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# International Law and Agreements: Their Effect upon U.S. Law

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# International Law and Agreements: Their Effect upon U.S. Law

International law is derived primarily from two sources: international agreements and customary international practice. Under U.S. law, the United States enters into international agreements by either executing a treaty or an executive agreement. The Constitution gives primary responsibility for entering into international agreements to the executive branch, but Congress plays an essential role in several ways. First, for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to ratification by a two-thirds majority. Second, a category of agreements known as congressional-executive agreements are made by the executive branch with the approval of Congress through the normal legislative process. Third, many treaties and executive agreements have provisions that are not self-executing, meaning that Congress must enact implementing legislation to make the provisions judicially enforceable in the United States.

An international agreement's status in relation to U.S. law depends on many factors. Self-executing treaties have a status equal to federal statutes, superior to U.S. state laws and inferior to the Constitution. Depending on their nature, executive agreements may or may not have a status equal to a federal statute. Non-self-executing provisions in treaties and executive agreements occupy a complex place in the U.S. legal system. While non-self-executing provisions bind the United States as a matter of international law, they do not create rights or obligations enforceable as domestic law in U.S. courts.

Along with legally binding agreements, the executive branch regularly enters into non-binding instruments with foreign entities. The formality, specificity, and duration of these instruments may vary considerably, but non-binding instruments do not modify existing legal authorities, which remain controlling under both U.S. domestic and international law. While they do not create new legal obligations, non-binding instruments may still carry significant moral and political incentives for compliance.

The second major source of international law is customary international practice. While its effects upon domestic law are more difficult to discern, more than a century ago the Supreme Court observed that customary international law is "part of" U.S. law, notwithstanding domestic statutes that conflict with customary international rules. Scholars have debated whether the Supreme Court's customary international law jurisprudence still applies in the modern era. In addition, some domestic U.S. statutes directly incorporate customary international law and therefore invite courts to interpret and apply this body of law in the domestic legal system. The Alien Tort Statute serves as one example, as it establishes federal court jurisdiction over tort claims brought by aliens for violating "the law of nations." Because the legislative branch possesses important powers to shape and define the United States' international obligations, Congress is likely to continue to play a critical role in shaping international law's status in the U.S. legal system.

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International law consists of "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[1] While U.S. courts and officials have long recognized that international law can create legally binding rights and obligations for the United States, international law's exact role in the U.S. legal system implicates complex legal dynamics.[2]

The United States takes on new international obligations most often through treaties and other international agreements.[3] The Constitution vests the power to make treaties in the President, "by and with the advice and consent of the Senate,"[4] but the United States does not make most international commitments[5] through this constitutionally defined process. The President regularly concludes *executive agreements* and *non-binding instruments*, which are not mentioned in the Constitution and are not submitted to the Senate for advice and consent.[6] These international commitments' effect on U.S. law depends on what form the commitment takes and whether the commitment requires implementing legislation from Congress to be judicially enforceable.[7]

The United States is also bound by *customary international law*, which is derived from countries' general and consistent practice arising out of a sense of legal obligation.[8] In a 1900 opinion, the Supreme Court described customary international law as "part of our law,"[9] but scholars debate whether 20th-century legal developments fundamentally altered customary international law's role in the U.S. legal system.[10]

This report introduces the primary forms of international law and examines their effect on U.S. law. It also highlights issues that may be particularly relevant to Congress, including the Senate's advice and consent function, Congress's role in interpreting and implementing international agreements, and the executive branch's obligations to consult with and report to Congress about international commitments.

[1] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. L. INST. 1987) [hereinafter THIRD RESTATEMENT]. Although originally limited to nation-to-nation relations, international law grew in the 20th century with the fields of human rights law and international criminal law to regulate individuals' conduct in some circumstances. *See, e.g.*, G.A. Res. 217 (III) (Dec. 10, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; G.A. Res. 2200A (XXI) (Dec. 16, 1966; U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966).

[2] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations."); Letter from Thomas Jefferson, Sec'y of State, to Edmond Charles Genet, French Minister (June 5, 1793), *in* JEFFERSON PAPERS, https://founders.archives.gov/documents/Jefferson/01-26-02-0189 (describing the law of nations as an "integral part" of domestic law).

[3] *See infra* "Forms of International Commitments."

[4] U.S. CONST. art. II, § 2, cl. 2.

[5] As used in this report, the term *commitment* is a generic term intended to encompass all forms of legally binding agreements and non-binding instruments.

[6] *See infra* "Forms of International Commitments."

[7] *See infra* "Effects of International Agreements on U.S. Law."

[8] *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, § 102(2).

[9] The Paquete Habana, 175 U.S. 677, 700 (1900).

[10] *See infra* "Relationship Between Customary International Law and Domestic Law."

# Forms of International Commitments

For purposes of U.S. law and practice, international commitments between the United States and foreign nations may take the form of treaties, executive agreements, or non-binding instruments.[11] When using these terms, there are important distinctions between international legal parlance and domestic American usage. *International agreement* is a blanket term used to refer to any agreement between the United States and a foreign state or body that is binding under international law.[12] In international law, *treaty* and *international agreement* are synonymous terms that refer to any binding agreement.[13] In the context of domestic law, *treaty* generally refers to a narrower subcategory of binding international agreements that receives the Senate's advice and consent.[14] This report follows the domestic usage unless otherwise noted.

[11] For further detail of various types of international commitments and their relationship with U.S. law, see CONG. RSCH. SERV., 106TH CONG., REP. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 43–97 (Comm. Print 2001) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS], *available at* https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1207–09 (2018).

[12] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 cmt. a (AM. L. INST. 2018) [hereinafter FOURTH RESTATEMENT]. *See also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395, 2600 (2022) (to be codified in 1 U.S.C. § 112b(k)(4)(A)) [hereinafter 2023 NDAA].

[13] *See* Vienna Convention on the Law of Treaties art. 2, Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Although the United States has not ratified the Vienna Convention, courts and the executive branch generally regard it as reflecting customary international law on many matters. *See*, *e.g.*, De Los Santos Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices.") (quoting Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 80 n.8 (2d Cir. 2005)); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an 'authoritative guide to the customary international law of treaties.' ") (quoting Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000)). *But see* THIRD RESTATEMENT, *supra* note 1, § 208 reporters' n.4 ("[T]he [Vienna] Convention has not been ratified by the United States and, while purporting to be a codification of preexisting customary law, it is not in all respects in accord with the understanding and the practice of the United States and of some other states."); *The Administration's Proposal for a U.N. Resolution on the Comprehensive Nuclear Test-Ban Treaty: Hearing Before the Sen. Comm. on Foreign Relations*, 114th Cong. (2016) (statement of Stephen G. Rademaker, Principal, The Podesta Grp.), https://www.foreign.senate.gov/download/090716_rademaker_testimony [hereinafter Rademaker Statement] ("[T]he more correct statement with respect to the Vienna Convention would be that in the opinion of the Executive branch it generally reflects customary international law, but, in the opinion of the Senate, in important respects it does not.").

[14] *See*, *e.g.*, 2023 NDAA, 136 Stat. 2600 (codified in 1 U.S.C. § 112b(k)(4)(A)); FOURTH RESTATEMENT, *supra* note 12, § 301 cmt. a. Under U.S. law, the term *treaty* is not always interpreted to refer only to those agreements described in Article II, Section 2, of the Constitution. *See* Weinberger v. Rossi, 456 U.S. 25, 31–32 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (construing the term *treaty*, as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

**Forms of International Commitments**

**International agreement**: A blanket term used to refer to any agreement between the United States and a foreign state or body that is binding under international law.[15]

**Treaty**: An international agreement that receives the advice and consent of the Senate and is ratified by the President through the process defined in the Treaty Clause.[16]

**Executive agreement**: An international agreement that is binding but which the President enters into without receiving the advice and consent of the Senate.[17]

**Non-binding instrument**: An instrument between the United States and a foreign entity that is not binding under international law but may carry non-legal incentives for compliance.[18]

## Treaties

Under U.S. law, a treaty is an agreement negotiated and signed by a member of the executive branch that enters into force if approved by a two-thirds majority of the Senate and ratified by the President.[19] Most modern treaties require parties to exchange or deposit instruments of ratification to enter into force.[20] A chart depicting the steps necessary for the United States to enter into a treaty is in the **Appendix**.

The Treaty Clause—Article II, Section 2, clause 2, of the Constitution—vests the power to make treaties in the President, acting with the "advice and consent" of the Senate.[21] Many scholars have concluded that the Framers intended "advice" and "consent" to be separate aspects of the treaty-making process.[22] According to this interpretation, the "advice" element required the President to consult the Senate during treaty negotiations before seeking the Senate's final "consent."[23] Early in his presidency, President George Washington appears to have followed the process that the Senate had such a consultative role,[24] but he and other early Presidents soon declined to seek the

[15] FOURTH RESTATEMENT, *supra* note12, § 301 cmt. a. *See also* 2023 NDAA, 136 Stat. 2600 (codified in 1 U.S.C. § 112b(k)(4))

[16] *See* 2023 NDAA, *supra* note 14; FOURTH RESTATEMENT, *supra* note 12, § 301 cmt. a.; *Weinberger*, 456 U.S. at 31–32 (1982); *B. Altman*, 224 U.S. at 601.

[17] *See infra* "Executive Agreements."

[18] *See infra* Non-Binding Instruments."

[19] *See* FOURTH RESTATEMENT, *supra* note 12, § 301 cmt. a.

[20] *See id.* § 304 cmt. a ("Some agreements provide that they are binding upon signature alone, although signature *ad referendum* (that is, subject to confirmation through some subsequent act) is frequently employed."); Curtis A. Bradley, *Unratified Treaties, Domestic Politics and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007) ("Under modern practice ... consent is manifested through a subsequent act of ratification—the deposit of an instrument of ratification or accession with a treaty depositary in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties.").

