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Why Ratification of the U.N. Convention of the Law of the Sea May Violate Article III of the U.S. Constitution

Julian G. Ku

Essay

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I. INTRODUCTION

The United States remains the most important seafaring nation that is not a member of the United Nations Convention on the Law of the Sea (UNCLOS).[1] Despite vigorous efforts by both the Bush and Obama Administrations, the U.S. Senate has continued to refuse to give consent to accession. Most of the objections to U.S. membership are based on policy disagreements.[2]

In addition to policy objections, opponents of ratification have also offered constitutional objections to joining UNCLOS. The first set of objections focuses on the authority created by UNCLOS to manage undersea resources outside of the jurisdiction of particular countries.[3] Numerous opponents have

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; *Status of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, United Nations, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21&lang=en (last visited Jan. 4, 2016).

2. *The Law of the Sea Convention: Hearing on Senate Treaty Document 103-39 Before the S. Comm. on Foreign Relations*, 112th Cong. 13–14 (2012) (statement of Steven Groves) [hereinafter Groves, Hearing on Senate Treaty Document 103-39]. *See generally* Raul Pedrozo, *Is It Time for the United States to Join the Law of the Sea Convention?,* 41 J. MAR. L. & COM. 151 (2010) (explaining the Obama Administration's support for U.S. ratification).

3. Groves, Hearing on Senate Treaty Document 103-39, *supra* note 2, at 30 ("Now, finally, this treaty has allowed for us, on a provisional basis, to

also suggested that UNCLOS impermissibly authorizes an international organization to tax United States citizens or companies.[4] The second set of objections relate to the constitutionality of the treaty's complex system of binding dispute settlement.[5]

In general, the legal academy has not seriously considered any of these constitutional objections to UNCLOS. Most prior studies of UNCLOS have been devoted to analyzing issues of international law and institutional design.[6] Much of this literature has also openly advocated for U.S. ratification of UNCLOS. None have seriously reviewed or analyzed constitutional objections.[7]

This Essay seeks to address this gap in the academic literature by considering what I believe to be the most serious constitutional problem with accession to UNCLOS: the compulsory dispute settlement system. This work draws heavily on two important U.S. Supreme Court decisions in the past ten years that considered the constitutional issues raised in U.S. participation in other analogous systems of international

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participate and influence the work of various entities, such as the Commission on the Limits on the Continental Shelf and the International Seabed Authority, the body that regulates the exploration, development, exploration of international areas beyond national jurisdiction, such as oil, gas, and nonliving resources under the seabed and subsoil.").

4. *Id.* at 16 ("Other critics have suggested that the convention gives the United Nations the authority to levy some kind of global tax.").

5. *Id.* at 10 ("I know some are concerned that the treaty's provisions for binding dispute settlement would impinge on our sovereignty.").

6. *See, e.g.*, A. O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY (1987); UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Myron H. Nordquist ed., 1989). *See also* NATALIE KLEIN, DISPUTE SETTLEMENT IN THE U.N. CONVENTION ON THE LAW OF THE SEA (2005); CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION. (Jon M. Van Dyke ed., 1985); THE UNITED STATES AND THE 1982 LAW OF THE SEA CONVENTION: THE CASE PRO & CON (George Galdorisi ed., 1994); John A. C. Cartner & Q.C. Edgar Gold, *Commentary in Reply to "Is It Time for the United States to Join the Law of the Sea Convention,"* 42 J. MAR. L. & COM. 49, 54 (2011).

7. *See, e.g.*, John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification,* 11 OCEAN & COASTAL L.J. 1, 2 (2006); John Norton Moore, *UNCLOS Key to Increasing Navigational Freedom*, 12 TEX. REV. L. & POL. 459 (2008); Bernard H. Oxman, *United States Interests in the Law of the Sea Convention,* 88 AM. J. INT'L L. 167, 168 (1994). *See* Cartner & Gold, *supra* note 6, at 54; THE UNITED STATES AND THE 1982 LAW OF THE SEA CONVENTION, *supra* note 6; CONSENSUS AND CONFRONTATION, *supra* note 6.

dispute settlement. In *Medellín v. Texas* and *Sanchez-Llamas v. Oregon*, the Supreme Court considered the impact of decisions from the International Court of Justice, and its holdings strongly suggest that there are meaningful constitutional limits on U.S. participation in international courts and tribunals.[8] While the U.S. government has recognized the potential constitutional issues created by one aspect of UNCLOS dispute settlement,[9] this Essay will explain that its proposal for eliding these issues is insufficient to completely resolve the constitutional problems I will identify.

This Essay begins by offering background regarding the system of dispute settlement created by UNCLOS. In Part II, the work considers possible constitutional limits imposed on U.S. participation with international courts as gleaned from recent Supreme Court decisions as well as other important legal historical research on U.S. participation in systems of international adjudication in the nineteenth and twentieth centuries. The Essay goes on in Part III to argue that these limits are most clearly exceeded by the treaty's requirement that U.S. courts give automatic enforcement to decisions of the International Tribunal for the Law of the Sea's Sea-Bed Disputes Chamber. Less clear, but non-trivial constitutional questions are also raised by the power of other UNCLOS bodies to issue compulsory orders binding on the United States. The U.S. government's strategy treating these provisions as non-self-executing alleviates, but does not completely solve these constitutional problems. Of course, these constitutional infirmities do not mean that the U.S. should never ratify UNCLOS. Instead, supporters of U.S. ratification need to frankly acknowledge these constitutional weaknesses and propose a more serious way to resolve them.

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8. Medellín v. Texas, 552 U.S. 491, 527 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)) ("A non-self-executing treaty . . . is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result. We therefore conclude, given the absence of congressional legislation, that the non-self-executing treaties at issue here did not 'express[ly] or implied[ly]' vest the President with the unilateral authority to make them self-executing."); Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006) ("We therefore conclude . . . that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal law claims.").

