing *Chevron* deference).

[126] *See id.* at 668–69.

[127] *See id.* at 669. The Court in *Chevron* referred to both reasonability and permissibility. 467 U.S. at 842–43. Scholarly literature has used the two words interchangeably, and this Note shall follow suit. *See* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Should Be Overruled*, 42 Conn. L. Rev. 779, 781 & n.3 (2010).

[128] *See* Bradley, *supra* note 81, at 669.

[129] *See* Sullivan, *supra* note 80, at 803.

[130] *See* Bradley, *supra* note 81, at 703–04.

[131] *Id.*

[132] *See id.* at 703.

[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] *See* Bradley, *supra* note 81, at 703–04. Professor Bradley acknowledges one flaw in his analysis: that the *Chevron* doctrine does not account for the fact that treaties are pacts between different countries, and so the treaty partner does not necessarily consent to in-

Chevron theory of interpretation, therefore, explains much of the current judicial treatment of treaties.[137] Indeed, some U.S. courts of appeals have begun explicitly using *Chevron* deference to interpret treaties.[138]

2. The *Skidmore* Model: A Sliding Scale

The second main theory of interpretation argues that the *Chevron* standard is too static, and that instead the more flexible *Skidmore* standard should be applied.[139] Taken from the U.S. Supreme Court's 1944 decision in *Skidmore v. Swift & Co.*,[140] the *Skidmore* standard does not require an all-or-nothing determination of deference, but rather allows for a sliding scale of deference, depending on the interpretation's "power to persuade."[141] The persuasiveness factors that determine the amount of deference due are: (1) validity of reasoning; (2) agency expertise; (3) the form in which the interpretation was issued; and (4) whether the interpretation was thoroughly and consistently applied.[142] Unlike the *Chevron* approach, it does not matter under *Skidmore* whether Congress has delegated authority to the agency, so long as the agency has the relevant expertise.[143] Also unlike *Chevron*, a

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terpretive powers being delegated to a U.S. administrative agency. *See id.* at 704. Bradley notes, however, that under a dualist notion of international law, the United States can be a law violator on the international sphere, yet be in compliance with its own domestic law. *See id.* at 705 & n.241.

[137] *See id.* at 703–04.

[138] *See, e.g.*, Hill v. Norton, 275 F.3d 98, 104–06 (D.C. Cir. 2001) (applying *Chevron* deference to the Secretary of the Interior's interpretation of the Migratory Bird Treaty); More v. Intelcom Support Servs., Inc., 960 F.2d 466, 471–72 (5th Cir. 1992) (applying *Chevron* deference to the Department of Defense's interpretation of a treaty between the United States and the Philippines); *cf.* Auguste v. Ridge, 395 F.3d 123, 144, 145 & n.22 (3d Cir. 2005) (applying *Chevron* deference to the Board of Immigration Appeals' interpretation of immigration laws, in a case involving the Convention Against Torture).

[139] *See* Evan Criddle, Comment, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1933–34 (2007).

[140] 323 U.S. 134, 140 (1944). *Skidmore* involved interpretation of the overtime compensation requirements of the Fair Labor Standards Act and the degree of deference due to the interpretation of the administrator of the Act. *Id.* at 135, 139–40.

[141] *Id.*; *see* Sullivan, *supra* note 80, at 815, 817.

[142] *See Skidmore*, 323 U.S. at 139–40; *see also* Sullivan, *supra* note 80, at 811. These factors are discussed both implicitly and explicitly in *Skidmore*. *See* 323 U.S. at 139–40. After discussing the specialized experience of a government administrator, the Court went on to say that that the weight given to the administrator's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

[143] *See* Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 854–55 (2001).

court that finds an agency's interpretation to have satisfied all the above factors may still decline to adopt the interpretation; deference is not mandated.[144]

Scholars who advocate for *Skidmore* deference argue that, though *Chevron* may fit the administrative law context, it is inadequate in the treaty context, because it assumes that: (1) there is any delegation of interpretive authority for a treaty; and (2) any agency possesses specialization in the treaty.[145] Neither of these assumptions is generally true of treaties.[146] On the contrary, in the treaty context *Skidmore* would be a more flexible standard, with the degree of deference due turning on various factors, such as the agency's expertise; the persuasiveness of its reasoning; reliance on its interpretation among states and private actors; and its interpretation's consistency with the international legal order.[147] Thus, under *Skidmore*, a judge is not constrained by so many rigid rules of delegation and specialization, which may be inapplicable in a treaty context.[148] At least one U.S. court of appeals has discussed the *Skidmore* standard while interpreting a treaty.[149]

3. Deference Based on the Nature of the Treaty

Beyond the methods of interpretation, a third theory about deference to executive branch treaty construction underlies the *Skidmore* standard and is thus worth noting here.[150] Although much of the scholarship on judicial deference has examined deference under treaties involving highly political issues such as national security,[151] at least

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[144] *See id.* at 856 ("*Skidmore* . . . makes clear that the weight given to the agency interpretation is always ultimately up to the court.").

[145] *See, e.g.*, Sullivan, *supra* note 80, at 806–09 (explaining the assumptions behind the *Chevron* model and their inapplicability to the treaty context).

[146] *Id.* at 807 ("Unlike administrative law, treaties are not executed with an implicit delegation of interpretive authority from Congress. Similarly, most treaties to which the United States is a party are not amenable to the routine and consistent application by a core group of professionals insulated from the larger political machinations of the Presidency.").

[147] *See* Criddle, *supra* note 139, at 1934.

[148] *See* Sullivan, *supra* note 80, at 806–07.

[149] *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1253–54 (D.C. Cir. 2003) (considering application of *Skidmore* deference to the Coast Guard's interpretation of the International Regulations for Preventing Collisions at Sea).

[150] *See infra* notes 151–158 and accompanying text.