[21] For additional background on the Treaty Clause, see Cong. Research Serv., *Treaty Clause: Overview of the President's Treaty-Making Power*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952/ (last visited Jan 12, 2023).

[22] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 177 (2d ed. 1996); Arthur Bestor, *"Advice" from the Very Beginning, "Consent" When the End Is Achieved*, 83 AM. J. INT'L L. 718, 726 (1989).

[23] *See supra* note 22.

[24] On the occasion that scholars have described as the first and last time the President personally visited the Senate chamber to receive the Senate's advice on a treaty, President Washington went to the Senate in August 1789 to consult about proposed treaties with the Southern Indians. *See* 1 ANNALS OF CONG. 65–71 (1789). Observers reported that he was so frustrated with the experience that he vowed never to appear in person to discuss a treaty again. *See, e.g.*, WILLIAM MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES 122–24 (George W. Harris ed., 1880) (record of the President's visit by Senator William Maclay of Pennsylvania); RALSTON HAYDEN, THE SENATE AND TREATIES, 1789–1817, at 21–26 (1920) (providing a historical account of Washington's visit to the Senate).

Senate's input during the negotiation process.[25] In modern treaty-making practice, the executive branch generally assumes responsibility for negotiations, and the Supreme Court has stated that the President's constitutional power to conduct treaty negotiations is exclusive.[26]

Although Presidents generally do not consult the Senate during treaty negotiations, the Senate maintains an aspect of its "advice" function by providing conditional consent.[27] In considering a treaty, the Senate may condition its consent on proposed conditions known as *reservations*,[28] *understandings*,[29] or *declarations*[30] (RUDs).[31] The Senate has sometimes imposed other requirements under other labels such as *condition*[32] or *proviso*,[33] which often set forth procedural requirements for ratifying or implementing a treaty.[34] Under established U.S. practice, the President cannot ratify a treaty unless the President accepts the Senate's RUDs and other conditions.[35] If accepted by the President, RUDs and other conditions may modify or define U.S.

[25] *See* MEMOIRS OF JOHN QUINCY ADAMS 427 (Charles Francis Adams ed., 1875) ("[E]ver since [President Washington's first visit to the Senate to seek its advice], treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate.").

[26] *See* Zivotofsky v. Kerry, 576 U.S. 1, 13 (2015) ("The President has the sole power to negotiate treaties.... "); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[27] *Accord* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) ("The exercise of the conditional consent power has been in part a response by the Senate to its loss of any substantial 'advice' role in the treaty process."); SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 81 (2d ed. 1916) ("Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments.").

[28] As a general matter, "[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party." *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 11. *Accord* FOURTH RESTATEMENT, *supra* note 12, § 305 reporters' n.2 ("Although the Senate has not been entirely consistent in its use of the labels, in general the label ... 'reservation' [has been used] when seeking to limit the effect of the existing text for the United States.").

[29] Understandings are "interpretive statements that clarify or elaborate provisions but do not alter them." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 11. *Accord* FOURTH RESTATEMENT, *supra* note 12, § 305 reporters' n.5.B ("The Senate has regularly used 'understandings' to set forth the U.S. interpretation of particular treaty provisions.").

[30] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 11. *See also* FOURTH RESTATEMENT, *supra* note 12, § 305 reporters' n.5.E ("The Senate sometimes uses 'declarations' to express views on matters of policy.").

[31] For additional background on RUDs, see CRS In Focus IF12208, *Reservations, Understandings, Declarations, and Other Conditions to Treaties*, by Stephen P. Mulligan.

[32] *See, e.g.*, Resolution of Advice and Consent to Ratification of Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden § 3, S. TREATY DOC. 117-3, *available at* https://www.congress.gov/treaty-document/117th-congress/3/resolution-text (providing advice and consent subject to the condition that the President make certain certifications to the Senate).

[33] *See, e.g.*, Resolution of Advice and Consent to Ratification of the Food Aid Convention 1999 § 3(b), S. TREATY DOC.106-4, *available at* https://www.congress.gov/treaty-document/106th-congress/14/resolution-text (providing advice and consent subject to the provision that "Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States").

[34] Procedural matters include requirements that the President make certifications to the Senate, produce reports, or consult certain congressional committees on issues the treaty raises. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 11; FOURTH RESTATEMENT, *supra* note 14, § 305 reporters' n.2.

[35] FOURTH RESTATEMENT, *supra* note 12, § 305 reporters' n.4. *See also* United States v. Stuart, 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) ("[The Senate] may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States.... ").

rights and obligations under the treaty.[36] The Senate may also propose to amend the text of the treaty itself, and other nations that are parties to the treaty must consent to the changes for them to take effect.[37]

## Executive Agreements

The great majority of international agreements that the United States enters into are not treaties but executive agreements—agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent.[38] The Constitution does not specifically discuss executive agreements, but they have still been considered valid international agreements under Supreme Court jurisprudence and as a matter of historical practice.[39] The United States has made executive agreements since the earliest days of the Republic,[40] and their use increased significantly in the post–World War II era.[41] Commentators estimate that more than 90% of the United States' international agreements have been in the form of an executive agreement.[42]

### Types of Executive Agreements

There are three categories of executive agreements—congressional-executive agreements, executive agreements made pursuant to a treaty, and sole executive agreements. Executive agreements are traditionally categorized based upon the source of the President's authority to conclude them. In the case of *congressional-executive agreements*, Congress provides the President with domestic authority through legislation enacted through the bicameral process.[43]

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[36] For discussion of historical examples of conditions attached by the Senate to treaties, see FOURTH RESTATEMENT, *supra* note 12, § 305 reporters' n.5.

[37] For example, in giving its advice and consent to the first treaty that was to be ratified by the United States after the adoption of the Constitution—dubbed the Jay Treaty because it was negotiated by the first Supreme Court Chief Justice of the United States, John Jay, who was appointed a special envoy to Great Britain despite his role in the judicial branch—the Senate insisted on suspending an article allowing Great Britain to restrict U.S. trade in the British West Indies. S. EXEC. JOURNAL, 4th Cong., Spec. Sess. 186 (1795). Great Britain ratified the Jay Treaty without objection to the Senate's changes. *See* HAYDEN, *supra* note 24, at 86–88.

[38] *See infra* notes 40–42 (discussing historical usage of executive agreements and related judicial opinions).

[39] *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) (recognizing presidential power to settle claims of U.S. nationals and concluding "that Congress has implicitly approved the practice of claim settlement by executive agreement"); United States v. Belmont, 301 U.S. 324, 330 (1937) ("[A]n international compact ... is not always a treaty which requires the participation of the Senate.").

[40] *See, e.g.*, *Garamendi*, 539 U.S. at 415 (discussing "executive agreements to settle claims of American nationals against foreign governments" dating back to "as early as 1799"); Act of Feb. 20, 1792, ch. 8, § 26, 1 Stat. 239 (act passed by the Second Congress authorizing postal-related executive agreements).

[41] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 38; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1288 (2008); Bradley & Goldsmith, *supra* note 11, at 1210.

[42] Bradley & Goldsmith, *supra* note 11, at 1213. *See also* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* 11, at 40.

[43] Congress sometimes enacts legislation that pre-authorizes the President to conclude executive agreements on certain subjects or within certain parameters. *See, e.g.*, CLOUD Act, Pub. L. No. 115-141, div. V, § 105, 132 Stat. 1213, 1217 (2018) (codified at 18 U.S.C. § 2523) (authorizing data-sharing executive agreements with certain foreign nations); Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151–2431k) (authorizing the President to furnish assistance to foreign nations "on such terms and conditions as he may determine, to any friendly country"). Pre-authorized agreements are sometimes referred to as *ex ante* agreements. On other occasions, Congress enacts legislation approving agreements that the President already negotiated and signed. *See, e.g.*, (continued...)

The President also enters into *executive agreements made pursuant to a treaty* based on authority granted to the President in prior Senate-approved, ratified treaties.[44] In other cases, the President enters into *sole executive agreements* based on a claim of independent presidential power in the Constitution.[45] A chart describing the steps in making an executive agreement is in the **Appendix**.

**Categories of Executive Agreements**

**Congressional-executive agreement**: an executive agreement that Congress authorizes through legislation enacted through the bicameral process.[46]

**Executive agreement made pursuant to a treaty**: an executive agreement based on the President's authority in a treaty previously approved by the Senate.

**Sole executive agreement**: an executive agreement based on the President's constitutional powers.

## *Congressional-Executive Agreements*

Congressional-executive agreements have long-standing historical precedent dating to the Second Congress.[47] The Supreme Court has never directly addressed the constitutionality of congressional-executive agreements, but it has recognized that the United States possesses the "power to make such international agreements as do not constitute treaties in the constitutional sense."[48] The Court has also stated that, while a congressional-executive agreement may lack the "dignity" of a Senate-approved treaty, it is still a valid international instrument.[49] Whereas only the Senate gives consent to treaties, both houses of Congress are involved in authorizing congressional-executive agreements.[50] Historically, congressional-executive agreements have covered many topics ranging from postal conventions to bilateral trade to military assistance.[51]

United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, § 101 (2020) (providing approving for the United States-Mexico-Canada Agreement Implementation Act). Agreements authorized after conclusion are sometimes referred to as *ex post* agreements.

[44] *See* THIRD RESTATEMENT, *supra* note 1, § 303(3); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 86.

[45] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 88. *See also supra* note 39 (citing Supreme Court case law recognizing the validity of sole executive agreements).

[46] For background on methods of legislative approval for congressional-executive agreements, see *supra* note 43.

[47] The Second Congress enacted legislation in 1792 authorizing the postmaster general to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices." Act of Feb. 20, 1792, ch. 8, § 26, 1 Stat. 239.