9. THE LAW OF THE SEA CONVENTION, S. EXEC. DOC. NO. 110-09, at 17 (2007) [hereinafter Senate Exec. Doc. 110-09].

II. UNCLOS AND DISPUTE SETTLEMENT

The adoption of UNCLOS in 1982 marked the conclusion of one of the most ambitious and comprehensive efforts to create a worldwide system of legal rules governing the world's oceans and undersea resources.[10] The United States and numerous other industrialized nations initially refused to sign UNCLOS and were largely responsible for forcing a second round of negotiations culminating in a slightly revised 1994 agreement.[11] President Clinton signed the revised version of UNCLOS in 1996.[12] Presidents Bush and Obama both submitted UNCLOS to the Senate for its advice and consent, but the Senate has thus far refused to move to consider the treaty.[13]

UNCLOS has numerous provisions governing questions as diverse as the 'rules of the road' for ships traversing the high seas, definitions of land and sea features, the determination of maritime boundaries and economic zones built from those land features, scientific research, management of living marine resources, and development of natural resources drawn from the sea-bed beyond the limits of any national jurisdiction.[14]

Recognizing that UNCLOS regulates a wide and diverse set of issues, the drafters of UNCLOS sought to create mechanisms for states-parties to resolve disputes under the Convention peacefully. In Section 1 of Part XV, UNCLOS encourages states-parties to resolve disputes through negotiations, inquiries, mediation, conciliation, arbitration, exchanges of views, or judicial settlement.[15] These traditional mechanisms of dispute settlement are completely voluntary.[16]

However, the UNCLOS conference was not satisfied with

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10. *See* Duff, *supra* note 7, at 1 ("As of August 26, 2005, there were 149 parties to [UNCLOS] . . . . For all the parties to the Convention virtually all legal questions concerning the law of the sea are now governed by the Convention.").

11. *Id.* at 2.

12. *See* Senate Exec. Doc. 110-09, *supra* note 9, at 2–3.

13. *Id. See also* Sean Patrick Mahard, *Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea,* 47 VAND. J. TRANSNATL L. 331, 344 (2014) ("In the summer of 2012, thirty-four senators were staunchly against UNCLOS, which makes reaching the sixty-seven votes required to ratify the treaty impossible.").

14. *See* UNCLOS art. 279–299.

15. *Id.* at art. 279–285.

16. *Id.*

merely encouraging states-parties to settle their disputes peacefully through voluntary settlement. If they cannot resolve any disputes through conciliation or negotiations, states-parties are required to submit "any dispute concerning the interpretation or application of this Convention . . . to the court or tribunal having jurisdiction under this section."[17]

States-parties must choose one of four possible methods of dispute resolution: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), an arbitral tribunal established under Annex VII for disputes under the Convention as a whole, or a special arbitral tribunal established according to Annex VIII for disputes related to fisheries and the marine environment.[18] If a state does not choose a method of dispute settlement, the state will be deemed to have accepted arbitration under Annex VII.[19]

States-parties may also avail themselves of provisional measures under UNCLOS. Once a dispute has been submitted to one of the courts or arbitral tribunals authorized by UNCLOS, that court or arbitral tribunal "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[20] In cases where an arbitral tribunal has not yet been constituted, the ITLOS or Seabed Disputes Chamber may prescribe provisional measures.[21] Importantly, UNCLOS states that all parties to a dispute "shall comply promptly with any provisional measures prescribed under this article."[22]

Indeed, despite the complexity of the dispute settlement system and the various options for states-parties, UNCLOS makes it clear that all forms of dispute settlement are binding. As UNCLOS states in Article 296, "Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."[23] The use of mandatory language removes any doubt as to whether rulings issued pursuant to dispute settlement

17. *Id.* at art. 286.
18. *Id.* at art. 287.
19. *Id.*
20. *Id.* at art. 290.
21. *Id.*
22. *Id.*
23. *Id.* at art. 296.

system are binding.[24]

No matter what method for dispute resolution the states-parties choose under Article 287, all states-parties will be deemed to have accepted the jurisdiction of the Sea-Bed Disputes Chamber for questions concerning the sea-bed.[25] Under Article 187, all states-parties to UNCLOS must agree to have disputes relating to the exploration and management of sea-bed settled with finality.[26] UNCLOS states-parties involved in a dispute may also agree to separate arbitration of a sea-bed dispute,[27] but all other disputes fall within the exclusive domain of the Sea-Bed Disputes Chamber.[28]

The Sea-Bed Disputes Chamber not only has jurisdiction for all disputes between states-parties to the Convention, but it will also have jurisdiction over disputes "between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons."[29]

This aspect of the Sea-Bed Disputes Chamber's jurisdiction makes it highly unusual as compared to the rest of the UNCLOS system and to most international tribunals. For instance, the ICJ's jurisdiction is limited to nation-states,[30] but individuals, corporations, nation-states, and the international agency managing the Sea-Bed (the Authority) are all given direct access to the jurisdiction of the Sea-Bed Disputes Chamber.[31]

Interestingly, the Sea-Bed Disputes Chamber has jurisdiction over disputes between the Authority and private companies regarding "the interpretation or application of a relevant contract or a plan of work" or "acts or omissions of a

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24. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, *supra* note 6, at 82–84 n.2 (describing UNCLOS' drafting history, "[e]mphasiz[ing] the finality of decisions and the obligation of the parties to the dispute to comply with them").

25. *See* UNCLOS at art. 287.

26. *Id.* at art. 187.

27. *Id.* at art. 188.

28. *Id.* at art. 187 ("The seabed disputes chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: . . . (f) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.").

29. *Id.*

30. U.N. Charter art. 92–96 (noting that the Statute of the ICJ is annexed to and functions "[i]n accordance with" Article 92 of the UN Charter); Statute of the International Court of Justice, art. 34, 59 Stat. 1055, T. S. No. 993 (1945) [hereinafter ICJ Statute].

31. UNCLOS art. 187.

Party to the contract" relating to activities in the international seabed area beyond national jurisdictions (called the "Area" by UNCLOS).[32] Such private companies can initiate proceedings against the Authority whether or not they are sponsored by a state-party to the Convention.[33]

Unlike the other methods of dispute settlement, UNCLOS has specific provisions for the enforcement of Sea-Bed Disputes Chamber judgments. Not only are decisions of the Sea-Bed Disputes Chamber binding on parties before the Chamber, but Article 39 of Annex VI states, "[D]ecisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[34]

It is perhaps not surprising, however, that the Sea-Bed Disputes Chamber's judgments have this status given the involvement of private companies in actions before the Sea-Bed Disputes Chamber. Presumably, this provision would prevent private parties from seeking to have national courts question the decisions of the Sea-Bed Disputes Chamber. This provision, as I will discuss *infra*, imposes a broad obligation for domestic enforcement of the Chamber's decisions. This "enforcement" clause raises the most serious constitutional issues for U.S. accession to UNCLOS.