[151] *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361, 1361–1435 (2009); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 193–200 (2004); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 Hastings L.J. 441, 445–81 (2005).

one author has argued that less deference may be due where the treaty regulates private behavior.[152] Under this theory, treaties that govern private behavior differ fundamentally from the traditional "contract" between independent nations envisioned by the framers,[153] in that such treaties do not necessarily require sovereign nations to take on obligations vis-à-vis one another.[154] Self-executing treaties, which do not require implementing legislation,[155] are enforceable by individuals in courts, and do not require the sovereign to undertake any obligation whatsoever.[156] Because of this, the Executive should not be assumed to have any particular expertise in the treaty, and the treaty essentially has the status of Article I legislation; in short, interpretive authority lies exclusively with the judicial branch.[157] The Hague Service Convention may be one such treaty.[158]

III. Deference to the Executive Branch and the Article 10(a) Controversy

In order to assess the impact of deference to the executive branch on the controversy surrounding Article 10(a) of the Hague Service Convention, this Note next examines potential sources of executive interpretation on which judges may be relying.[159] It then considers the cases where judges have authoritatively resolved the controversy, and analyzes three cases noteworthy for their treatment of executive treaty deference.[160]

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[152] *See* Michael P. Van Alstine, Response Essay, *The Judicial Power and Treaty Delegation*, 90 Cal. L. Rev. 1263, 1268 (2002) [hereinafter Van Alstine, *Treaty Delegation*]; Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 707–08 (1998) [hereinafter Van Alstine, *Dynamic Treaty Interpretation*].

[153] Van Alstine, *Dynamic Treaty Interpretation*, *supra* note 152, at 691 & n.15. *See generally* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999) (providing a historical analysis of how the framers viewed treaties).

[154] *See* Van Alstine, *Treaty Delegation*, *supra* note 152, at 1271.

[155] *See Medellín*, 552 U.S. at 505 n.2.

[156] *See* Van Alstine, *Treaty Delegation*, *supra* note 152, at 1279.

[157] *See id.* at 1280.

[158] *See* Van Alstine, *Dynamic Treaty Interpretation*, *supra* note 152, at 705 n.67 (describing the Convention as private in nature, but noting that it does require the public action of establishing a Central Authority for service of process).

[159] *See infra* notes 161–169 and accompanying text.

[160] *See infra* notes 170–193 and accompanying text.

A. *Potential Sources of Executive Interpretation*

There may be good reason to think that courts are deferring to the executive branch's interpretation of Article 10(a).[161] First, any modern court has the ability to go to the U.S. State Department's website to see whether the State Department recommends mail service in a particular country.[162] For example, the website lists the countries that have formally objected to service by mail under the treaty, stating that:

> American courts have held that formal objections to service by mail made by countries party to a multilateral treaty or convention on service of process at the time of accession or subsequently in accordance with the treaty are honored as a treaty obligation, and litigants should refrain from using such a method of service . . . [s]ervice by mail should not be used in the following countries which notified the treaty repository that it objected to the method described in Article 10(a) (postal channels) . . . .[163]

Though helpful to a deciding judge, because this section merely states that objections to the treaty should be honored, it is relatively uncontroversial.[164]

More controversial is the position that the State Department took with regard to the U.S. Court of Appeals for the Eighth Circuit's 1989 decision in *Bankston v. Toyota Motor Corp.*,[165] in the Kreczko letter issued two years later.[166] After describing an official statement of the Japanese government about Article 10(a), the Kreczko letter stated that the State Department believes the *Bankston* opinion to be incorrect in its holding that service by registered mail abroad is not permitted under the Hague Service Convention.[167] Courts continue to cite this opinion when inter-

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[161] *See infra* notes 161–169 and accompanying text.

[162] *See* U.S. Dep't of State, Service of Process Abroad, http://travel.state.gov/law/info/judicial/judicial_2513.html (last visited Apr. 25, 2010).

[163] U.S. Dep't of State, Service of Legal Documents Abroad, http://travel.state.gov/law/info/judicial/judicial_680.html (last visited Apr. 25, 2010) (emphasis omitted). The countries that the State Department lists as having formally objected are: Argentina, Bulgaria, China/PRC, Czech Republic, Egypt, Germany, Greece, Hungary, Japan, Korea, Kuwait, Lithuania, Norway, Poland, Russian Federation, San Marino, Slovak Republic, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela. *Id.*

[164] *See* Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986) (acknowledging that states may object).

[165] 889 F.2d 170, 172 (1989).

[166] Kreczko letter, *supra* note 26, at 260–61.

[167] *See id.*

preting the Convention as the view of the U.S. government on the Article 10(a) controversy.[168] Where the U.S. government has litigated Hague Service Convention cases through the Justice Department, it has reconfirmed this position itself.[169]

B. *Circuit and District Court Cases Resolving the Controversy*

To determine whether deference has been a major factor in Article 10(a) outcomes, this Note considers all the cases in federal circuit and district courts that have authoritatively determined whether Article 10(a) allows for service by mail.[170] Although only so much can be understood through a survey of published judicial opinions, the case law gives a sense of the extent to which courts are relying on executive branch treaty interpretations.[171] Since *Bankston* was decided in 1989, thirty-eight cases have been decided in federal courts conclusively resolving the Article 10(a) controversy.[172] Of those cases, twenty-one (55%) ruled that Article 10(a) permits service by mail,[173] whereas seventeen

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[168] *See* Rae Group, Inc. v. AISEC Int'l, No. 08-10364, 2008 WL 4642849, at *3 (E.D. Mich. Oct. 20, 2008).

[169] *See* Lestrade v. United States, 945 F. Supp. 1557, 1559 (S.D. Fla. 1996) ("[T]he Government further argues that Article 10(a)'s use of the term *send* also means *serve*, and thus service of process by mail to initiate litigation is permissible.").

[170] This Note considers all cases after November 7, 1989 (the date of the *Bankston* decision) in which federal courts have decided whether Article 10(a) allows service by mail, and cited to either *Bankston* or *Ackermann*. Opinions by district courts within the Second, Fifth, Eighth and Ninth Circuits were not considered, as the U.S. courts of appeals have conclusively decided the issue in those circuits. *See* Brockmeyer v. May (*Brockmeyer II*), 383 F.3d 798, 808–09 (9th Cir. 2004); Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F.3d 374, 384–85 (5th Cir. 2002); *Bankston*, 889 F.2d at 174; *Ackermann*, 788 F.2d at 838–40.

[171] *See* Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 U.M.K.C. L. Rev. 171, 173–74 (2006) (describing bias in relying on published judicial opinions because many cases settle, and because judges have wide discretion on whether to write an opinion).

[172] *See supra* note 170.