[48] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

[49] *See* B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) ("While it may be true that this commercial agreement, made under authority of the tariff act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.").

[50] Congress authorizes congressional-executive agreements through legislation enacted through the bicameral process, which involves both houses of Congress. For background on bicameralism, see Cong. Research Serv., *Bicameralism*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S1-3-4/ALDE_00013293// (last visited June. 21, 2023).

[51] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 5.

The North American Free Trade Agreement (NAFTA)[52] and the 1947 General Agreement on Tariffs and Trade[53] are notable examples of congressional-executive agreements.

### *Executive Agreements Pursuant to Treaties*

The Supreme Court has given effect to at least one executive agreement made pursuant to a treaty.[54] Executive agreements made pursuant to treaties can arise in many contexts. For example, treaties that authorize the United States to operate military facilities in foreign countries often require additional agreements related to activities and personnel at the base.[55] Other treaties create international commissions that make recommendations on how to resolve matters such as boundary delimitation and allocation of transnational water bodies.[56] These treaties may empower the executive branch to conclude new agreements accepting the commissions' recommendations.[57] Controversy occasionally arises as to whether a particular treaty actually authorizes the executive to conclude an agreement in question.[58]

### *Sole Executive Agreements*

Sole executive agreements rely on neither treaty nor congressional authority to provide their legal basis.[59] The Constitution confers at least some authority to the President to make sole executive agreements based on the President's powers defined in Article II.[60] The Supreme Court has recognized the power of the President to conclude sole executive agreements in the context of settling claims with foreign nations.[61] Examples of sole executive agreements include the 1933 Litvinov Assignment, under which the Soviet Union purported to assign to the United States claims to American assets in Russia that had been nationalized by the Soviet Union, and the 1973 Vietnam Peace Agreement ending the United States' participation in the war in Vietnam.[62]

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[52] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 (entered into force Jan. 1, 1994).

[53] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3.

[54] *See* Wilson v. Girard, 354 U.S. 524, 526–30 (1957) (giving effect to administrative agreement authorized under the bilateral U.S.-Japan Security Treaty).

[55] For example, the United States acquired the naval base at Guantanamo Bay, Cuba, through an executive agreement authorized by a 1903 treaty. *See* CRS Report R44137, *Naval Station Guantanamo Bay: History and Legal Issues Regarding Its Lease Agreements*, by Jennifer K. Elsea, at 7.

[56] The binational International Boundary and Water Commission, for example, was created by a series of U.S.-Mexico treaties and is authorized to make decisions, called "minutes," that the United States can approve on a case-by-case basis. *See* CRS Report R45430, *Sharing the Colorado River and the Rio Grande: Cooperation and Conflict with Mexico*, by Nicole T. Carter, Stephen P. Mulligan, and Charles V. Stern, at 3.

[57] *See, e.g.*, CRANDALL, *supra* note 27, at 179–119 (discussing acceptance of U.S.-British boundary delimitation).

[58] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 86–87 n.117 (discussing examples in which Members of the Senate contended that certain executive agreements did not fall within the purview of an existing treaty and required Senate approval).

[59] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress."); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981); United States v. Belmont, 301 U.S. 324, 330 (1937).

[60] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 5 (citing U.S. CONST. art. II, § 1, cl. 1 (executive power), § 2, cl. 1 (commander in chief power, treaty power), § 3 (receiving ambassadors)).

[61] *Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 680; United States v. Pink, 315 U.S. 203, 229 (1942); *Belmont*, 301 U.S. at 330.

[62] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 88. *See also Belmont*, 301 U.S. at 330 (continued...)

If the President enters into a sole executive agreement addressing an area with clear, exclusive constitutional authority—such as an agreement to recognize a particular foreign government—the agreement may be legally permissible regardless of congressional disagreement.[63] If, on the other hand, the President enters into a sole executive agreement and the constitutional authority over the subject matter is unclear, a reviewing court may consider Congress's position in determining whether the agreement is constitutional.[64] If Congress has given implicit approval for the President's action or is silent on the matter, courts may be more likely to deem the agreement valid.[65] When Congress opposes the agreement and the President's constitutional authority is ambiguous, it is unclear whether courts would give effect to the agreement.[66]

## Mixed Sources of Authority for Executive Agreements

Some foreign relations scholars have argued that the international agreement-making practice has evolved such that some modern executive agreements no longer fit in the three generally recognized categories of executive agreements.[67] Advocates for a new form of executive agreements contend that identification of a specific authorizing statute, treaty, or constitutional power is not necessary if the President already possesses the domestic authority to implement the executive agreement, the agreement requires no changes to domestic law, and Congress has not expressly opposed it.[68] In line with this reasoning, the Obama Administration defended its authority to enter into the Anti-Counterfeiting Trade Agreement based, in part, on statutory authority to *implement* the agreement, even though existing law did not expressly authorize the executive branch to *conclude* new international agreements.[69] Critics of this proposed new

(recognizing constitutional authority for the Litvinov Assignment); *Pink*, 315 U.S. at 229 (confirming the holding in *Belmont*).

[63] *See* THIRD RESTATEMENT, *supra* note 1, § 303(4). *See also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084–96 (2015) (recognizing that the Constitution confers the President with exclusive authority to recognize foreign states and their territorial bounds and striking down a statute that impermissibly interfered with the exercise of such authority).

[64] *See Dames & Moore*, 453 U.S. at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

[65] *See id.* at 686 (upholding sole executive agreement concerning the handling of Iranian assets in the United States despite the existence of a potentially conflicting statute given Congress's historical acquiescence to these types of agreements). *But see* Medellín v. Texas, 552 U.S. 491, 531–32 (2008) (suggesting that *Dames & Moore* analysis regarding significance of congressional acquiescence might be relevant only to a "narrow set of circumstances," where presidential action is supported by a "particularly longstanding practice" of congressional acquiescence).

[66] While the exact framework that the Supreme Court would use to evaluate a sole executive agreement that Congress expressly opposes is not settled, in separation-of-powers cases, the Supreme Court has sometimes adopted the reasoning of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which explained that the President's constitutional powers "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress." 343 U.S. 579, 635 (1952). *See also, e.g.*, *Zivotofsky*, 135 S. Ct. at 2083, 2096 (citing and relying, in part, on Justice Jackson's concurrence). Under Justice Jackson's framework, the President's authority could be considered at its "lowest ebb" when concluding a sole executive agreement in direct opposition to Congress's expressed will. *See Youngstown Sheet & Tube*, 343 U.S. at 637–38. At the "lowest ebb," the President could conclude a sole executive agreement only if it fell within a constitutional power that was "at once so conclusive and preclusive" that Congress cannot regulate the issue. *See id.*

[67] *See* Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 345 (2017); Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 887 (2016).

[68] *See* Bodansky & Spiro, *supra* note 67 at 927; Koh, *supra* note 67, at 345–48.

[69] *See* DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 2012, at 95 (Carrie Lyn D. Guymon ed., 2012). The Obama Administration made similar arguments concerning its authority to conclude the Paris Agreement on climate change and the Minamata Convention on Mercury. *See* CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Stephen P. Mulligan, at 18 nn. 145–148; (continued...)

paradigm of executive agreements argue that it is not consistent with separation-of-powers principles, which they contend require that the President's conclusion of international agreements be authorized by either the Constitution, a ratified treaty, or an act of Congress.[70] Whether executive agreements with mixed or uncertain sources of authority become prominent may depend on future executive practice and the congressional responses.

## Choosing Between a Treaty and an Executive Agreement

The changing trends in international agreements has led to debate over whether executive agreements—particularly congressional-executive agreements—are a constitutionally permissible alternative to treaties or whether some types of international agreements must be submitted to the Senate for advice and consent.[71] This debate first surfaced in the mid-20th century when the use of executive agreements began to rise substantially.[72] The debate was revived in the 1990s when the United States joined NAFTA and the World Trade Organization through congressional-executive agreements[73] and when the Obama Administration joined the Paris Agreement on climate change as an executive agreement.[74]

Judicial opinions thus far have not resolved the issue. While the Supreme Court has made clear that some executive agreements are constitutional,[75] no court has held that executive agreements are fully interchangeable with treaties. Nor have courts articulated standards to determine what types of agreements must be submitted to the Senate as treaties and what types of agreements the President can conclude as executive agreements. There is a dearth of judicial opinions on the

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Press Release, U.S. Dep't of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), https://2009-2017.state.gov/r/pa/prs/ps/2013/11/217295.htm.

[70] *See* Bradley & Goldsmith, *supra* note 11, at 1263.

[71] *Compare* Bradford C. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1661 (2007) (arguing that the text and drafting history of the Constitution support the position that treaties and executive agreements are not interchangeable); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–67 (1995) (arguing that the Treaty Clause is the exclusive means for Congress to approve significant international agreements); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 852 (2001) (arguing that treaties are the constitutionally required form for international agreements concerning action outside of Congress's Article I powers, including matters with respect to human rights, political/military alliances, and arms control, but are not required for Congress's enumerated powers, such as agreements concerning international commerce); *with* THIRD RESTATEMENT, *supra* note 1, § 303 n.8 ("At one time it was argued that some agreements can be made only as treaties, by the procedure designated in the Constitution.... Scholarly opinion has rejected that view."); HENKIN, *supra* note 22, at 217 ("[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.... "); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 861–96 (1995) (arguing that developments in the World War II era altered historical understanding of the Constitution's allocation of power between government branches so as to make congressional-executive agreement a complete alternative to a treaty).

[72] *See, e.g.*, WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Myers S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pt. I)*, 54 YALE L.J. 181 (1945).

[73] *See, e.g.*, Ackerman & Golove, *supra* note 71, at 681–96; Tribe, *supra* note 71, at 1249–67.