Finally, it is worth noting that ITLOS's jurisdiction is also not limited to disputes between states. Article 20 of the ITLOS Statute "shall be open to entities other than States Parties" where any other agreement conferred jurisdiction on ITLOS.[35] This means that ITLOS may potentially hear disputes on legal questions beyond the interpretation or application of the Convention. Most importantly, it suggests that ITLOS could acquire jurisdiction in "cases involving a private commercial corporation or an intergovernmental organization, or even a non-governmental organization, as a party."[36]

In sum, UNCLOS creates a system of compulsory dispute settlement where states-parties must choose one of four methods

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32. *Id.* at (c).

33. *Id.*

34. UNCLOS, *supra* note 1, annex VI, art. 39.

35. Statute of International Tribunal for the Law of the Sea art. 20 § 2, Dec. 10, 1982, 1833 U.N.T.S. 566.

36. Thomas A. Mensah, *The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea*, 2 Max Planck Y.B. U.N. L. 307, 321 (1998).

of international adjudication. Each of these adjudicatory options results in a binding judgment which states-parties are obligated to comply with. All states-parties must accept the jurisdiction of the Sea-Bed Disputes Chamber for disputes related to the Area, and this jurisdiction extends to non-state parties such as natural persons and business enterprises. Moreover, UNCLOS makes judgments of the Sea-Bed Disputes Chamber enforceable in the domestic legal systems of states-parties as if those judgments were those of the highest domestic court.

III. THE U.S. CONSTITUTION AND INTERNATIONAL COURTS

Although the United States has participated in forms of international dispute resolution since its founding,[37] the constitutional consequences of binding judgments issued by international tribunals are rarely considered by scholars and barely addressed by courts. Prior to the Supreme Court's decisions in *Sanchez-Llamas v. Oregon* and *Medellín v. Texas*, most commentary on the constitutionality of U.S. participation in international courts dismissed such concerns are largely overblown.[38] For instance, when I advocated for applying a clear statement rule to mitigate or limit delegations to international courts and tribunals, several commentators dismissed my delegation concerns as mistaken or mere "myth."[39]

However, the combination of those two Supreme Court decisions and recent new historical research about constitutional limits on the U.S. participation in slave-trade tribunals and international prize courts has re-framed this debate and highlighted the constitutional challenge posed by the U.S. participation in international courts. International courts will continue to play an important role in world affairs,[40] and as a result, constitutional limits on U.S. participation can and should be defined.

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37. *See generally* The Treaty of Amity, Commerce, and Navigation (the Jay Treaty), U.S.–Gr. Brit., art. VI, Nov. 19, 1795, 8 Stat. 116 (appointing five commissioners to settle claims from the Revolutionary War).

38. *See, e.g.*, Andrew T. Guzman and Jennifer Landsidle, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693 (2008).

39. *Compare* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions,* 85 MINN. L. REV. 71 (2000), *with* Guzman, *supra* note 38, at 1697.

40. Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 24–25 (2006).

A. ARTICLE III AND INTERNATIONAL COURTS

1. Article III

The Constitution states that the "judicial power of the United States" is vested in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."[41] The judges in these courts exercising judicial power must be appointed pursuant to the President's nomination and with the advice and consent of the Senate. Those judges must also be granted life tenure and receive other protections in order to safeguard their political independence.[42]

Although the Constitution does not mention any other kind of federal judicial body, U.S. history and practice have typically allowed some kinds of legal disputes that would otherwise fall within the scope of the Article III federal judicial power to be resolved by other kinds of courts or tribunals.[43] Despite this permissive approach, judicial interpretations of Article III have nonetheless maintained limitations on the allocation of jurisdiction to non-Article III courts.

Thus, although there is some precedent for non-Article III courts in early U.S. history with the establishment of territorial tribunals, courts-martial, and consular courts, the real growth of Article III jurisprudence coincided with the rise of the administrative state in the twentieth century.[44] In the seminal 1932 decision of *Crowell v. Benson*, the Supreme Court upheld the use of non-Article III administrative courts to determine facts in cases.[45] The Court noted that in most cases, such courts were appropriately authorized to resolve disputes involving "public rights," or disputes asserting monetary claims against the United States. The *Crowell* Court also opened the door to allowing non-Article III courts to resolve even some "private rights," a category which includes most common law actions and criminal prosecutions.[46]

While private rights may in some cases be allocated to a non-

41. U.S. CONST. art. III, § 1.

42. *Id.*

43. *See, e.g.*, James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 660–65 (2004) (analyzing the Supreme Court's Article III delegation jurisprudence).

44. *Id.*

45. 285 U.S. 22, 46 (1932).

46. *Id.* at 47.

Article III tribunal, other decisions have imposed strict limits. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, saw the Court invalidate a portion of the Bankruptcy Act that allowed non-Article III bankruptcy judges to decide state law claims involving an estate.[47] Other cases have required juries for private rights cases pursuant to the Seventh Amendment, further circumscribing non-Article III bodies.[48] The scope of these Article III limitations, however, remains unclear since the Court permitted certain common law claims to be resolved by an administrative agency in *Commodity Futures Trading Commission v. Schor*.[49]

The clearest approach to identifying Article III limits would focus on requiring that Article III courts maintain appellate review over the decisions of non-Article III tribunals.[50] Not only are state courts subject to Article III appellate review for federal issues, but non-Article III tribunals, including administrative tribunals, are subject to various forms of appellate review in the federal courts. It is likely (although the Court has never ruled so explicitly), that retaining appellate review in an Article III court should satisfy concerns about the delegation of the federal judicial power to non-Article III tribunals.[51] As a historical matter, at least, scholars have argued that even though Congress has created non-Article III courts and tribunals, such judicial bodies always remained within the supervisory jurisdiction of federal courts.[52]

In sum, the Supreme Court has maintained limitations on the kinds of disputes that can be delegated to non-Article III tribunals, favoring the delegation of judicial power over public rights rather than private rights. These limitations, however, have not been consistently applied. In any event, scholarly and historical practice supports maintaining at least some form of

47. 458 U.S. 50, 87 (1982).

48. Granfianciera, S.A. et al. v. Nordbeg, 492 U.S. 33, 61, 64 (1989).

49. 478 U.S. 833 (1986).

50. This approach has received much support in the literature, although it has never been directly embraced by the Supreme Court. *See* Pfander, *supra* note 43, at 647–48 (2004). *See also* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision,* 1983 DUKE L.J. 197, 226–28; Richard B. Saphire and Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 88, 138–39 (1988).

51. The most thorough textual defense of this approach was offered by Professor James Pfander. *See* Pfander, *supra* note 43, at 647–48.

52. *Id.* at 653.