[173] *See Brockmeyer*, 383 F.3d at 803; *Rae*, 2008 WL 4642849, at *3; Mitchell v. Theriault, 516 F. Supp. 2d 450, 455 (M.D. Pa. 2007); Conax Fla. Corp. v. Astrium Ltd., 499 F. Supp. 2d 1287, 1293 (M.D. Fla. 2007); Koss Corp. v. Pilot Air Freight Corp., 242 F.R.D. 514, 517 (E.D. Wis. 2007); Rogers v. Kasahara, No. 06-2033 (PGS), 2006 WL 6312904, at *4–5 (D.N.J. Oct. 16, 2006); Sibley v. Alcan, Inc., 400 F. Supp. 2d 1051, 1055 (N.D. Ohio 2005); Ballard v. Tyco Int'l, Ltd., No. MD-02-1335-PB, 02-1335-PB, Civ. 04-CV-1336-PB, 2005 WL 1863492, at *4 (D.N.H. Aug. 4, 2005); Schiffer v. Mazda Motor Corp., 192 F.R.D. 335, 337–38 (N.D. Ga. 2000); Wawa, Inc. v. Christensen, No. CIV. A. 99-1454, 1999 WL 557936, at *2 (E.D. Pa. July 29, 1999); Randolph v. Hendry, 50 F. Supp. 2d 572, 578 (S.D. W. Va. 1999); Trump Taj Mahal Assocs. v. Hotel Servs., Inc., 183 F.R.D. 173, 179 (D.N.J. 1998); Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 471 (D.N.J. 1998); EOI Corp. v. Med. Mktg. Ltd., 172 F.R.D. 133, 140–41 (D.N.J. 1997); *Lestrade*, 945 F. Supp. at 1559; Curcuruto v. Cheshire, 864 F. Supp. 1410, 1412 (S.D. Ga. 1994); Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 472, 480 (D.P.R. 1992); Patty v. Toyota Motor Corp., 777 F.

(45%) ruled that such service is prohibited.[174] Of the twenty-one cases finding that Article 10(a) permits service by mail—the position of the executive branch—thirteen cases (50%) explicitly cited to the State Department's position embodied in the Kreczko letter.[175] By contrast, of the seventeen cases interpreting Article 10(a) to prohibit service by mail, only one court cited to the executive branch's interpretation.[176] These results show that the Executive's interpretation was a factor in a substantial number of cases where the court agreed with the Executive, but mostly a nonfactor in cases where the court disagreed with the Executive.[177]

Three cases are notable for their treatment of deference to the executive branch.[178] *Brockmeyer v. May*, decided in 2004, is the most recent decision by a U.S. court of appeals on the Article 10(a) controversy, and it is exceptional in that the Ninth Circuit found service by mail permissible without any analysis of the treaty's text.[179] Instead, the Ninth Circuit looked at judicial opinions from other countries, the

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Supp. 956, 958–59 (N.D. Ga. 1991); Chowaniec v. Heyl Truck Lines, No. 90 C 07034, 1991 WL 111156, at *2 (N.D. Ill. June 17, 1991); Melia v. Les Grands Chais de Fr., 135 F.R.D. 28, 35–36 (D.R.I. 1991); *In re* Harnischfeger Indus., Inc., 288 B.R. 79, 86 (Bankr. D. Del. 2003).

[174] *See Nuovo Pignone*, 310 F.3d at 384; Humble v. Gill, No. 1:08-cv-00166-JHM-ERG, 2009 WL 151668, at *2 (W.D. Ky. Jan. 22, 2009); Moore v. Irving Materials Inc., No. 4:05-CV-184, 2007 WL 2081095, at *5 (W.D. Ky. July 18, 2007); Darko, Inc. v. MegaBloks, Inc., No. 5:06CV1374, 2006 WL 2945954, at *2 (N.D. Ohio Oct. 13, 2006); Uppendahl v. Am. Honda Motor Co., 291 F. Supp. 2d 531, 534 (W.D. Ky. 2003); Knapp v. Yamaha Motor Corp. U.S.A., 60 F. Supp. 2d 566, 573 (S.D.W. Va. 1999); Friedman v. Isr. Labour Party, No. CIV.A. 96-CV-4702, 1997 WL 379181, at *3 (E.D. Pa. July 2, 1997); Golub v. Isuzu Motors, 924 F. Supp. 324, 328 (D. Mass. 1996); Brand v. Mazda Motor of Am., Inc., 920 F. Supp. 1169, 1172 (D. Kan. 1996); Arco Elecs. Control Ltd. v. Core Int'l, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1082 (E.D. Pa. 1992); Fleming v. Yamaha Corp., USA, 774 F. Supp. 992, 995–96 (W.D. Va. 1991); Wilson v. Honda Motor Co., 776 F. Supp. 339, 341–42 (E.D. Tenn. 1991); Gen. Electro Music Corp. v. Samick Music Corp., No. 90 C 5590, 1991 WL 169354, at *1 (Aug. 27, 1991); Raffa v. Nissan Motor Co., 141 F.R.D. 45, 46–47 (E.D. Pa. 1991); Wasden v. Yamaha Motor Co., 131 F.R.D. 206, 209 (M.D. Fla. 1990); *In re* Greater Ministries Int'l, Inc., 282 B.R. 496, 503 (Bankr. M.D. Fla. 2002).

[175] *Brockmeyer II*, 383 F.3d at 803; *Rae Group*, 2008 WL 4642849, at *3; *Mitchell*, 516 F. Supp. 2d at 454–55; *Conax*, 499 F. Supp. 2d at 1293; *Koss*, 242 F.R.D. at 517; *Rogers*, 2006 WL 6312904, at *4; *Sibley*, 400 F. Supp. 2d at 1054–55 & n.6; *Ballard*, 2005 WL 1863492, at *4; *Schiffer*, 192 F.R.D. at 337, 338–39; *Randolph*, 50 F. Supp. 2d at 578; *Trump*, 183 F.R.D. at 178–79; *Eli Lilly*, 23 F. Supp. 2d at 471; *EOI*, 172 F.R.D. at 138, 141.

[176] *Uppendahl*, 291 F. Supp. 2d at 534.

[177] *See supra* notes 175–176 and accompanying text.

[178] *See infra* notes 179–193 and accompanying text.