[74] *Compare, e.g.*, Steven Groves, The Paris Agreement is a Treaty and Should be Submitted to the Senate, Backgrounder No. 3103 (Heritage Foundation, March 15, 2016), http://thf-reports.s3.amazonaws.com/2016/BG3103.pdf (arguing that the Paris Agreement requires the Senate's advice and consent) *with* David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515 (2015) (asserting that neither Senate advice and consent nor new congressional legislation are necessarily conditions precedent to the United States becoming a party to an international agreement related to emissions reduction and climate change).

[75] *See supra* note 39.

issue largely because plaintiffs often cannot satisfy the threshold justiciability requirements that would allow them to challenge the constitutionality of executive agreements in court.[76] In a challenge to the President's ability to join NAFTA outside the Article II treaty-making process, for example, a U.S. court of appeals concluded that the question of what form an international agreement should take was a nonjusticiable political question.[77]

As a matter of historical practice, some types of international agreements have traditionally been entered as treaties in all or many instances, including compacts concerning mutual defense,[78] extradition and mutual legal assistance,[79] human rights,[80] arms control and reduction,[81] taxation,[82] and the final resolution of boundary disputes.[83] In addition, the Senate has occasionally used its

[76] *See* Made in the USA Found. v. United States, 242 F.3d 1300, 1319 (11th Cir. 2001), *cert. denied*, United Steelworkers v. United States, 534 U.S. 1039 (2001); Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258, 265–66 (D.C. Cir. 1980).

[77] *See Made in the USA Found*., 242 F.3d at 1312–19. For background on the political question doctrine, see Cong. Research Serv., *Overview of the Political Question Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE_00001283/ (last visited Jan. 25, 2023)

[78] *See*, *e.g.*, Inter-American Treaty of Reciprocal Assistance, Dec. 3, 1948, 62 Stat. 1681, 21 U.N.T.S. 77; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; Security Treaty, Austl.-N.Z.-U.S., Sept. 1, 1951, 3 U.S.T. 3420; Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 U.S.T. 3947; Mutual Defense Treaty, S. Kor.-U.S., Oct. 1, 1953, 5 U.S.T. 2368; Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81; Treaty of Mutual Cooperation and Security, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632, (replacing Security Treaty, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3329).

[79] See generally CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Contemporary Treaties*, by Michael John Garcia and Charles Doyle, at App. A (listing bilateral extradition treaties to which the United States is a party). Congress enacted statutes that permitted in certain circumstances the extradition of non-citizens to foreign countries even in the absence of a treaty, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 443(a), 110 Stat. 1214, 1280, as well as the surrender of U.S. citizens to face prosecution before the International Tribunals for Rwanda and Yugoslavia, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486. The U.S. Court of Appeals for the Fifth Circuit upheld the legality of the latter statute and held that extradition may be effectuated pursuant to either a treaty or authorizing statute. Ntakirutimana v. Reno, 184 F.3d 419, 425 (5th Cir. 1999).

[80] *See*, *e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (Agreement was not ratified by Congress until Nov. 5, 1988); International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 (Agreement was not ratified by Congress until June 8, 1992); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 95-2, 1465 U.N.T.S. 85 (Agreement was not ratified by Congress until Oct. 21, 1994).

[81] *See*, *e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483; Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435; Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1975 U.N.T.S. 3. *But see* 22 U.S.C. § 2573 (provision of 1961 Arms Control and Disarmament Act, as amended, generally barring acts that oblige the United States to limit forces or armaments in a "military significant manner" unless done pursuant to a treaty or further affirmative legislation by Congress); Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3462 (Strategic Arms Limitation Talks (SALT I) Interim Agreement, which was entered as a congressional-executive agreement, *see* Pub. L. No. 92-448, 86 Stat. 746, and was intended as a stop-gap, five-year measure while the parties negotiated a permanent agreement).

[82] For a list of tax treaties to which the United States is a party, see *United States Income Tax Treaties–A to Z*, INTERNAL REVENUE SERV. (Apr. 28, 2022), https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z.

[83] *See*, *e.g.*, Treaty Concerning the Canadian International Boundary, U.K.-U.S., Apr. 11, 1908, 35 Stat. 2003; Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Mex.-U.S., Nov 23, 1970, 23 U.S.T. 371. The executive branch has regularly entered agreements to "provisionally" set boundaries pending ratification of a treaty intended to permanently resolve a boundary dispute. While some of these provisional agreements have been for a short duration, others have remained in effect for many (continued...)

conditional consent authority to insist that certain types of agreements be submitted for advice and consent rather than concluded as executive agreements. In giving advice and consent to several arms control treaties, for example, the Senate included a declaration that it would consider "international agreements that obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner" only through the Article II advice and consent process.[84] When giving advice and consent to protocols expanding the North Atlantic Treaty Organization (NATO) alliance, the Senate stated that it will not support future NATO expansion unless the President consults the Senate consistent with the Treaty Clause.[85]

State Department regulations also address the dividing line between treaties and executive agreements. In a process for coordinating and approving international agreements known as the *Circular 175 procedure*,[86] the State Department lists criteria for determining whether an international agreement should take the form of a treaty or an executive agreement. Congressional preference is one of several factors (identified in the text box below). The Circular 175 procedure also provides that, in determining how an international agreement "should be brought into force ... the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole."[87]

In 1978, the Senate passed a resolution expressing its sense that the President seek the advice of the Senate Committee on Foreign Relations in determining whether an international agreement should be submitted as a treaty.[88] The State Department later modified the Circular 175 procedure to provide for consultation with appropriate congressional leaders and committees about significant international agreements.[89] Consultations are to be held "as appropriate."[90]

**Factors to Distinguish Treaties from Executive Agreements**

In determining whether a particular international agreement should be concluded as a treaty or an executive agreement, the State Department requires consideration to be given to these factors:

(1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;

(2) Whether the agreement is intended to affect state laws;

years because of the lack of a ratified final agreement. For example, by way of a series of two-year executive agreements, the executive branch has continued to provisionally apply a proposed U.S.-Cuba maritime boundary agreement that was submitted to the Senate in 1978. *See* SEN. EXEC. DOC. H, 96th Cong.

[84] *See*, *e.g.*, 137 Cong. Rec. 34348 (Nov. 23, 1991) (Treaty on Conventional Armed Forces in Europe); 143 Cong. Rec. 932 (Jan. 21, 1997) (Chemical Weapons Convention).

[85] *See* 144 CONG. REC. 7909 (May 4, 1998); 149 CONG. REC. 10783 (May 8, 2003); 163 CONG. REC. S2038 (daily ed. March 2018); 165 CONG. REC. S5943 (daily ed. Oct. 22, 2019). A paragraph immediately following the consultation requirement states the following:

> The Senate declares that no action or agreement other than a consensus decision by the full membership of NATO, approved by the national procedures of each NATO member, including, in the case of the United States, the requirements of Article II, section 2, clause 2 of the Constitution of the United States (relating to the advice and consent of the Senate to the making of treaties), will constitute a security commitment pursuant to the North Atlantic Treaty.

*E.g.*, 144 CONG. REC. 7909 (May 4, 1998).

[86] Circular 175 initially referred to a 1955 Department of State circular that established a process for the coordination and approval of international agreements. These procedures, as modified, are now found in 22 C.F.R. Part 181 and Volume 11 of the Foreign Affairs Manual (FAM). *See* 11 FAM § 720.

[87] 11 FAM § 723.3.

[88] S. Res. 536, 95th Cong. (1977).

[89] 11 FAM § 723.4(b)–(c).

[90] *Id.* § 723.4(c).

(3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

(4) Past U.S. practice as to similar agreements;

(5) The preference of the Congress as to a particular type of agreement;

(6) The degree of formality desired for an agreement;

(7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

(8) The general international practice as to similar agreements.

**Source:** 11 FAM § 723.

## Non-Binding Instruments

Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally binding international agreement.[91] In some cases, the United States makes non-binding commitments to foreign countries, sometimes called "political commitments" or "soft law" pacts.[92] Although non-binding instruments do not modify existing legal requirements under either international or domestic U.S. law, they may still contain commitments with moral and political weight. For example, the 1975 Helsinki Accords, a Cold War agreement signed by 35 nations, contains provisions concerning territorial integrity, human rights, scientific and economic cooperation, peaceful settlement of disputes, and the implementation of confidence-building measures.[93]

Under State Department regulations, an international agreement is generally presumed to be legally binding unless there is an express provision indicating its non-binding nature.[94] State Department regulations provide that this presumption may be overcome when there is "clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system."[95] Other factors considered include the form of the agreement and its provisions' specificity.[96]

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[91] *See generally* Memorandum from Robert E. Dalton on International Documents of Non-Legally Binding Character 1–5 (Mar. 18, 1994), https://2009-2017.state.gov/documents/organization/65728.pdf (discussing U.S. and international practice with respect to non-binding instruments); Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507 (2009) (discussing the origins and constitutional implications of the practice of making political commitments); Curtis Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 CHI. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023641 (discussing increasing use of non-binding instruments for major international commitments).

[92] *E.g.*, Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 96 (2d ed. 2015).

[93] Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323, Aug. 1, 1975 [hereinafter Helsinki Accords].

[94] 22 C.F.R. § 181.2(a)(1) ("In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law."). *See also* Hollis & Newcomer, *supra* note 91, at 525 ("To date, most (but not all) international lawyers favor a presumption of treaty making in lieu of creating political commitments.").

[95] 22 C.F.R. § 181.2(a)(1).

[96] *Id.* § 181.2(a). *See also Guidance on Non-Binding Documents*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/treaty/guidance/index.htm (last visited Jan. 12, 2023). Presidents sometimes unilaterally make temporary commitments known as *modi vivendi* arrangements, which are stopgap measures intended to guide the parties' conduct until they conclude a more permanent legal agreement. *See generally* William Hays Simpson, *Use of Modi Vivendi in Settlement of International Disputes*, 11 ROCKY MNTN. L. REV. 89 (1938); W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNATIONAL L. 729 (2002).