Article III appellate review over any non-Article III tribunals ruling on matters otherwise within the jurisdiction of the federal courts.

B. INTERNATIONAL COURTS: SLAVE-TRADE TRIBUNALS AND THE INTERNATIONAL PRIZE COURT PRECEDENTS

Although Article III has not been invoked in any recent decision involving international courts, the idea that Article III could limit U.S. involvement in international tribunals has a long historical pedigree. Thanks to recent research by Professor Eugene Kontorovich,[53] it is now clear that leading statesmen and U.S. government negotiators considered Article III a meaningful constitutional limitation when the United States considered joining two international courts during the nineteenth century.

First, as Professor Kontorovich details, Article III objections played a key role in the U.S. rejection of an 1818 proposal from Great Britain inviting the U.S. to join an international commission to punish slave traders. Such a commission, which several other countries had already agreed to join, would have established a trial of slave traders by two commissioners—only one of which held the same nationality as the accused. Sitting as an international tribunal, the commission could also seek an additional commissioner, from a third country, to resolve deadlocks.

President James Monroe's cabinet considered and rejected the British invitation. The reasons for non-participation were varied, but constitutional obstacles were a central motivation. According to various sources, the "opinion was unanimous . . . that it would be repugnant to the article in the Constitution concerning the organization of the judicial power."[54]

Although history is complicated and there are good reasons to think other issues played an important role in the U.S. government's initial decision to reject the tribunals, key figures such as John Quincy Adams invested substantial effort outlining the constitutional difficulties with U.S. participation. In correspondence, Adams argued that the slave-trade tribunals

53. Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 42 (2009).

54. *Id.* at 51 (citing MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 217 (Philadelphia, J.B. Lippincott & Co. 1875)).

were constitutionally questionable because Congress could not create courts "irresponsible to the supreme corrective tribunal of the American Union."[55] In other words, Article III required at least appellate review of a non-Article III tribunal's decision, and no such review existed in the British proposal.

The precedential value of these early constitutional objections is limited due to a Civil War reversal by the U.S. In finally joining the treaty in 1862, the U.S. seemed to jettison decades of opposition and constitutional concerns. Constitutional objections may also have been allayed by a decision to limit jurisdiction to vessels, excluding crews.[56] Moreover, the highly delicate nature of Anglo-American relations during the first years of the Civil War may also have played a role in the U.S. government's reversal.[57] In any event, it is still noteworthy that Article III objections to joining the tribunals were seriously considered and prevailed for many decades.

It is thus not surprising that similar Article III arguments were raised again more than a generation later against U.S. participation in another international maritime court—the International Prize Court (IPC). Arising out of the Hague Conference of 1907, the IPC was established to hear appeals by various private parties of prize condemnations or decisions made by national courts. It was thought that the new IPC would apply international prize law more consistently and neutrally than diverse national courts.

Since the IPC would have the power to review and reverse prize decisions of the U.S. Supreme Court, serious Article III doubts were raised during consideration by the Senate Foreign Relations Committee.[58] Similar doubts were expressed by the

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55. *See* Letter from John Quincy Adams to Stratford Canning (June 24, 1823), *in* WRITINGS OF JOHN QUINCY ADAMS, 1820–1823, at 500 (New York, The Macmillan Company 1917) (objecting that the commissions would be "under no subordination to the ordinary judicial tribunals of the country"); Letter from John Quincy Adams to Albert Gallatin and Richard Rush (Nov. 2, 1818), *in* LETTERS FROM THE SECRETARY OF WAR 88 (Washington, Galks & Seaton 1823) (noting that the tribunal would be unacceptable because it would "decid[e] upon the statutes of the United States without appeal").

56. WRITINGS OF JOHN QUINCY ADAMS, *supra* note 55, at 500.

57. Kontorovich, *supra* note 53, at 42.

58. *See* George A. Finch, *Appellate Jurisdiction in International Cases*, 43 AM. J. INT'L L. 88, 89 (1949) (noting that objections were raised by "eminent judges and lawyers and in the Committee on Foreign Relations"). The U.S. legal advisor to the Hague Delegation, James Brown Scott, acknowledged an Article III constitutional difficulty with the appeal provision, at least under "a strict

American delegation to the 1909 London Naval Conference, who told other delegates that the U.S. Constitution does not allow non-Article III courts to "have the effect of annulling the decision" of Article III courts.[59]

Eventually, these constitutional doubts and objections spurred President Taft's decision to seek amendments to the IPC. These amendments would have allowed the United States to reserve to those provisions of the IPC allowing appeal of the U.S. court prize decisions. Consequently, an appellant could bring a separate IPC proceeding whose jurisdiction was limited to claims against the U.S. government, as opposed to individual U.S. citizens or vessels. Moreover, unlike the original IPC, the amended treaty would have only authorized the court to award damages, instead of broader authority to issue substantive remedial orders.[60]

These historical episodes reflect the significance of Article III as a limitation on U.S. participation in an international court. Both episodes underscore potential objections grounded in the question of final appellate review by a federal U.S. court. While constitutional objections were also raised to the delegation of judicial power over certain types of rights that one might consider private rights, the main consistent constitutional objection appears to have been the divestment of federal appellate review.

C. *MEDELLÍN* AND *SANCHEZ-LLAMAS*

Article III challenges were not directly raised in two recent Supreme Court decisions considering the domestic effects of an International Court of Justice order.[61] As this section explains, however, concerns over protecting the Article III power animates the holdings of these important contemporary analyses of international courts' role in our domestic legal framework.

The origins of the *Medellín* and *Sanchez-Llamas* cases stem from a series of lawsuits brought against the United States in the International Court of Justice. The ICJ is an international

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construction" of the Constitution. *See* James Brown Scott, *The International Court of Prize*, 5 AM. J. INT'L L. 302, 314 (1911).

59. PROCEEDINGS OF THE INTERNATIONAL NAVAL CONFERENCE, BRITISH PARL. PAP., MISC. NO. 5, at 222 (1909).

60. Kontorovich, *supra* note 53, at 115.

61. Medellín v. Texas, 552 U.S. 491 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006).

court established by the United Nations Charter to resolve disputes between states.[62] Beginning in 1998, the United States was the subject of three separate lawsuits before this tribunal alleging U.S. violations of the Vienna Convention on Consular Relations (VCCR).[63]

The Vienna Convention on Consular Relations, ratified by the United States in 1969, represented the culmination of years of negotiation between most countries in the world regarding the rights and obligations of consular officials. Under the Vienna Convention, a foreign national was granted the right to be informed that he has the right to seek consular assistance if arrested while travelling abroad.[64] This right, and the related obligation of the host government to notify the foreign national of this right, was an innovation of the Vienna Convention.[65] Additionally, the Vienna Convention obligated states to ensure

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62. *Medellín*, 552 U.S. at 497.

63. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter Vienna Convention].

64. *Id.* at art. 36(1).

65. Communication and Conduct with Nationals of the Sending State:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id. art. 36.

its domestic laws conformed to these requirements. Article 36(2) provided that:

> The (notification) rights . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

The Vienna Convention also contained an 'Optional Protocol' stating that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."[66] This provision gave the ICJ jurisdiction to resolve disputes between states under the Vienna Convention.

Creative lawyers used the combination of Article 36(2) and the Optional Protocol to challenge the convictions and capital sentences of certain foreign nationals in the United States. Discovering that most U.S. jurisdictions, especially state and local law enforcement, failed to comply with Article 36 when detaining and arresting foreign nationals, lawyers for foreign nationals began to invoke Article 36 in post-conviction habeas corpus proceedings, as well as during trials and direct appeals of capital convictions.[67]

Most U.S. courts rejected the invocation of Article 36 in habeas proceedings holding that such claims were "defaulted" due to the failure of defendants to raise those claims at their trials.[68] Other U.S. courts rejected the use of Article 36 during trials (or appeals of convictions) holding that this provision of the VCCR was either non-self-executing or should be interpreted to conform to state and federal law.[69]

The unwillingness of U.S. courts to use the VCCR to delay or block the implementation of capital sentences did not settle the matter, however. The Optional Protocol opened the door for

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66. Vienna Convention, *supra* note 63, at art. 1 (citing the Optional Protocol Concerning the Compulsory Settlement of Disputes).

67. *See, e.g.*, Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 620–21, 623 (2008).

68. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 375 (1998); Medellín v. Dreke, 371 F.3d 270, 279 (5th Cir. 2004); Fisher v. Texas, 169 F.3d 295, 300–01 (5th Cir. 1999).

69. *See, e.g.*, United States v. Jimenez-Nava, 243 F.2d 192, 197 (5th Cir. 2001).

foreign states to bring disputes about the interpretation and implementation of Article 36 to the International Court of Justice. In a series of remarkable cases, three nations challenged the U.S. for its failure to give suitable judicial remedies under Article 36.

Paraguay and Germany brought actions on an emergency basis because their foreign nationals were facing imminent execution in Virginia and Arizona respectively. Though the ICJ issued "provisional measures" calling on the U.S. to take all measures to preserve the case on the merits, i.e., stopping the executions,[70] the U.S. Supreme Court did not give a definitive order to execute the ICJ judgment. While the U.S. State Department did call upon Virginia and Arizona to consider the ICJ's provisional measures judgment, neither state changed course.[71] The Supreme Court explicitly refused to act in the first Paraguay case, citing concerns as to whether the provisional measures order was binding and whether other federal laws governing post-conviction habeas challenges superseded its domestic effect.[72]

Mexico was the third state to invoke the VCCR and the Optional Protocol. Unlike the first two cases, Mexico's action was not brought on an expedited basis, but sought a full hearing at the ICJ on the proper implementation of Article 36 by the United States in the context of foreign nationals facing capital punishment. After full briefing and arguments presented by both the United States and Mexico, the ICJ held that the U.S. must provide a judicial remedy to evaluate the effects of violations of Article 36 in post-conviction proceedings by capital defendants.[73] The *Avena* ruling therefore squarely put the ICJ at odds with most U.S. judicial (and executive) interpretations of Article 36.

The *Avena* decision sparked a new round of U.S. litigation

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70. *See* Press Release, International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Ger. v. United States of America) (Mar. 3, 1999), http://www.icj-cij.org/ docket/?pr=350&p1=3&p2=3 &p3=6&case=104; Press Release, International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) (Apr. 9, 1998), http://www.icj-cij.org/docket /index.php?pr=322&code=paus&p1=3&p2=3&p3=6&case=99&k=08.

71. *See* Stephanie Baker, Germany v. United States *in the International Court of Justice*, 30 GA. J. INT'L & COMP. L. 277, 289 (2002).

72. *Breard*, 523 U.S. at 376. *See also* Levit, *supra* note 67, at 620 n.18.

73. *See* Avena and Other Mexican Nationals (Mex. v. United States of America), 2004 I.C.J. 12 (Mar. 31, 2004).

by foreign nationals seeking adoption of the *Avena* court's interpretation of Article 36. Instead of only relying on Article 36, the new litigation directly invoked the authority of the ICJ over the proper interpretation of the Vienna Convention by virtue of the Optional Protocol.[74] Eventually, the Supreme Court considered the effect of *Avena* in two separate decisions. The first, *Sanchez-Llamas v. Oregon*, involved a direct challenge to a non-capital conviction based on violation of Article 36 against a Honduran national.[75] The second, *Medellín v. Texas*, involved a post-conviction habeas action seeking (per *Avena*) a judicial hearing to consider the effects of the Article 36 violation on the Mexican defendants' conviction and capital sentence.[76] In both cases, the effect of the ICJ's interpretation of Article 36 was central to the petitioner's arguments. Both decisions reflected substantial constitutional discomfort with giving too much weight or force to the ICJ's interpretation and orders.

1. *Sanchez-Llamas*

In *Sanchez-Llamas*, the Supreme Court agreed to consider three issues: (1) whether Article 36 created an individual right; (2) whether violation of this right required suppression of evidence collected in violation of this right; and (3) whether post-habeas challenges based on Article 36 were subject to state law "procedural default" provisions requiring such claims to be raised at trial.[77] The Court, by a 6-3 majority, held that no suppression remedy could be required by Article 36 and that Article 36 claims were subject to the procedural default rule. The Court assumed for the purposes of the decision but did not decide, that the VCCR created individual rights.[78]

The Court's holding that Article 36 does not require suspension conflicted directly with the ICJ's interpretation in *Avena*. The Court was aware of this conflict, but offered two reasons why it did not have to follow the ICJ.

First, under the terms of the ICJ Statute, the decisions of the ICJ have "no binding force except between the parties and in respect of that particular case."[79] The petitioner in *Sanchez-*

74. *Id.*
75. 548 U.S. 331 (2006).
76. 522 U.S. 491 (2008).
77. 548 U.S. at 331.
78. *See id.*
79. ICJ Statute art. 59. *See also Sanchez-Llamas*, 548 U.S. at 354.