[179] *See* 383 F.3d at 802–03. Neglecting to analyze text would be in contravention of the canon of construction that requires courts to start with a treaty's text. *See* Medellín v. Texas, 552 U.S. 491, 506 (2008).

purpose of the Convention, commentaries on the negotiating history, and the opinion of the State Department, and concluded from those sources alone that "send" in Article 10(a) includes "serve."[180] The court quoted the Kreczko letter, and the "great weight" standard from the U.S. Supreme Court's 1961 decision in *Kolovrat v. Oregon*.[181] Finally, the opinion cited favorably State Department circulars, which advise that service by mail is permitted in international civil litigation.[182]

Another case indicating the persuasiveness of the executive branch's interpretation is the 2006 case *Rogers v. Kasahara*, from the U.S. District Court for the District of New Jersey.[183] The case is remarkable not for the judge's opinion—the judge cited the Kreczko letter favorably in finding that service by mail is authorized—but for the extensive briefing on the Article 10(a) issue by the litigants.[184] In opposing a Japanese defendant's motion to dismiss for insufficiency of process, the plaintiff argued that *Bankston* was no longer good law due to the U.S. State Department's letter, and the "great weight" due to the executive branch's interpretation.[185] In response, the defendant stated:

> Plaintiff, in his criticism of *Bankston*, cites to a letter from legal counsel at the United States State Department. However, plaintiff's reliance on this letter is misplaced. It would be incongruous that a letter from legal counsel at a government agency could trample a decision of a United States Court, let alone the United States Court of Appeals. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803).[186]

The court in *Rogers* rejected this argument, explicitly relying on the Kreczko letter in allowing service by mail under Article 10(a).[187] The case shows the power of deference, even in the face of strong non-deference arguments.[188]

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[180] *See Brockmeyer II*, 383 F.3d at 803.

[181] *Id.* at 803 (citing Kreczko letter, *supra* note 26); *see* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[182] *Brockmeyer II*, 383 F.3d at 803.

[183] 2006 WL 6312904, at *4.

[184] *See* Memorandum in Further Support of Defendant's Motion To Dismiss, *Rogers*, 2006 WL 6312904; Plaintiff's Opposition to Defendant's Motion to Dismiss, *Rogers*, 2006 WL 6312904.

[185] *See* Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 184, at 14.

[186] Memorandum in Further Support of Defendant's Motion To Dismiss, *supra* note 184, at 2 n.3.

[187] *Rogers*, 2006 WL 6312904, at *4–5.

[188] *See id.*

At the opposite end of the spectrum is a 2003 decision from the U.S. District Court for the Western District of Kentucky, *Uppendahl v. American Honda Motor Co., Inc.*,[189] in which a judge explicitly took note of the Kreczko letter, and declined to follow it.[190] Reasoning that there is nothing difficult or ambiguous about the word "send" in Article 10(a), the judge refused to read past the plain text of the treaty, and held that Article 10(a) does not permit service by mail.[191] In doing so, the court took note of the State Department opinion concerning *Bankston*, but stated that "[w]hile we find the commentary concerning the courts' diverse opinions interesting, the court simply cannot alter the text of the treaty to add matters not contained therein."[192] Although this was the lone case considered to cite the State Department opinion and yet rule against service by mail, it indicates that a court may be willing to place strict canons of construction ahead of deference to the executive branch.[193]

IV. Application of the Standards and A Proposal for Change

As explained in Part II.A above, the U.S. Supreme Court's only attempt to enunciate a standard of deference was to say that although "courts interpret treaties for themselves," the interpretation of the executive branch is entitled to "great weight."[194] This standard has engendered an unprincipled approach by lower courts examining treaty questions.[195] Part IV illustrates this point, through an analysis of the above-mentioned case law on the *Ackermann-Bankston* controversy.[196] The case law demonstrates the perils of an unprincipled approach by showing the extreme lack of predictability generated by the "great weight" standard in the context of the Hague Service Convention.[197] Part IV suggests that without a more detailed deference standard articulated by the Supreme Court, substantive areas of treaty law such as the Hague Service Convention will continue to suffer from wild unpredict-

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[189] 291 F. Supp. 2d at 531.

[190] *See id.* at 534.

[191] *See id.* at 533, 534.

[192] *Id.* at 534.

[193] *See id.*

[194] Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); *see supra* notes 102–109 and accompanying text.

[195] *See* Sullivan, *supra* note 80, at 790–91 (analyzing the case law employing the standard, and concluding that no structured approach exists in the courts).

[196] *See infra* notes 197–292 and accompanying text.

[197] *See infra* notes 201–230 and accompanying text.

ability.[198] This Part then analyzes how the proposed scholarly models on executive branch deference would fare in the Hague Service Convention context,[199] and concludes that a test adapted from the Supreme Court's 1944 decision in *Skidmore v. Swift & Co.* would be most appropriate in the treaty context.[200]

A. *The Inadequacy of "Great Weight"*

The Article 10(a) case law demonstrates that courts addressing the Article 10(a) controversy do not weigh deference to the executive branch according to the U.S. Supreme Court's standard in *Kolovrat v. Oregon*,[201] but rather cite to *Kolovrat* when they agree with the Executive, or omit *Kolovrat* altogether when they disagree.[202] In other words, courts use *Kolovrat* not as a principle to guide their analysis, but rather as one justification among many to reaching a given result.[203] This untethered approach leads to significant unpredictability in the law of international service of process.[204]

Courts invoking either "great weight" or the State Department's opinion overwhelmingly agree with the executive branch's view that service by mail is permissible.[205] The case law shows that these courts ignore the other half of the *Kolovrat* standard—that courts interpret treaties for themselves—and automatically defer to the executive branch's opinion.[206] Out of the five judicial opinions considered that mention the phrase "great weight," all five ruled in favor of service by mail.[207] Similarly, out of twelve cases considered that mention the Kreczko letter, eleven ruled in favor of the executive branch's opinion.[208]

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[198] *See infra* notes 225–230 and accompanying text.

[199] *See infra* notes 231–292 and accompanying text.

[200] 323 U.S. 134, 140 (1944); *see infra* notes 257–292 and accompanying text.

[201] 366 U.S. at 194.

[202] *See infra* notes 205–213 and accompanying text.

[203] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("When we wish to strike down a practice [the *Lemon* test] forbids, we invoke it . . . ; when we wish to uphold a practice it forbids, we ignore it entirely . . . .").

[204] *See infra* notes 214–224 and accompanying text.

[205] *See infra* notes 206–209 and accompanying text.

[206] *Cf.* 366 U.S. at 194.

[207] Brockmeyer v. May (*Brockmeyer II*), 383 F.3d 798, 803 (9th Cir. 2004); Rae Group, Inc. v. AISEC Int'l, No. 08-10364, 2008 WL 4642849, at *3 (E.D. Mich. Oct. 20, 2008); Koss Corp. v. Pilot Air Freight Corp., 242 F.R.D. 514, 517 (E.D. Wis. 2007); Rogers v. Kasahara, No. 06-2033 (PGS), 2006 WL 6312904, at *4 (D.N.J. Oct. 16, 2006); Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 471 (D.N.J. 1998).