The executive branch claims authority to make non-binding commitments on behalf of the United States without congressional authorization, but the scope of this authority is the subject of a long-standing debate between Congress and the executive branch.[97] Disputes have been particularly acute when the executive branch has made non-binding commitments involving U.S. military forces. In 1969, the Senate passed the National Commitments Resolution, expressing the sense of the Senate that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty [or legislative enactment] ... specifically providing for such commitment."[98] The resolution defined a "national commitment" to include "a promise to assist a foreign country ... by the use of armed forces ... either immediately or upon the happening of certain events."[99]

The National Commitments Resolution, which was a sense of the Senate resolution, had no legal effect.[100] Although Congress has occasionally considered legislation that would bar significant military commitments without congressional action,[101] no such measure has been enacted.

## Transparency Requirements

To facilitate oversight of and transparency into the United States' international obligations, Congress has enacted legislation that requires the executive branch to publish and report to Congress on certain international commitments.[102] A statute originally enacted in 1950 (1 U.S.C. § 112a) requires the Secretary of State to compile and publish annually a list of all treaties and other binding international agreements in force for the United States.[103] Legislation originally

[97] *Compare*, *e.g.*, Press Briefing by Press Secretary Josh Earnest, WHITE HOUSE (Jan. 29, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/29/press-briefing-press-secretary-josh-earnest-12915 ("[A] congressional vote on a nonbinding instrument is not required by law and could set an unhelpful precedent for other negotiations that result in other nonbinding instruments."); *with* S. REP. NO. 91-129 (1969) (Senate Committee on Foreign Relations report criticizing, among other things, the President's "national commitments" and unilateral pledges to other countries without congressional involvement).

[98] S. Res. 85, 91st Cong. (1969).

[99] *Id.* According to the committee report accompanying the National Commitments Resolution, the resolution arose from concern over the growing development of "constitutional imbalance" in matters of foreign relations, with Presidents frequently making significant foreign commitments on behalf of the United States without congressional action. S. REP. NO. 91-129, at 7 (1969). Among other things, the report criticized a practice it described as "commitment by accretion," by which a "sense of binding commitment arises out of a series of executive declarations, no one of which in itself would be thought of as constituting a binding obligation. Simply repeating something often enough with regard to our relations with some particular country, we come to support that our honor is involved in an engagement no less solemn than a duly ratified treaty." S. REP. NO. 91-129, at 26 (1969).

[100] *See*, *e.g.*, Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) ("'Sense of the Congress' provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law."). For additional background on "sense of" provisions, see CRS Report 98-825, *"Sense of" Resolutions and Provisions*, by Christopher M. Davis.

[101] *See*, *e.g.*, Executive Agreements Review Act, H.R. 4438, 94th Cong. (1975) (proposing to establish legislative veto over executive agreements involving national commitments); Treaty Powers Resolution, S. Res. 24, 95th Cong. (1977) (proposing that it would not be in order for the Senate to consider any legislation authorizing funds to implement any international agreement that the Senate has found to constitute a treaty, unless the Senate has given its advice and consent to treaty ratification).

[102] For background on the development of the transparency regime related to treaties and international agreements, see TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 209–12; Oona A. Hathaway et al., *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 645–56 (2020).

[103] Several exceptions apply to the publication requirements in the pre-2023-NDAA version of 1 U.S.C. § 112a (2022). For example, publication is not required when the Secretary of State determines that public interest in the agreements is insufficient to justify publication. 1 U.S.C. § 112a(b)(2) (2022). The 2023 NDAA replaces these exceptions with a new (continued...)

enacted in 1972, commonly called the Case-Zablocki Act (1 U.S.C. § 112b), as amended, requires the Secretary of State to transmit to Congress the text of all executive agreements to which the United States is a party within 60 days after the agreement enters into force.[104] Exceptions and limitations to the Case-Zablocki Act's requirements[105] led some observers to argue that these statutes do not provide sufficient insight into international agreement-commitment.[106] To address potential shortcomings, Congress amended both statutes in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA) and created new transparency obligations that will take effect in September 2023.[107]

## Qualifying Non-Binding Instruments

The 2023 NDAA will require, for the first time, the executive branch to report and publish certain non-binding commitments.[108] The 2023 NDAA applies these transparency obligations to *qualifying non-binding instruments*, which the statute defines as instruments with foreign governments, international organizations, or foreign entities (including non-state actors) that could reasonably be expected to have a significant impact on U.S. foreign policy.[109] A non-binding instrument that is the subject of a written communication between the Secretary of State and the chair or ranking member of the House Committee on Foreign Affairs or the Senate Committee on Foreign Relations is deemed a qualifying non-binding instrument.[110] Instruments concluded or implemented based on authorities relied on by the Department of Defense (DOD), the armed forces, or the intelligence community are exempt from the definition of *non-binding instrument*.[111]

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list of agreements and instruments not subject to its transparency requirements. *See infra* "Congressional Reporting and Publication Requirements."

[104] The Case-Zablocki Act authorizes the President to decline to transmit executive agreements to the Senate Foreign Relations Committee and the House Foreign Affairs Committee (then called the House Committee on International Relations) if, in the President's opinion, immediate public disclosure of the agreement would prejudice national security. *See* 1 U.S.C. § 112b(a) (2022).

[105] The notification requirements in the Case-Zablocki Act were not interpreted to apply to every executive agreement. Legislative history suggests Congress "did not want to be inundated with trivia ... [but wished] to have transmitted all agreements of any significance." H.R. REP. NO. 92-301, 92nd Cong. (1972). Implementing State Department regulations set criteria for assessing when a compact constitutes an "international agreement" that must be reported under the Case-Zablocki Act. These regulations provide that "[m]inor or trivial undertakings, even if couched in legal language and form," are not considered to fall under the purview of the act's reporting requirements. 22 C.F.R. §181.2(a).

[106] *See* Hathaway et al., *supra* note 102, at 657–91.

[107] 2023 NDAA, § 5947 (to be codified at 1 U.S.C. §§ 112a–112b).

[108] The State Department's pre-2023-NDAA regulations on publication and reporting of international agreements do not apply to non-binding documents. *See* 22 C.F.R. § 181.2(a)(1). On at least one occasion, Congress enacted context-specific legislation requiring the executive branch to provide notification of any commitment, regardless of whether it was legally binding, so that Congress could give expedited consideration on whether to disapprove of the commitment. *See* Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, § 2(h)(1), 129 Stat. 201, 211 (codified in 42 U.S.C. § 2160e(h)(1)).

[109] 2023 NDAA, § 5947(a)(1) (to be codified at 1 U.S.C. § 112b(k)(5)(A)).

[110] *Id.*

[111] *Id.* (to be codified at 1 U.S.C. § 112b(k)(5)(B)). Some observers argue that, because DOD concludes a high volume of non-binding instruments, the exemption for instruments based upon DOD, armed forces, and intelligence authorities will have the effect of excluding many non-binding instruments from the 2023 NDAA's disclosure requirements. *See* Curtis Bradley, Jack Goldsmith, Oona Hathaway, *Congress Mandates Sweeping Transparency Reforms for International Agreements*, LAWFARE (Dec. 23, 2022), https://www.lawfareblog.com/congress-mandates-sweeping-transparency-reforms-international-agreements.

## Congressional Reporting and Publication Requirements

Once in effect, the 2023 NDAA will require the Secretary of State to provide monthly written reports to the majority and minority leaders of the House and Senate and of the foreign affairs committees with the material listed in the text below.

### Congressional Reporting Requirements in the 2023 NDAA

Under the 2023 NDAA, the Secretary of State must provide the following each month:

**List**: A list of all international agreements[112] and qualifying non-binding instruments signed, concluded, or otherwise finalized or that entered into force or became operative in the prior month.[113]

**Text**: The text of each agreement and instrument, including any implementing material, annex, appendix, side letter, or similar document entered into contemporaneously and in conjunction with the underlying agreements and instruments.[114]

**Authorizing authority**: A detailed description of the legal authority that the executive branch views as authorizing the agreements and instruments.[115] All citations to the Constitution, treaties, and statutes must include the specific article, section, or subsection that the executive branch relies upon.[116] If the relied-upon authority includes Article II of the Constitution, the executive branch must explain the basis for its reliance.[117]

**Implementing authority**: A statement of any new or amended statutory or regulatory authority anticipated to be necessary to implement a listed agreement or instrument that entered into force or became operative.[118]

Along with periodic reports to Congress, the 2023 NDAA will require the Secretary of State to publish the text, authorizing authority, and implementing authority for each international agreement and qualifying non-binding instrument on its website within 120 days of entering into force or becoming operative.[119] The legislation will exempt several categories of agreements and instruments from this publication requirement.[120] Exempted agreements and instruments are those that contain classified information or information exempt from public disclosure, address certain military matters, establish terms for certain foreign assistance, provide technical details for an existing project, or are published separately.[121]

[112] The 2023 NDAA defines *international agreement* as including any treaty that requires the Senate's advice and consent pursuant to Article II of the Constitution and "any other international agreement to which the United States is a part and that is not subject to the advice and consent of the Senate." 2023 NDAA § 5947(a)(1) (to be codified at 1 U.S.C. § 112b(k)(4)(A)–(B)).

[113] *Id.* (to be codified at 1 U.S.C. § 112b(a)(1)).

[114] *Id.* (to be codified at 1 U.S.C. § 112b(a)(1)(A)(ii) and (k)(7)(A)). If the text changes after signature or finalization, the executive branch must provide the updated text when the agreement or instrument enters into force or becomes operative. *Id.* (to be codified at 1 U.S.C. § 112b(a)(1)(B)(ii)). The list and text of international agreements may be submitted in classified and unclassified form. *Id.* (to be codified at 1 U.S.C. § 112b(a)(2)).