Llamas was not a Mexican national, and consequently, the *Avena* decision did not bind the United States outside of the Mexican context.

Second, the Court rejected arguments by amici arguing that "the United States is *obligated* to comply with the [VCCR], *as interpreted by the ICJ*."[80] Flatly disagreeing, the Court instead announced that ICJ decisions would receive only "respectful consideration."[81] Not only was the ICJ decision not binding in this particular case, but "[U]nder our Constitution, 'the judicial Power of the United States is vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'"[82] This "judicial Power . . . extend[ed] to . . . Treaties,"[83] and, as Chief Justice Marshall famously explained, "that judicial power includes the duty 'to say what the law is.'"[84] Consequently, if treaties are to be given effect as federal law, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution.[85]

After citing authority for its own supremacy in the interpretation of treaties, the Court went on to argue that nothing in the United Nations Charter, the ICJ Statute, nor the VCCR's Optional Protocol suggested that the ICJ's decisions were intended to bind federal courts or the Supreme Court in its interpretation of treaties.[86] Additionally, nothing in the history of Senate ratification of the U.N. Charter or the Optional Protocol suggested otherwise.[87]

2. *Medellín v. Texas*

At the same time that non-Mexican defendants sought to apply the ICJ's interpretation, Mexican defendants also sought Supreme Court review. Unlike the defendants in *Sanchez-Llamas*, Mexican defendants facing capital sentences were the

80. *Sanchez-Llamas*, 548 U.S. at 353–54.
81. *Id.* at 355–56.
82. *Id.* at 353 (citing U.S. CONST. art. III, § 1).
83. *Id.* (citing U.S. CONST. art. III, § 2).
84. *Id.* (citing Marbury v. Madison, 5 (1 Cranch) U.S. 137, 177 (1803)).
85. *Id.* at 353–54.
86. *Id.* at 354 (stating that the Charter "contemplates quintessentially *international* remedies" for non-compliance) (emphasis original).
87. *Id.*

actual subjects of the ICJ's decision in *Avena*. There was no doubt, therefore, that the ICJ's decision in *Avena* was intended to be binding on the United States with respect to the Mexican defendants.[88] Jose Medellín, a Mexican national facing a death sentence in Texas, brought the first *Avena*-related action.

Medellín's initial trip to the Supreme Court was delayed when President Bush issued a memorandum stating that state courts should give effect to the ICJ's *Avena* decision out of "comity."[89] The Court sent Medellín back to Texas courts to litigate the effect of the presidential memorandum.[90] When Texas courts failed to give effect to either the ICJ's decision or the Presidential memorandum, Medellín returned to the Supreme Court arguing that the Court was obligated to give effect to the *Avena*-interpretation of Article 36 and allow a judicial hearing for Article 36 claims.[91]

This time, the Supreme Court allowed Medellín to present his argument on the merits—that the ICJ's decision in *Avena* required the Supreme Court to change its interpretation of Article 36 because the ICJ's decision was directly enforceable in U.S. law. After analyzing the text of the Optional Protocol and the U.N. Charter provision setting out the U.S. government's obligation to comply with ICJ judgments, the Court held that the ICJ judgment was not directly enforceable.[92] In large part, the Court relied on its reading of Article 94 of the U.N. Charter, which requires United Nations member states to "undertake to comply" with judgments of the ICJ.[93] The Court held that this language could not create a direct domestically enforceable obligation when read in the context of the larger structure of the Charter for the enforcement of obligations through the Security Council.[94] Indeed, the Court went so far as to express discomfort with the consequences of *Medellín*'s interpretation, noting that:

> Moreover, the consequences of *Medellín*'s argument give pause. An ICJ judgment, the argument goes, is not only

88. Avena and Other Mexican Nationals (Mex. v. United States of America), 2004 I.C.J. 12 (Mar. 31, 2004) (finding 14-1 that United States "breached the obligations incumbent upon it under Article 36").

89. *Medellín*, 522 U.S. at 498, 504.

90. *See id.* at 503.

91. *Id.* at 504.

92. *Id.* at 517.

93. U.N. Charter art. 94.

94. *See Medellín*, 522 U.S. at 505.

> binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result.[95] Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ.[96]

Curiously, the Court does not fully explain why the "consequences" of *Medellín*'s argument "give pause." The Court states what it finds an obviously problematic result—"ICJ judgments . . . overrid[ing] otherwise binding" law or even "annull[ing] criminal convictions and sentences."[97] In the next paragraph, the majority drew attention to the fact that the dissent was also uncomfortable with this result since it seemed to interfere with the role of the political branches in conducting foreign affairs.[98] However, the Court did not fully divulge the sources of its discomfort with *Medellín*'s preferred result.[99]

Read together with *Sanchez-Llamas*, nevertheless, it is likely that one source of discomfort is the tension between the petitioners' arguments and the Court's designation of itself as the supreme arbiter of federal law. Therefore, the likely, but unstated reason that the Court was "given pause" was the notion that the Court's own interpretation of Article 36 must be reversed as a result of the ICJ's interpretation.

To be sure, there is reason to doubt that the Court was ready to announce a rule preventing the enforcement of an international court judgment. As the Court acknowledged in *Medellín*, "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so."[100]

However, the Court also rejected arguments that the

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95. We already know, from *Sanchez-Llamas*, that this Court disagrees with both the reasoning and result in *Avena*.

96. *Medellín,* 552 U.S. at 517–18.

97. *Id.* at 518.

98. *See id.* at 565–66 (Breyer, J., dissenting) (noting that the majority decision "unnecessarily complicate[d] the President's foreign affairs task.").

99. *See id.*

100. *Id.* at 519.

enforcement of an international tribunal judgment could be analogized to routine enforcement of a foreign court judgment. To the contrary, the Court noted that "the general rule . . . is that judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign States, 'are not generally entitled to enforcement.'"[101]

In so many words, the Court emphasized the extraordinary nature of the rule that *Medellín* was seeking to have the court adopt. The Supreme Court was being asked to give automatic enforcement—the equivalent of injunctive relief against a sovereign state on a matter of public policy—to a judgment of an international court. The Court's narrow reading of the relevant treaties seemed influenced by its discomfort with *Medellín*'s claimed-for rule.