[208] *Rae Group*, 2008 WL 4642849, at *3; Conax Fla. Corp. v. Astrium Ltd., 499 F. Supp. 2d 1287, 1293 (M.D. Fla. 2007); *Koss*, 242 F.R.D. at 517; *Rogers*, 2006 WL 6312904, at

No court mentioning the "great weight" standard or the Kreczko letter went on to invoke the court's independent ability to interpret treaties and decide the case contrary to the executive branch's opinion.[209]

On the contrary, courts that decided the controversy against the executive branch's opinion generally omitted any discussion of "great weight" or the State Department's opinion.[210] Instead of using the *Kolovrat* standard to assert judicial independence over an Executive opinion with which they disagreed, these courts simply ignored the *Kolovrat* standard altogether and relied on the treaty's text.[211] Indeed, of the seventeen cases considered that decided the Article 10(a) controversy against the executive branch's opinion, none even cited to the *Kolovrat* standard, and only one cited to the State Department opinion.[212] Clearly, courts addressing the Article 10(a) issue are not weighing deference according to any real principle.[213]

The Hague Service Convention cases considered here also demonstrate that the unprincipled approach employed by district and circuit court judges deciding treaty cases leads to significant uncertainty and

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*4; Sibley v. Alcan, Inc., 400 F. Supp. 2d 1051, 1054–55 & n.6 (N.D. Ohio 2005); Ballard v. Tyco Int'l, Ltd., No. MD-02-1335-PB, 02-1335-PB, Civ. 04-CV-1336-PB, 2005 WL 1863492, at *4 (D.N.H. Aug. 4, 2005); Schiffer v. Mazda Motor Corp., 192 F.R.D. 335, 337, 338–39 (N.D. Ga. 2000); Randolph v. Hendry, 50 F. Supp. 2d 572, 578 (S.D.W. Va. 1999); Trump Taj Mahal Assocs. v. Hotel Servs., Inc., 183 F.R.D. 173, 178, 179 (D.N.J. 1998); *Eli Lilly*, 23 F. Supp. 2d at 471; EOI Corp. v. Med. Mktg. Ltd., 172 F.R.D. 133, 138, 141 (D.N.J. 1997). *But see* Uppendahl v. Am. Honda Motor Co., 291 F. Supp. 2d 531, 534 (W.D. Ky. 2003) (citing the Kreczko letter but rejecting service by mail).

[209] *See Kolovrat*, 366 U.S. at 194 ("[C]ourts interpret treaties for themselves . . . .").

[210] *See, e.g.*, Humble v. Gill, No. 1:08-cv-00166-JHM-ERG, 2009 WL 151668, at *2 (W.D. Ky. Jan. 22, 2009) (rejecting service by mail under Article 10(a) but omitting any reference to "great weight" or the Kreczko letter).

[211] *See id.*

[212] Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F.3d 374, 384 (5th Cir. 2002); *Humble*, 2009 WL 151668, at *2; Moore v. Irving Materials Inc., No. 4:05-CV-184, 2007 WL 2081095, at *5 (W.D. Ky. July 18, 2007); Darko, Inc. v. MegaBloks, Inc., No. 5:06CV1374, 2006 WL 2945954, at *2 (N.D. Ohio Oct. 13, 2006); Knapp v. Yamaha Motor Corp. U.S.A., 60 F. Supp. 2d 566, 573 (S.D. W. Va. 1999); Friedman v. Isr. Labour Party, No. CIV.A. 96-CV-4702, 1997 WL 379181, at *3 (E.D. Pa. July 2, 1997); Golub v. Isuzu Motors, 924 F. Supp. 324, 328 (D. Mass. 1996); Brand v. Mazda Motor of Am., Inc., 920 F. Supp. 1169, 1172 (D. Kan. 1996); Arco Elecs. Control Ltd. v. Core Int'l, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1082 (E.D. Pa. 1992); Fleming v. Yamaha Corp., USA, 774 F. Supp. 992, 995–96 (W.D. Va. 1991); Wilson v. Honda Motor Co., 776 F. Supp. 339, 341–42 (E.D. Tenn. 1991); Gen. Electro Music Corp. v. Samick Music Corp., No. 90 C 5590, 1991 WL 169354, at *1 (N.D. Ill. Aug. 27, 1991); Raffa v. Nissan Motor Co., 141 F.R.D. 45, 46–47 (E.D. Pa. 1991); Wasden v. Yamaha Motor Co., 131 F.R.D. 206, 209 (M.D. Fla. 1990); *In re* Greater Ministries Int'l, Inc., 282 B.R. 496, 503 (Bankr. M.D. Fla. 2002); *cf. Uppendahl*, 291 F. Supp. 2d at 534 (rejecting service by mail but taking note of the Kreczko letter).

[213] *See supra* note 212.

unpredictability.[214] As noted in the previous Part, twenty-one of the considered cases decided that service by mail is permissible, whereas seventeen cases decided that it is not—hardly making this a predictable area of the law.[215] Further analysis of the case law shows that the discord among deciding courts is not only between circuits, but also within circuits and within districts.[216] For example, litigants in an Article 10(a) case in the U.S. District Court for the Northern District of Ohio would be faced with a 2006 case, *Darko, Inc. v. MegaBloks, Inc.* rejecting service by mail,[217] and also a 2005 case, *Sibley v. Alcan*, permitting such service.[218] The cases considered also revealed conflicting precedents in U.S. district courts in the Eastern District of Pennsylvania,[219] the Middle[220] and Southern Districts of Florida,[221] the Southern District of West Virginia,[222] and the Northern District of Illinois.[223] Clearly, a litigant in a Hague Service Convention case cannot know what to expect from litigation outside of the Second, Ninth, Fifth, and Eighth Circuits.[224]

The lack of predictability caused by American courts' unprincipled approach to treaty deference is obviously troublesome in a system based on stare decisis,[225] but it has particularly negative effects on treaties like the Hague Service Convention. Interpreting the treaty differently across circuit and district courts defeats a principle purpose of the treaty—to simplify and expedite service abroad.[226] Offending the purposes of a treaty can also frustrate international comity, an important element to international disputes.[227] Finally, uncertainty as to what

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[214] *See supra* notes 170–177 and accompanying text.

[215] *See supra* notes 170–177 and accompanying text.

[216] *See infra* notes 217–224 and accompanying text.

[217] No. 5:06CV1374, 2006 WL 2945954, at *2 (N.D. Ohio Oct. 13, 2006).

[218] 400 F. Supp. 2d 1051, 1055 (N.D. Ohio 2005).