[115] *Id.* (to be codified at 1 U.S.C. § 112b(a)(1)(A)(iii)). If multiple authorities are relied upon, the executive branch must cite all authorities.

[116] *Id.* When no specific article, section, or subsection is available, the citation must be "as specific as possible." *Id.*

[117] 2023 NDAA § 5947(a)(1) (to be codified at 1 U.S.C. § 112b(a)(1)(A)(iii)).

[118] *Id.* (to be codified at 1 U.S.C. § 112b(a)(1)(B)(iii)).

[119] *Id.* (to be codified at 1 U.S.C. § 112b(b)(1)–(2)). The State Department must make available upon request any international agreement or qualifying non-binding instrument that is in its possession but not published. *Id.* § 5947(b) (to be codified at 1 U.S.C. § 112a(b)).

[120] *Id.* (to be codified at 1 U.S.C. § 112b(b)(3).

[121] *Id.* (to be codified at 1 U.S.C. § 112b(b)(3)(A)–(E)).

## Other Oversight and Transparency Provisions

The 2023 NDAA contains other provisions related to congressional oversight of and transparency into international agreements.

### *Implementing Agreements*

The Secretary of State must submit implementing agreements or arrangements not otherwise required to be provided to Congress under the 2023 NDAA upon request from a chair or ranking member of the foreign affairs committees.[122] In response to such a request, the Secretary must provide the implementing agreements or arrangements to the majority and minority leaders of the House and Senate and of the foreign affairs committees.[123]

### *Internal Executive Branch Process*

When any executive branch agency signs or concludes an international agreement or qualifying non-binding instrument, it must provide the Secretary of State with the text and a statement of authorizing authority within 15 days after the agreement was signed or otherwise concluded.[124] Agencies may not sign or conclude binding international agreements without consulting the Secretary of State.[125] Any agency that enters into an international agreement or qualifying non-binding instrument must appoint a chief international agreements officer.[126]

### *Oral Agreements*

All oral agreements must be reduced to writing to fulfill congressional reporting and publication requirements.[127]

### *Sense of Congress*

The 2023 NDAA restates a "sense of Congress," similar to a provision in the Case-Zablocki Act, that "the executive branch should not prescribe or otherwise commit to or include specific legislative text in a treaty or executive agreement unless Congress has authorized such action."[128]

### *Audits and Non-Compliance*

The Comptroller General is required to conduct and publish periodic audits of the executive branch's compliance with its transparency obligations.[129] The Secretary of State must establish a mechanism for State Department personnel to report instances of non-compliance with the law's transparency requirements to the Secretary.[130]

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[122] *Id.* (to be codified at 1 U.S.C. § 112b(c)).

[123] 2023 NDAA § 5947(a)(1) (to be codified at 1 U.S.C. § 112b(c)).

[124] *Id.* (to be codified at 1 U.S.C. § 112b(d)(1)–(3)). Agencies must also provide implementing material on an ongoing basis as necessary to fulfil congressional reporting requirements. *See id*. (to be codified at 1 U.S.C. § 112b(d)(4)).

[125] *Id.* (to be codified at 1 U.S.C. § 112b(g)).

[126] *Id.* (to be codified at 1 U.S.C. § 112b(e)).

[127] *Id.* (to be codified at 1 U.S.C. § 112b(f)).

[128] *Id.* (to be codified at 1 U.S.C. § 112b(j)).

[129] 2023 NDAA § 5947(a)(1) (to be codified at 1 U.S.C. § 112b(h)(1)).

[130] *Id.* § 5947(a)(4) (to be codified at 1 U.S.C. § 112b note).

### *Congressional Consultations and Briefings*

The Secretary of State must consult the House and Senate foreign affairs committees on matters related to implementing the 2023 NDAA's transparency provisions before and after the law's enactment.[131] The Secretary must also brief these committees on its implementation efforts 90 days after the law's enactment and once every 90 days for the next year.[132]

# Effects of International Agreements on U.S. Law

Just as the taxonomy of and transparency into international agreements has become increasingly sophisticated, the relationship between international agreements and domestic U.S. law presents complex considerations. How international agreements affect U.S. law varies depending on the form of the agreement and whether the agreement (or a provision within an agreement) calls for implementing legislation from Congress in order to be made judicially enforceable.

## Self-Executing vs. Non-Self-Executing Agreements

The Supremacy Clause of the Constitution (Article VI, clause 2), provides that treaties concluded in accordance with constitutional requirements have the status of the "supreme Law of the Land." Despite the clause's pronouncement, not all treaties and international agreements have the status of domestic law enforceable in U.S. courts. Some provisions in international agreements are considered *self-executing* and have the force of domestic law.[133] Other provisions are *non-self-executing* and occupy a more complex place within the U.S. legal system.[134]

Non-self-executing provisions in treaties are not directly enforceable in U.S. courts, and Congress must generally pass legislation to make them judicially enforceable.[135] The Supreme Court has deemed a provision non-self-executing when the text manifests an intent that the provision not be directly enforceable in U.S. courts[136] or when the Senate conditions its advice and consent on the understanding that the provision is non-self-executing.[137] If pre-existing federal or state domestic law addresses the same matter as a non-self-executing provision, the pre-existing law remains

[131] *Id.* § 5947(a)(6)(A) (to be codified at 1 U.S.C. § 112b note).

[132] *Id.* § 5957(a)(6)(B) (to be codified at 1 U.S.C. § 112b note).

[133] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829) (Marshall, C.J.) (describing a treaty as "equivalent to an act of the legislature" when it "operates of itself without the aid of any legislative provision"), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Ga., LLC, 8 F.4th 1007, 1013 (9th Cir. 2021) (provision mandating that domestic courts "shall" enforce arbitration agreements was self-executing), *cert. denied*, 142 S. Ct. 862 (2022).

[134] See *Medellín*, 552 U.S. at 505 n.2 ("[A] 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress."

[135] *E.g.*, *Id.* at 505 ("[W]hile treaties may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (citations, internal quotation marks, and alteration omitted); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by [C]ongress as legislation upon any other subject.").

[136] *See, e.g.*, *Medellín*, 552 U.S. at 507–08; *Foster*, 27 U.S. (2 Pet.) at 254.

[137] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004).

unchanged and controlling even after the international agreement is ratified and enters into force.[138]

Although the Supreme Court has not addressed the issue directly, many courts and commentators agree that international agreements that would require the United States to exercise authority that the Constitution assigns to Congress exclusively must be considered non-self-executing, and implementing legislation would be needed to give them domestic legal effect.[139] Lower courts have stated that, because Congress has the power of the purse, a provision that requires expenditure of funds must be treated as non-self-executing.[140] Other lower courts have suggested that provisions that purport to create criminal liability[141] or raise revenue[142] must be treated as non-self-executing because those powers are the exclusive prerogative of Congress.

The doctrine of self-execution appears to be in some tension with the Supremacy Clause's statement that *all* treaties are part of the supreme law of the land.[143] Some courts and scholars seek to resolve this tension by reasoning that non-self-executing provisions are still part of the supreme law of the land[144] but do not create rights that courts can enforce.[145] Other authorities suggest non-self-executing treaties lack any domestic legal status whatsoever.[146] Still others contend that non-self-executing provisions do not create a private right of action—meaning

[138] *See*, *e.g.*, *Medellín*, 552 U.S. at 503–04.

[139] *See*, *e.g.*, FOURTH RESTATEMENT, *supra* note 12, § 310(3) & cmt. c. *See also* 5 ANNALS OF CONG. 771 (1796) (resolution passed by the House of Representatives stating that "when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress").

[140] *See* Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) ("[E]xpenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable."), *cert. denied*, 436 U.S. 907 (1978); The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925) ("All treaties requiring payments of money have been followed by acts of Congress appropriating the amount. The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); Turner v. Am. Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) ("[M]oney cannot be appropriated by the treaty-making power. This results from the limitations of our government.").

[141] *See* Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals ... require domestic legislation before they are given any effect."); United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979) (noting that constitutional restrictions on the use of a self-executing treaty to withdraw money from the treasury would also "be the case with respect to criminal sanctions"), *cert. denied*, 444 U.S. 832 (1979).

[142] *See Edwards*, 580 F.2d at 1058 ("[T]he constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,' ... appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.... ") (quoting U.S. CONST. art. I, § 7, cl. 1); Swearingen v. United States, 565 F. Supp. 1019, 1022 (D. Colo. 1983).

[143] U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.... ").

[144] *See*, *e.g.*, *The Over the Top*, 5 F.2d at 845 ("The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); FOURTH RESTATEMENT, *supra* note 12, § 310 reporters' n.12 ("[T]here is no clear reason at present to conclude that non-self-executing provisions are, as a general matter, less than supreme law."); Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. 1809, 1828 (2020) (arguing that "treaties generally, and the U.N. Charter in particular, are 'Laws'" in the constitutional sense).

[145] *See*, *e.g.*, Auguste v. Ridge, 395 F.3d 123, 133 (3d Cir. 2005) ("Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation."); BRADLEY, *supra* note 92, at 44 (summarizing the debate of the domestic status of non-self-executing treaties).