3. Summary

Although neither *Sanchez-Llamas* nor *Medellín* drew a constitutional 'red line' against giving international courts' judgments broad effect within the U.S. system, both decisions found a way to avoid giving the ICJ any automatic legal force within the United States. The caution and "pause" that characterized both decisions has a deeper historical pedigree than was generally acknowledged. Through avoiding foundational Article III objections, the Court was able to dodge issues that will reoccur in the future. In the next Part, this Essay will argue that the Law of the Sea's Dispute Settlement system will present a far less avoidable clash with Article III than the treaties that served as the basis for *Sanchez-Llamas* and *Medellín*.

IV. ARTICLE III AND UNCLOS DISPUTE SETTLEMENT

The UNCLOS Dispute Settlement system has two provisions which create potential constitutional conflicts with federal judicial power. First, like the ICJ provisions considered in *Sanchez-Llamas* and *Medellín*, UNCLOS mandates that all states-parties comply with the decision of any UNCLOS court or tribunal that holds jurisdiction over a particular dispute.[102]

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101. *Id.* at 522 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 481 cmt. b.).

102. *See* UNCLOS art. 296.

Second, UNCLOS mandates that the judgments of the Sea-Bed Disputes Chamber be given automatic direct enforcement by U.S. courts without national appellate review.[103] Each of these provisions present clear Article III difficulties that will be more challenging to avoid than the provisions considered in the ICJ cases.

A. UNCLOS BINDING DISPUTE SETTLEMENT

As discussed in Part II *supra*, UNCLOS creates a complicated system of dispute settlement that requires states parties to agree to binding adjudication of disputes under the Convention. Although the parties have choices as to which kind of dispute settlement to agree to, UNCLOS makes clear that all forms of dispute settlement create binding obligations among the parties. Article 296 states, "Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."[104]

It is worth comparing the language of this provision to Article 94 of the United Nations Charter, which was the main basis for the attempt to enforce the ICJ *Avena* decision in U.S. law:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[105]

As discussed above, the *Medellín* Court emphasized that the phrase "undertakes to comply" did not necessarily denote immediate enforcement of an ICJ judgment.[106] When combined with Article 94(2)'s provision for "recourse to the Security

103. *See* UNCLOS art. 187.
104. UNCLOS art. 296.
105. U.N. Charter art. 94.
106. *Medellín*, 552 U.S. at 517.

Council," the *Medellín* Court found that there was no reason to think domestic courts had an obligation to enforce decisions automatically.[107]

Unlike Article 94 of the UN Charter, Article 296 of UNCLOS uses the phrases "final" and "shall be complied with by all parties to the dispute."[108] This direct language, along with the lack of a Security Council "enforcement" provision analogous to Article 94(2), would make it much more problematic for the Supreme Court to interpret Article 296 to avoid an Article III quandary.[109]

Indeed, the "final" and "shall be complied with" language is not only exacting, but it is also much more binding than other international tribunals to which the U.S. belongs. For example, the Dispute Settlement Body of the World Trade Organization (WTO) has the power to order "recommendations" for how a party in violation of the various WTO agreements must bring its laws and regulations "into conformity with that agreement."[110] Indeed, it is clear under U.S. law that the judgments of the WTO dispute settlement body have no direct effect on judgments of U.S. courts, although they are typically implemented by new congressional legislation or administrative rulemaking.[111]

In contrast, a United States court considering the legality of a detained vessel would note that it is bound to "comply" with an order from a UNCLOS tribunal for the prompt release of that vessel. The obligation to comply with the UNCLOS tribunal order has no exceptions and would not allow review by federal courts—i.e., the word "final" suggests no further appeal or review is permitted.[112]

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107. *Id.* (citing U.N. Charter art. 94).

108. UNCLOS art. 296.

109. *See* ICJ Statute art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."); *id.* at art. 60 ("The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.").

110. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, annex II, art. 19.

111. It is worth noting that even the Rome Statute creating the International Criminal Court (which the U.S. has not ratified) does not contain language as direct as UNCLOS. Under Article 87 of Rome Statute, the ICC may make a finding of non-compliance of a member state, after which it "may" refer the matter to the Assembly of State Parties or to the Security Council. Rome Statute to the ICC, art. 87(7). Any other dispute between ICC member states is also referred to the Assembly for further action. *See* Rome Statute art. 119(2).

112. *See* UNCLOS art. 296.

As discussed *supra*, this creates tension with Article III, especially since UNCLOS tribunals hold jurisdiction over matters as diverse as fishing practices, actions on the high seas, scientific research of the marine environment, and intrusions into territorial seas or exclusive economic zones. While most would likely involve public rights, it is also possible that private rights could be implicated in UNCLOS arbitral proceedings. UNCLOS requires states-parties to submit any disputes "concerning the interpretation or application of this Convention" to UNCLOS dispute settlement.[113] Private activities with respect to fishing, undersea resources extraction, or scientific research (among others) could fall within a UNCLOS proceeding. Since all matters would involve the interpretation of UNCLOS, federal courts would ordinarily have the judicial power over the interpretation of the treaty. Article 296's clear designation of all UNCLOS tribunal decisions as "final" arguably precludes reserving such powers to the U.S. courts. At the very least, the Supreme Court would strain to find a narrow interpretation of the phrase "final . . . decision" in a way that would reserve final review in federal courts.

Even if one re-framed a UNCLOS award or judgment as analogous to a foreign court judgment, the "finality" obligation under UNCLOS seems substantially more onerous than that imposed by a foreign court judgment. Although U.S. courts routinely enforce judgments of foreign courts, the Supreme Court has made it clear that such enforcement is made out of comity rather than binding obligation toward those foreign courts.[114] Indeed, it is not even clear that the law governing the enforcement of foreign judgments is federal as opposed to a matter of individual state common law. In any event, most American federal and state courts will refuse to enforce foreign judgments that lack "due process" or which violate other public policy of the forum.[115] This admittedly limited review is still more than what would seem to be required by a UNCLOS judgment.

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113. UNCLOS art. 286.

114. *See* Hilton v. Guvot, 159 U.S. 113, 163 (1895).

115. Yuliya Zeynalova, *The Law of Recognition and Enforcement of Foreign Judgments*, 31 BERKELEY J. INT'L L. 150, 158 (2013) (noting that most federal and state courts will follow a comity-type standard when considering foreign judgments).