[219] *Compare Friedman*, 1997 WL 379181, at *3; *Gallagher*, 781 F. Supp. at 1082, *and Raffa*, 141 F.R.D. at 46–47, *with* Wawa, Inc. v. Christensen, No. CIV. A. 99-1454, 1999 WL 557936, at *2 (E.D. Pa. July 29, 1999).

[220] *Compare Wasden*, 131 F.R.D. at 209, *and In re Greater Ministries*, 282 B.R. at 503, *with Conax*, 499 F. Supp. 2d at 1293.

[221] *Compare Arco*, 794 F. Supp. at 1147, *with* Lestrade v. United States, 945 F. Supp. 1557, 1559 (S.D. Fla. 1996).

[222] *Compare Randolph*, 50 F. Supp. 2d at 578, *with Knapp*, 60 F. Supp. 2d at 573.

[223] *Compare* Chowaniec v. Heyl Truck Lines, No. 90 C 07034, 1991 WL 111156, at *2 (N.D. Ill. June 17, 1991), *with Gen. Electro*, 1991 WL 169354, at *1.

[224] *See supra* notes 205–213 and accompanying text.

[225] *See* Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (noting the expectation of predictability created by stare decisis). Stare decisis refers to the doctrine of precedent, whereby courts must follow earlier decisions when the same points of law arise again in litigation. BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

[226] *See supra* note 37 and accompanying text.

[227] *See* Cooper, *supra* note 56, at 714–15.

method is authorized by the treaty creates difficulties in enforcing judgments abroad: if a country does not recognize a particular method of service, that country's courts may not recognize the judgment procured through use of that method.[228] Thus, beyond the familiar stare decisis perils of a circuit split, unpredictability in the treaty realm can cause serious problems of international comity and enforcement of judgments that adversely affect U.S. litigants.[229] It is thus clear that the law in this area would benefit greatly from the U.S. Supreme Court articulating a new standard of treaty deference.[230]

B. *The* Chevron *Model: An Uneasy Fit*

Although the *Chevron* model, adapted from the U.S. Supreme Court's 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*, has gained favor among academics and some courts, applying it to the Article 10(a) controversy would not decrease variance or unpredictability in treaty cases.[231] Under *Chevron* deference, a court deciding whether service by mail is permitted under Article 10(a) of the Hague Service Convention would first have to decide whether Congress has spoken clearly on the issue; if the text is unambiguous, the court must give effect to the unambiguous meaning.[232] Even at this first stage, the *Chevron* framework is not easily applied to the Article 10(a) controversy.[233] As other scholars have noted, ambiguity is in the eye of the beholder.[234] Indeed, the 2003 opinion of the U.S. District Court for the Western District of Kentucky in *Uppendahl v. American Honda Motor Co.* stated, with regard to Article 10(a), that "[t]his court does not find anything difficult or ambiguous about the passage in question."[235] Furthermore, the case law considered in this Note reveals that the majority of cases that rejected service by mail relied upon the treaty's text in doing so, implicitly finding no ambiguity.[236] This stands in contrast to

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[228] *See id.* at 717.

[229] *See supra* notes 225–228 and accompanying text.

[230] *See supra* notes 225–229 and accompanying text.

[231] 467 U.S. 837, 842–45 (1984); *see infra* notes 232–256 and accompanying text.

[232] *Chevron*, 467 U.S. at 842–43; *see also* Bradley, *supra* note 81, at 668–69.

[233] *See infra* notes 234–238 and accompanying text.

[234] *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1269 (2007).

[235] 291 F. Supp. at 533.

[236] *See, e.g.*, *Nuovo Pignone*, 310 F.3d at 384 ("[W]e rely on the canons of statutory interpretation rather than the fickle presumption that the drafters' use of the word 'send' was a mere oversight."); *Knapp*, 60 F. Supp. 2d at 570 ("The court finds [the *Bankston*] interpretation persuasive inasmuch as it reflects applicable principles of treaty interpretation.

those courts permitting service by mail, which tend to gloss over the text, implicitly finding it ambiguous.[237] Clearly then, the first *Chevron* factor—whether the language is ambiguous—does not work to reduce interpretive disharmony in treaty interpretation.[238]

If a court does find ambiguity, the next step under *Chevron* is to determine whether the Executive's interpretation is reasonable.[239] The word "reasonable" obviously poses similar problems as does the word "ambiguous,"[240] but *Chevron* provides more guidance for this factor.[241] As noted in Part II.B, an interpretation is more likely to be found reasonable if: (1) congressional delegation of authority can be inferred; (2) agency specialization is evident; and (3) procedural safeguards have been respected.[242]

As for the first factor, scholars argue that *Chevron* fits in the treaty context in part because courts presume that the executive branch has been delegated the treaty power because of its expertise in foreign affairs.[243] Implied delegation, however, fits uneasily into the treaty context.[244] Unlike regulations, treaties receive direct feedback from Congress through the advice and consent procedure of Article II of the U.S. Constitution.[245] As other scholars have noted, it would be difficult to imply a delegation of treaty authority when Congress has directly expressed its understandings and reservations on a treaty prior to ratification.[246] Certainly, to imply that the advice and consent procedure itself is a delegation of authority would defy logic.[247]

When interpreting treaties, '[courts] must be governed by the text . . . .'" (quoting Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989))); *Brand*, 920 F. Supp. at 1172 ("Since the drafters were careful to use 'serve' and 'service' in several other provisions of this treaty, this court shares the reluctance of other courts to believe the drafters were simply careless. . . . The court, therefore, concludes the registered mailings . . . did not comply with the Hague Convention.").

[237] *See, e.g.*, *Brockmeyer II*, 383 F.3d at 802–03; *Conax*, 499 F. Supp. 2d at 1293; *Lestrade*, 945 F. Supp. at 1559.

[238] *See supra* notes 231–237 and accompanying text.

[239] 467 U.S. at 843; *see* Bradley, *supra* note 81, at 669.

[240] *See* Jinks & Katyal, *supra* note 234, at 1269.

[241] *See* 467 U.S. at 843–45.

[242] *See id.*; *see also* Sullivan, *supra* note 80, at 803 (citing Texas v. United States, 497 F.3d 491, 501–04 (5th Cir. 2007)).

[243] *See* Bradley, *supra* note 81, at 702. Bradley argues that the presumed delegation to the Executive arises out of the President's constitutional role in the treaty process. *See id.* at 702–03.

[244] *See* Sullivan, *supra* note 80, at 807–08.