[146] ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 162 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."), *certified question answered*, 880 N.E.2d 852 (N.Y. 2007); Renkel v. United States, 456 F.3d 640, 643 (6th Cir. 2006) ("[N]on-self-executing' treaties do require domestic legislation to have the force of law."); Authority of the Federal Bureau of Investigation To Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 178–79 (1989) ("[U]nexecuted treaties ... are not legally binding on the political branches.").

litigants cannot use them as the basis to start litigation—but courts can still enforce them when no private right of action is necessary, such as in a defense to criminal proceedings.[147]

**Self-Execution and International Law**

Although the self-execution doctrine can complicate an international agreement's role in the U.S. legal system, the same complexities generally do not arise under international law.[148] International law generally allows each individual nation to decide how to implement its international legal commitments into its own domestic legal system.[149] The self-execution doctrine concerns how the United States implements its commitments in U.S. domestic law, but it does not affect the United States' obligation to comply with the provision under international law.[150] When the United States concludes an international agreement, it assumes binding obligations under international law regardless of self-execution, and it may be in default of the obligations if the agreement requires implementing legislation but none is enacted.[151]

## Congressional Implementation of International Agreements

When an international agreement requires implementing legislation or appropriation of funds to carry out the United States' obligations, the task of providing that legislation falls to Congress.[152] In the early years of constitutional practice, debate arose over whether Congress was obligated—rather than simply empowered—to enact legislation implementing non-self-executing provisions into domestic law.[153] That debate has not been resolved in any definitive way, as it has not been addressed in a judicial opinion and continues to be the subject of disagreement.[154]

By contrast, the Supreme Court has addressed the scope of Congress's power to enact legislation implementing non-self-executing treaty provisions. In a 1920 case, *Missouri v. Holland*,[155] the Supreme Court addressed a constitutional challenge to a federal statute that implemented a treaty

[147] *See, e.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 197–216 (1999); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–44 (1992).

[148] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 504–06 (2008) (discussing the distinction between the binding effect of treaties under international law versus domestic law).

[149] *See* Head Money Cases, 112 U.S. 580, 598 (1884) ("[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."); FOURTH RESTATEMENT, *supra* note 12, §§ 310(3), 110 cmt. c ("It is ordinarily up to each nation to decide how to implement domestically its international obligations.").

[150] *See Medellín*, 552 U.S. at 522–23.

[151] *See* THIRD RESTATEMENT, *supra* note 1, § 111, cmt. h.

[152] *See* HENKIN, *supra* note 22, at 204. *See also supra* "Self-Executing vs. Non-Self-Executing Agreements" (discussing Congress's role in implementing non-self-executing treaties).

[153] Whereas Alexander Hamilton argued that the House of Representatives was obligated to appropriate funds for the Jay Treaty, *supra* note 37, James Madison, then a Member of the House of Representatives, and others disagreed. *Compare* Enclosure to Letter from Alexander Hamilton, to George Washington (Mar. 29, 1796), *in* PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett ed., 1974) ("[T]he house of representatives have no moral power to refuse the execution of a treaty, which is not contrary to the constitution, because it pledges the public faith, and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority."), *and* 5 ANNALS OF CONG. 493–94 (1796) (statement of Rep. Madison) ("[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation. If it must carry all Treaties into effect, ... it would be the mere instrument of the will of another department, and would have no will of its own."); *with id.* at 771 (proposed resolution of Rep. Blount) ("[W]hen a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect. . . .").

[154] *See* HENKIN, *supra* note 22, at 205.

[155] 252 U.S. 416 (1920).

prohibiting killing, capturing, or selling certain birds that traveled between the United States and Canada.[156] In the decade before, two federal district courts had held that similar statutes enacted before the treaty violated the Tenth Amendment[157] because they infringed on the reserved powers of the states to control natural resources within their borders.[158] However, the *Holland* Court concluded that, even if those district court decisions were correct, their reasoning no longer applied once the United States concluded a valid migratory bird treaty.[159] In an opinion written by Justice Holmes, the *Holland* Court held that the treaty power can be used to regulate matters that the Tenth Amendment might otherwise reserve to the states.[160] If the treaty itself is constitutional, the *Holland* Court held, Congress has the power under the Necessary and Proper Clause[161] to enact legislation implementing the treaty into the domestic law of the United States without restraint by the Tenth Amendment.[162]

Commentators and jurists have called some aspects of Justice Holmes's reasoning in *Holland* into question,[163] and some scholars have argued that the opinion does not apply to executive agreements.[164] At the same time, the Supreme Court has not overturned *Holland*'s holding related to Congress's power to implement treaties.[165] Nevertheless, principles of federalism embodied in

[156] *See* Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918); Convention for the Protection of Migratory Birds, art. VIII, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702.

[157] U.S. CONST. amend. X (The Tenth Amendment provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). For background on the Tenth Amendment, see Cong. Research Serv., *Overview of Tenth Amendment, Rights Reserved to the States and the People*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt10-1/ALDE_00013619/ (last visited Jan. 12, 2023).

[158] United States v. McCullagh, 221 F. 288, 295–96 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914).

[159] *See* Missouri v. Holland, 252 U.S. 416, 433 (1920).

[160] *See id.* at 433–34 (concluding that the "treaty in question does not contravene any prohibitory words to be found in the Constitution" and is not "forbidden by some invisible radiation from the general terms of the Tenth Amendment").

[161] *See* U.S. CONST. art. I, § 8, cl. 18.

[162] *See Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."). *Accord* Neely v. Henkel, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper ... includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.").

[163] *See* Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion) (responding to *dicta* in *Holland* by clarifying that the treaty power is subject to certain constitutional constraints); Bond v. United States, 572 U.S. 844, 873 (2014) (Scalia, J., concurring in the judgment) (joined by Thomas, J.) (describing *Holland*'s interpretation of the Necessary and Proper Clause as consisting of an "unreasoned and citation-less sentence" that is unsupported by the Constitution's text or structure); United States v. Rife, 33 F.4th 838, 842 n.1 (6th Cir. 2022) ("*Holland* itself might rest on shaky ground"), *cert. denied*, 214 L. Ed. 2d 172, 143 S. Ct. 356 (2022); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005) (arguing that *Holland*'s interpretation of the Necessary and Proper Clause "is wrong and the case should be overturned"). In the 1950s, there was an effort, led by Senator John Bricker of Ohio, to limit the scope of the treaty power as described in *Holland* through a constitutional amendment. One version of the proposed amendment, which became known as the "Bricker Amendment," would have provided that a "treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." *See* S. COMM. ON THE JUDICIARY, 83D CONG., PROPOSALS TO AMEND THE TREATY-MAKING PROVISIONS OF THE CONSTITUTION: VIEWS OF DEANS AND PROFESSORS OF LAW 3 (Comm. Print 1953). No version of the Bricker Amendment was ever adopted.

[164] BRADLEY, *supra* note 92, at 86.

[165] *See* United States v. Lara, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (quoting *Holland*, 252 U.S. at 433); *Reid*, 354 U.S. at 18 (plurality opinion) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.").

the Tenth Amendment continue to impact constitutional challenges to U.S. treaties and their implementing statutes, including in the 2014 Supreme Court decision *Bond v. United States*.[166]

*Bond* concerned a criminal prosecution arising from a case of "romantic jealously" when a jilted spouse spread toxic chemicals on the mailbox of a woman with whom her husband had an affair.[167] Although the victim suffered only a "minor thumb burn," the United States brought criminal charges under the Chemical Weapons Convention Implementation Act of 1998—a federal statute that implemented a multilateral treaty prohibiting the use of chemical weapons.[168] The accused asserted that the Tenth Amendment reserved the power to prosecute her "purely local" crime to the states and asked the Court to either overturn or limit *Holland*'s holding.[169]

Although a majority in *Bond* declined to revisit *Holland*'s interpretation of the Tenth Amendment,[170] the Court ruled in the accused's favor based on principles of statutory interpretation.[171] When construing a statute interpreting a treaty, the Court in *Bond* explained that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity.... "[172] Applying these principles through a presumption that Congress did not intend to intrude on areas of traditional state authority, the *Bond* Court held that the Chemical Weapons Convention Implementation Act did not apply to the jilted spouse's actions.[173] In other words, the majority in *Bond* did not disturb *Holland*'s conclusion that the Tenth Amendment does not limit Congress's power to enact legislation implementing treaties, but *Bond* did hold that principles of federalism reflected in the Tenth Amendment may dictate how courts interpret such implementing statutes.[174]

## Conflict with Existing Laws

Sometimes, a treaty or executive agreement will conflict with one of the three primary tiers of domestic law: U.S. state law, federal law, or the Constitution. Resolution of these conflicts depends on the specific form of agreement. All international agreements are inferior to the Constitution and subject to its constraints.[175]

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[166] *Bond*, 572 U.S. at 844.

[167] *Bond*, 572 U.S. at 861.

[168] Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, tit. II, § 201(a), 112 Stat. 2681, 2681–866 (codified in 18 U.S.C. §§ 229–229f); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction art. 1, Jan. 13, 1993, 1974 U.N.T.S. 317.

[169] *Bond*, 572 U.S at 863.

[170] *See id.* at 854–55. Justice Scalia and Justice Thomas criticized *Holland* and argued that the Supreme Court should depart from its interpretation of congressional power to enact legislation that is necessary and proper to implement treaties. *See id*. at 880–81 (Scalia, J., concurring in the judgment) (joined by Thomas, J.).

[171] *See id*. at 858–60.

[172] *Id.* at 859–60.

[173] *See id*. at 858–60.

[174] *Accord* William S. Dodge, *Bond v. United States and Congress's Role in Implementing Treaties*, 108 AJIL UNBOUND 86, 87 (2015) ("The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism.").

[175] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416–17 & n.9 (2003) (stating that the power of a treaty to preempt state law is "[s]ubject ... to the Constitution's guarantees of individual rights"); Boos v. Barry, 485 U.S. 312, 324 (1988) ("It is well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.' ") (quoting Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion)); Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) ("The treaty-making power of the United States ... does not extend 'so far as to authorize what the Constitution forbids.... ' ") (quoting De Geofroy v. (continued...)