B. SEA-BED DISPUTES CHAMBER

The constitutional conflict with the UNCLOS Sea-Bed Disputes Chamber is even more pronounced. As discussed in Part II, the Sea-Bed Disputes Chamber holds exclusive jurisdiction over disputes involving the sea-bed outside of national jurisdictions. As a tribunal under Article 296, states-parties must also comply with the Sea-Bed Disputes Chamber's decisions. UNCLOS goes further and demands that "[t]he decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[116]

The language of this provision is much more unequivocally in conflict with the U.S. Constitution's Article III's requirement of appellate review of any non-Article III tribunal. By the plain terms of Annex VI, Article 39, there is no possibility of any domestic court questioning or reviewing a decision of the Sea-Bed Disputes Chamber.[117] Any such decisions must be given automatic enforcement "in the same manner" as judgments of the "highest court of the State Party in whose territory the enforcement is sought."[118] That "highest court" would be the United States Supreme Court.

The removal of appellate review appears to be a serious problem under Article III. By explicitly removing this possibility, UNCLOS has squarely presented a constitutional challenge of the same kind that troubled U.S. decision makers in the slave-trade tribunal and International Prize Court contexts.

Compounding the difficulties, the Sea-Bed Disputes Chamber, unlike the other UNCLOS tribunals, holds jurisdiction over private parties and individuals in any legal disputes with states-parties or the Authority managing the sea-bed.[119] In other words, it is almost certain, given the Sea-Bed Disputes Chambers' jurisdiction over contract interpretation and similar matters that private rather than public rights will be subject to adjudication. The fact that private individual rights are at stake in Sea-Bed Disputes Chamber matters only heightens the Article III difficulty created by this unique

116. UNCLOS, annex VI, art. 39.
117. *Id.*
118. *Id.*
119. *See* UNCLOS art. 187.

institution.

V. CONCLUSION: NON-COMPLIANCE OR UNCONSTITUTIONALITY

It bears emphasizing that the constitutional difficulties facing the participation of the United States in UNCLOS are not necessarily fatal to U.S. participation. As John Yoo and I have argued elsewhere, treating all such provisions as non-self-executing can mitigate many of the Article III tensions identified in Part III by giving Congress the duty to determine how and whether the U.S. will comply with UNCLOS tribunal judgments.[120] Moreover, the U.S. is already a participant in at least one dispute resolution system, which also calls for automatic non-appealable enforcement—the International Center for the Settlement of Investment Disputes (ICSID).[121] Although no such enforcement action has ever been brought under the ICSID in the U.S., the fact that the U.S. has long been a part of ICSID suggests that Congress and the President may not be troubled by the Article III implications of this arrangement.

As discussed *supra*, however, the *Medellín* and *Sanchez-Llamas* decisions should prompt a second look at the legality of U.S. participation in international tribunals. In particular, the removal of appellate review poses a serious challenge to the supremacy of federal courts required by Article III. Unless Congress deviates from UNCLOS when it enacts a statute implementing this agreement, the United States is faced with the prospect of the Sea-Bed Disputes Chamber adjudicating private rights without any possibility of appellate review by the Supreme Court. On a lesser scale, Americans could also be faced with ITLOS provisional measures orders and UNCLOS arbitral awards that are "final" and binding on U.S. federal courts.

The United States government appears to be planning to delay and postpone the constitutional question as long as

120. *See* JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 87–101 (2012).

121. *See, e.g.*, 22 U.S.C. § 1650(a) (2015) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.").

possible. In its analysis of UNCLOS for the Senate, the U.S. State Department declared that it would treat UNCLOS as a whole and the Seabed Disputes Chamber provisions, in particular, as "non-self-executing."[122] This approach only postpones rather than resolves the constitutional issue. By acceding to the treaty, the U.S. takes on a clear and specific obligation to comply with UNCLOS awards and to give Seabed Disputes Chamber judgments the effect of its "highest court." Moreover, the legal status of ITLOS provisional measures awards or UNCLOS arbitration awards are not directly discussed by the State Department's analysis.

The plan, therefore, appears to be that the U.S. will join UNCLOS at some point without enacting legislation to carry out its settlement obligations. If the U.S. simply refuses to execute those dispute settlement obligations, it would be in violation of its obligations under UNCLOS and would be subject to criticism and sanctions from states-parties to UNCLOS. Thus, if the U.S. joins UNCLOS, the country will be under pressure to implement its dispute settlement obligations via legislation.

The U.S. will likely face a dilemma—enacting legislation to give direct effect to UNCLOS awards and orders, or avoiding the constitutional difficulties by refusing to comply with its UNCLOS dispute settlement obligations. The latter path is how the U.S. proceeded in the *Medellín* ICJ cases and it is the likely strategy if the U.S. joins UNCLOS.

The goal of this Essay was to establish that constitutional objections to joining UNCLOS with respect to dispute settlement are far from frivolous and are a serious impediment to participation. Even if it is a surmountable obstacle that the United States will solve by simply refusing to carry out its international obligations, it is an obstacle that needs to be taken seriously by both sides of the debate over ratification.

Simply joining the Convention with the intention of non-compliance is disrespectful of both UNCLOS and the other member states of the treaty. Instead, the U.S. should make clear upon its accession that the U.S. will interpret both UNCLOS dispute settlement provisions to be consistent with the U.S. Constitution. It has made similar interpretive declarations upon joining the U.N. human rights treaties and it has even limited the effect of a treaty's dispute resolution provision by such a

122. *See* Senate Exec. Doc. 110-09, supra note 9, at 2–3 (asserting that "[b]ecause of potential constitutional concerns," Senate advice and consent would likely be conditioned on limiting direct effect of certain provisions).

declaration. For example, when the U.S. joined the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), the U.S. declared that it would treat that treaty's binding dispute resolution provisions as requiring its "specific intent" before any action could be brought to the ICJ.[123] Even though no other country has adopted such an interpretation of the Convention, the U.S. was able to join the treaty.

Similarly, the U.S. limitation on UNCLOS dispute settlement could do no more than simply declare that it reads both UNCLOS dispute settlement obligations to be non-self-executing, as the U.S. government currently proposes. Rather, it could add a declaration that it reads Articles 287 and 296 to be consistent with the supremacy of the federal judicial power under Article III of the U.S. Constitution. Moreover, any implementing legislation would further clarify that before any UNCLOS judgments are found binding on the U.S., they are subject to final review by the U.S. Supreme Court consistent with Article III. This approach would thus allow the U.S. to join UNCLOS but signal to other members that there are limitations on its participation as a result of the U.S. Constitution.

UNCLOS may or may not be worth joining. There are good arguments on both sides. But the constitutional problems with U.S. accession has been largely ignored or glossed over by the legal academy. This Essay has identified a real constitutional conflict between Article III and the dispute resolution provisions of UNCLOS. It has also suggested a possible way to overcome the conflict that is superior to the current U.S. approach.

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[123] International Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) ("That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be substituted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en#EndDec.