[245] *See* U.S. CONST. art. II, § 2, cl. 2.

[246] *See* Sullivan, *supra* note 80, at 808.

[247] *See id.*

As for the second factor—agency specialization—although the factor itself can be applied to the treaty context, the way in which it is usually applied under *Chevron* illustrates the doctrine's unsuitability to the treaty context.[248] Commentators in favor of the *Chevron* standard generally assume that because the Executive negotiates treaties, the Executive possesses agency specialization in all treaties.[249] Though this assumption might hold true for treaties of a public nature, treaties like the Hague Service Convention create private rights and obligations among individuals, and not nations; thus, the presumption of executive branch specialization dissipates.[250] Of the thirty-eight cases considered in this Note, only one involved the United States as a party.[251]

The third factor, the respecting of procedural safeguards, refers to whether procedures were followed in adopting a regulation.[252] It does not apply to the treaty context, because unlike with agencies, the Executive is not required to follow administrative procedures such as notice-and-comment when it issues its interpretation of a treaty.[253] Thus, neither the first step of *Chevron* deference—the ambiguity inquiry—nor the reasonableness inquiry provide a workable framework to reduce disparity in judicial treaty interpretation.[254] The main difficulty in fitting the *Chevron* inquiry into the treaty context appears to be that the inquiry is more descriptive than prescriptive: although it may explain why judges defer when they do, it does not seek to improve judicial analysis through

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[248] *See infra* notes 249–251 and accompanying text.

[249] *See* Bradley, *supra* note 81, at 702.

[250] *See* Sullivan, *supra* note 80, at 808; *see also supra* notes 150–158 and accompanying text.

[251] *Lestrade*, 945 F. Supp. at 1557. The case arose out of the Internal Revenue Service's attempts to serve summonses on banks for information regarding French citizens believed to have violated French tax laws. *Id.* at 1558. The French citizens argued that the notice of summons sent to them in France did not comply with the Hague Service Convention. *Id.*

[252] *See* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (noting that greater deference under *Chevron* may be due where Congress has established a formal administrative procedure—such as notice-and-comment—that evinces an intent to delegate interpretive authority); *see also Texas*, 497 F.3d at 514 (ruling that regulations pertaining to gaming deserved *Chevron* deference because, inter alia, proper procedures were followed in their adoption).

[253] *See* Xilinx, Inc., v. Comm'r, Nos. 06-74246, 06-74269, 2010 WL 1006931, at *8 (9th Cir. Mar. 22, 2010) (stating that the U.S. Treasury Department's interpretation of the United States-Ireland Tax Treaty is not subject to notice-and-comment procedure (citing Administrative Procedure Act, 5 U.S.C. § 553(a)(1) (2006) (exempting "foreign affair[s] functions of the United States" from the APA))).

[254] *See* 467 U.S. at 842–43.

a principled approach.[255] If the U.S. Supreme Court does adopt a standard for treaty deference, the Article 10(a) controversy seems to indicate that *Chevron* would not be the most helpful standard for judges.[256]

C. *The* Skidmore *Model: Easily Adapted*

The Article 10(a) controversy demonstrates that, to increase predictability and uniformity in treaty interpretation, the U.S. Supreme Court should adapt the *Skidmore* standard to the treaty context.[257] Instead of *Chevron*'s static "yes or no" test, dependent upon a subjective finding of ambiguity or reasonableness, the *Skidmore* test forces judges to weigh deference according to a series of more objective factors.[258] As noted in Part II.B, the *Skidmore* test allows for a sliding scale of deference, depending on the persuasiveness of the executive branch's interpretation.[259] Applying these persuasiveness factors to the Article 10(a) controversy reveals that *Skidmore* would provide more principled guidance, and likely unity, in treaty interpretation.[260]

The first factor for determining persuasiveness is the validity of reasoning: this has been interpreted to mean that less deference is due where the Executive's opinion is essentially self-interested.[261] For example, if the treaty is meant to restrain executive power, it would be anomalous to allow the Executive to interpret away the restraints.[262] *Skidmore* thus requires a court to inquire into the motives of the Executive in issuing its opinion, rather than merely accepting it if reasonable.[263] Under this criterion, a court would probably find the State Department's opinion on the *Bankston* case to be persuasive: the State

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[255] Throughout his article, Professor Bradley uses *Chevron* to try to explain what courts are already doing, arguing that *Chevron* "fits well" in the treaty context. Bradley, *supra* note 81, at 703.

[256] *See supra* notes 231–255 and accompanying text. The all-or-nothing approach to deference under *Chevron* may also conflict with principles of international law that often arise in the treaty context. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. Rev. 293, 344–45 (2005) (discussing potential conflicts between *Chevron* deference and the canon of construction requiring U.S. courts to construe statutes, where possible, so as to avoid violations of international law—the *"Charming Betsy* canon").

[257] *See infra* notes 258–292 and accompanying text.

[258] *See Skidmore*, 323 U.S. at 139–40.

[259] *See id.*; *supra* notes 139–149 and accompanying text.

[260] *See infra* notes 261–292 and accompanying text.

[261] *See Skidmore*, 323 U.S. at 140; Sullivan, *supra* note 80, at 812.

[262] *See* Sullivan, *supra* note 80, at 812.

[263] *See* 323 U.S. at 140; *cf. Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

Department does not have any weighty self interest in allowing service by mail.[264] In this sense, the *Skidmore* test provides a tangible way for courts to assess whether deference is appropriate.[265]

The next *Skidmore* persuasiveness factor is similar to one of the *Chevron* factors: agency expertise.[266] Although the executive branch possesses expertise in the sense that it is responsible for negotiating treaties, the factor would always require deference if it meant expertise in this sense.[267] Rather, the factor refers more to expertise in the subject matter of the treaty; here, private civil litigation.[268] A court deciding an Article 10(a) case would thus likely give the Executive's interpretation less deference as to this factor, because the State Department possesses less expertise in private civil litigation.[269]

The third *Skidmore* factor—the type of statute involved—is basically neutral when applied to the Article 10(a) controversy.[270] Under this factor, more deference would be due to the executive branch's interpretation of a type of international agreement—such as a sole executive agreement—in which the Executive has greater involvement.[271] Because the instrument studied here is an Article II treaty, the executive branch is not solely responsible for the treaty's creation: the Senate is also involved through the advice and consent function.[272] Thus, there is no reason to accord particularly great deference to the executive branch based on the type of instrument.[273]

The last *Skidmore* factor asks whether the interpretation was thoroughly and consistently applied; if so, the treaty deserves more deference because it shows the executive branch's good faith and possible

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[264] Kreczko letter, *supra* note 26, at 261. The Executive's opinion might be entitled to less deference in a case like *United States v. Alvarez-Machain* where the permissibility of forcible abduction of a Mexican national by U.S. Drug Enforcement Agency agents was at issue. *See* 504 U.S. 655, 663–66 (1992).

[265] *See* 323 U.S. at 140.

[266] *See id.* at 139–40; Sullivan, *supra* note 80, at 779.

[267] *See* Sullivan, *supra* note 80, at 779.

[268] The great majority of Article 10(a) cases arise between individuals. *See supra* notes 250–251 and accompanying text.

[269] *See* Van Alstine, *Dynamic Treaty Interpretation*, *supra* note 152, at 698 n.35, 705 n.67 (describing certain commercial law treaties that "regulate solely private law transactions without the direct involvement of state actors," and likening Hague Service Convention to such treaties).

[270] *See* Sullivan, *supra* note 80, at 813. Although *Skidmore* does not explicitly enumerate this factor, it is included in scholarly analysis of the *Skidmore* test. *See id.*

[271] *See id.* at 813–14.

[272] *See* U.S. Const. art. II, § 2, cl. 2.

[273] *See id.*

reliance.[274] This factor too can be readily applied to a dispute such as the Article 10(a) controversy: if the State Department changed its mind after issuing its opinion on the *Bankston* case, a judge might find that the opinion was entitled to less deference.[275] In actuality, the Executive's position has been unchanged on the Article 10(a) issue since the 1991 Kreczko letter.[276] Thus, a court would likely find the letter more persuasive under this particular *Skidmore* factor.[277]

The *Skidmore* model is not without its flaws.[278] Although *Skidmore* allows for a more principled analysis of treaty interpretation questions than *Chevron*, it may give judges too free a hand to ignore valid executive interpretations.[279] *Skidmore* deference is mainly based on an agency interpretation's "power to persuade,"[280] and as such puts considerable interpretive authority in the hands of judges.[281] If the U.S. Supreme Court truly would like to accord deference to meaningful agency interpretations, as it seemed to say in both *Kolovrat* and *Chevron*, the *Skidmore* test might not always perform that function.[282] The Article 10(a) controversy demonstrates, however, that although *Skidmore* may grant judges more discretion, it also forces judges to explain their reasoning, which adds much-needed predictability to the law of treaty deference.[283]

Another potential flaw in the *Skidmore* model is the lack of a "step one" for courts to determine whether it is even necessary to consider deference, or if the treaty provision is clear on its face.[284] Although the first step in *Chevron* analysis—determining whether a provision is ambiguous or not—leads to significant variance among courts,[285] it does

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[274] *See* 323 U.S. at 140; Sullivan, *supra* note 80, at 814.

[275] Sullivan, *supra* note 80, at 814.

[276] *See* Kreczko letter, *supra* note 26, at 261.

[277] *See id.*

[278] *See* 323 U.S. at 140.

[279] *See* Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2221–22 (2009) (describing *Skidmore* as a "lower form of deference" and arguing that *Skidmore* may increase politicization of judicial decisions).

[280] 323 U.S. at 140.

[281] *See id.*

[282] *See Chevron*, 467 U.S. at 844 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme *it is entrusted to administer* . . . ." (emphasis added)); *Kolovrat*, 366 U.S. at 194 ("[T]he meaning given [treaties] by the departments of government *particularly charged with their negotiation and enforcement* is given great weight." (emphasis added)).

[283] *See supra* notes 257–277 and accompanying text.

[284] *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1280 (2007) (observing that the U.S. Supreme Court has not said that *Skidmore* requires a "step one" inquiry similar to *Chevron*).

[285] *See supra* notes 231–238 and accompanying text.

obviate the need for interpretation where no interpretation is necessary. *Skidmore* provides no such guidance.[286] This concern about *Skidmore* is alleviated, however, by the fact that in practice, most courts undertaking a *Skidmore* analysis do in fact examine a provision's text before engaging in any deference analysis.[287]

Overall, the *Skidmore* framework clearly provides a model more easily adapted to the treaty context.[288] By not conditioning deference on whether an interpretation meets a threshold standard (such as *Chevron*'s ambiguousness standard), and by allowing for a discretionary amount of deference, the *Skidmore* test would create more uniformity and predictability in treaty interpretation.[289] In the case of the Article 10(a) controversy, the *Skidmore* framework would likely cause a court to find the executive branch's opinion that service by mail is authorized under the Convention persuasive under two of the factors, less persuasive under one factor, and neutral under another.[290] Under *Skidmore*'s sliding scale, it would accord the opinion greater deference, but would not be required to defer completely.[291] Instead of an all-or-nothing decision on whether to defer, a court would take a principled stand based on the various *Skidmore* factors.[292]

Conclusion

The disparate outcomes in cases deciding whether service by mail is permitted under Article 10(a) of the Hague Service Convention can be explained largely by the unprincipled approach to treaty deference taken by U.S. courts. The current model of deference, based on the U.S. Supreme Court's decision in *Kolovrat v. Oregon*, is insufficient in that it does not give courts a principled basis upon which to decide whether deference is appropriate in a given case. Applying the various proposed models of deference to the Article 10(a) dispute reveals that the *Chevron* framework does not fit comfortably in the treaty context, because it requires levels of analysis that are either overly subjective or

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[286] *See Skidmore*, 323 U.S. at 139–40; Hickman & Krueger, *supra* note 284, at 1280.

[287] Hickman & Krueger, *supra* note 284, at 1280 ("[I]n practice, *Skidmore* generally does include a 'step one.' In many *Skidmore* applications, the court first reviewed the statute for a plain meaning, determined that the statute was ambiguous, and then proceeded to apply *Skidmore*.").

[288] *See* 323 U.S. at 139–40.

[289] *See id.*

[290] *See id.*

[291] *See id.*

[292] *See id.* at 140.

unique to administrative or statutory law, and out of place in treaty law. Instead, the Supreme Court should adopt the *Skidmore* model of deference in the treaty context. *Skidmore*'s sliding scale would allow courts to take a principled stance on whether to defer to the executive branch's interpretation of a particular treaty provision, and would create greater unity in treaty interpretation. Beyond the positive impact that such a standard would have on predictability and stare decisis, it would also enhance the efficiency of cross-border litigation and the principles of international comity that underlie all of the United States' treaty regimes.

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