Self-executing treaties are the law of the land equal to federal law and superior to U.S. state law.[176] Self-executing executive agreements[177] can also prevail against inconsistent state laws,[178] but executive agreements do not always have equal status to federal law. Congressional-executive agreements and executive agreements pursuant to treaties have the same status as federal law.[179] However, courts have held that sole executive agreements are inferior to conflicting federal law when they concern matters expressly within Congress's constitutional authority.[180] A sole executive agreement has the potential to prevail over existing federal law if the agreement concerns an enumerated or inherent executive power under the Constitution or if Congress has historically acquiesced to the President entering into agreements in the relevant area.[181]

In cases where treaties or executive agreements are equivalent to federal law, the "last-in-time" rule requires courts to apply whichever of the two reflects the "latest expression of the sovereign will" of the United States.[182] Under this rule, a more recent federal statute will prevail over an earlier inconsistent treaty or executive agreement, and a more recent self-executing treaty or executive agreement prevails over an earlier inconsistent federal statute.[183]

Because non-self-executing provisions in treaties and executive agreements are not judicially enforceable, the last-in-time rule does not apply to those provisions. Rather, non-self-executing provisions do not displace existing state or federal law without implementing legislation.[184] The Supreme Court has stated that the "responsibility for transforming an international obligation

Riggs, 133 U.S. 258, 267 (1890)); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854) ("The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.").

[176] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) ("[L]aws of any of the States, contrary to a treaty, shall be disregarded.").

[177] The Supreme Court has not directly addressed whether self-execution analysis applies to executive agreements, but lower courts have presumed that it does. *See*, *e.g.*, Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985); United States v. Sum of $70,990,605, 234 F. Supp. 3d 212, 233 (D.D.C. 2017); Beeler v. Berryhill, 381 F. Supp. 3d 991, 998 (S.D. Ind. 2019), *aff'd sub nom.* Beeler v. Saul, 977 F.3d 577 (7th Cir. 2020).

[178] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

[179] *See*, *e.g.*, Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. O.L.C. 389, 397–98 (1996); BRADLEY, *supra* note 92, at 78–82.

[180] *See* United States v. Guy W. Capps, Inc., 204 F.2d 655, 660–61 (4th Cir. 1953); Swearingen v. United States, 565 F. Supp. 1019, 1020–21 (D. Colo. 1983).

[181] *See Pink*, 315 U.S. at 230 ("'All [c]onstitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature.... '") (quoting THE FEDERALIST NO. 64 (John Jay)); Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding sole executive agreement concerning the handling of Iranian assets in the United States despite the existence of a potentially conflicting statute given Congress's historical acquiescence to these types of agreements).

[182] Whitney v. Robertson, 124 U.S. 190, 195 (1888).

[183] *See*, *e.g.*, Cook v. United States, 288 U.S. 102, 118–19 (1933); *Whitney*, 124 U.S. at 194–95; The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870).

[184] Some courts have disagreed on the domestic legal effect of a non-self-executing treaty following the enactment of implementing legislation. *Compare* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) (stating that legislation implementing non-self-executing agreement informed analysis as to whether state law was preempted, rather than the agreement itself) *with* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 725–27 (5th Cir. 2009) (en banc) (interpreting text of international agreement, rather than its implementing legislation, to supersede state law), *cert. denied*, La. Safety Ass'n of Timbermen—Self Insurers Fund v. Certain Underwriters at Lloyd's, London, 562 U.S. 827 (2010).

arising from a non-self-executing treaty into domestic law falls to Congress."[185] As a result, it appears unlikely that a non-self-executing agreement could be converted into judicially enforceable domestic law absent legislative action through the bicameral process.[186]

# Interpreting International Agreements

When analyzing an international agreement for purposes of its domestic application, U.S. courts have final authority to interpret the agreement's meaning.[187] As a general matter, the Supreme Court has stated that its goal in interpreting an international agreement is to discern the parties' intent.[188] The interpretation process begins by examining "the text of the [agreement] and the context in which the written words are used."[189] When an agreement provides that it is to be concluded in multiple languages, the Supreme Court has analyzed foreign language versions to assist in understanding the agreement's terms.[190] The Court also considers the broader "object and purpose" of an international agreement.[191] In some cases, the Supreme Court has examined extra-textual materials, such as drafting history,[192] the views of other state parties,[193] and the post-ratification practices of other nations.[194] The Court has cautioned, however, that consulting sources outside the agreement's text may not be appropriate when the text is unambiguous.[195]

The executive branch is often responsible for interpreting international agreements outside the context of domestic litigation.[196] While the Supreme Court has final authority to interpret an

[185] Medellín v. Texas, 552 U.S. 491, 525–26 (2008).

[186] *Id.* at 525–26 (holding that a presidential memorandum ordering a U.S. state court to give effect to a non-self-executing treaty requirement did not constitute federal law preempting the state's procedural default rules).

[187] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.... ' ") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[188] *See*, *e.g.*, BG Grp., PLC v. Republic of Arg., 572 U.S. 25, 37 (2014); Lozano v. Montoya Alvarez, 572 U.S. 1, 11 (2014); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 183 (1982); Wright v. Henkel, 190 U.S. 40, 57 (1903).

[189] Water Splash, Inc. v. Menon, 581 U.S. 271, 277–78 (2017) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 534 (1987); Air France v. Saks, 470 U.S. 392, 397 (1985).

[190] *See*, *e.g.*, *Water Splash*, 581 U.S. at 279–81; *Schlunk*, 486 U.S. at 699. In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. *Compare* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829) (construing English language version of 1819 treaty between the United States and Spain and deeming a provision stating that certain land grants "shall *be* ratified and confirmed" to be non-self-executing) (emphasis added), *with* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833) (concluding that the land grant provision at issue was self-executing after interpreting the Spanish language version, which was translated to state that the land grants "shall *remain* ratified and confirmed") (emphasis added).

[191] *See*, *e.g.*, Abbott v. Abbott, 560 U.S. 1, 20 (2010); *Sanchez-Llamas*, 548 U.S. at 347; *Société Nationale Industrielle Aerospatiale*, 482 U.S. at 530; E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).

[192] *See*, *e.g.*, *Water Splash*, 581 U.S. at 279–81; *Medellín*, 552 U.S. at 507; *Air France*, 470 U.S. at 400; *Schlunk*, 486 U.S. at 700.

[193] *See*, *e.g.*, 581 U.S. at 279–83; *Abbott*, 560 U.S. at 16; *Lozano*, 572 U.S. 1, 11–13 (2014); *Air France*, 470 U.S. at 404.

[194] *See*, *e.g.*, *Medellín*, 552 U.S. at 507; TWA v. Franklin Mint Corp., 466 U.S. 243, 259 (1984).

[195] *See*, *e.g.*, Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989).

[196] *See*, *e.g.*, Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. O.LC. 28, 30 (1987) ("[T]he President is responsible for enforcing and executing international agreements, a responsibility that necessarily 'involves also the obligation and authority to interpret what the treaty requires.' ") (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1st ed. 1972)); FOURTH RESTATEMENT, *supra* note 12, § 306 cmt. g ("Execution of a treaty requires interpretation, and the President often determines what a treaty means in the first instance.... ").

agreement for purposes of applying it as domestic law in the United States, some questions of interpretation may involve exercise of presidential discretion or may otherwise be deemed "political questions" more appropriately resolved in the political branches. In *Charlton v. Kelly*, for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President "elected to waive any right" to respond to the breach by voiding the treaty.[197] Moreover, the executive branch is often well-positioned to interpret an agreement's terms given its leading role in negotiating agreements and its understanding of other nations' post-ratification practices.[198] Thus, even when a question of interpretation is to be resolved by the judicial branch, the Supreme Court has stated that the executive branch's views are entitled to "great weight"[199]—although the Court has not adopted the executive branch's interpretation in every case.[200]

Congress also possesses power to interpret international agreements by virtue of its power to pass implementing or related legislation.[201] Because the Constitution expressly divides the treaty-making power between the Senate and the President, the Supreme Court has examined sources that reflect these entities' shared understanding of a treaty at the time of ratification.[202] The Senate's ability to influence treaty interpretation directly, however, may be limited to its role in the advice and consent process.[203] The Senate may, and often does, condition its consent on a requirement that the United States interpret a treaty in a particular fashion.[204] After the Senate provides its consent and the President ratifies a treaty, resolutions passed by the Senate that purport to interpret the treaty are "without legal significance," according to the Supreme Court.[205]

# Withdrawal from International Agreements

The Constitution sets forth a definite procedure through which the President has the power to make treaties with the advice and consent of the Senate, but it is silent on how to terminate

[197] *See* 229 U.S. 447, 475 (1913).

[198] *See* FOURTH RESTATEMENT, *supra* note 12, § 306 cmt. g & reporters' n.10 (discussing the executive branch's unique access to information related to treaty interpretation). *Accord* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (giving deference to the State Department's interpretation of a treaty because it is the agency "charged with [the treaty's] negotiation and enforcement").

[199] *See* Water Splash, Inc. v. Menon, 581 U.S. 271, 281 (2017) (quoting Abbott v. Abbott, 560 U.S. 1, 15 (2010)); *Medellín*, 552 U.S. at 513; *Avagliano*, 457 U.S. at 184–85; Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[200] *See* BG Grp., PLC v. Republic of Arg., 572 U.S. 25, 37 (2014) (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding "[w]e do not accept the Solicitor General's view as applied to the treaty before us"); Hamdan v. Rumsfeld, 548 U.S. 557, 629–30 (2006) (declining to adopt the executive branch's interpretation of Common Article 3 of the 1949 Geneva Conventions).

[201] *See* HENKIN, *supra* note 22, at 206 ("Congress, too, has occasion to interpret a treaty when it considers enacting implementing legislation, or other legislation to which the treaty might be relevant.").

[202] *See* United States v. Stuart, 489 U.S. 353, 365–68 (1989) (considering, but deeming inconclusive, a treaty's ratification history); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 531 (1987) (discussing Secretary of State's analysis of the purposes of a treaty that was provided to the Senate).

[203] *See* The Diamond Rings v. United States, 183 U.S. 176, 180 (1901) (declining to give legal weight to a Senate resolution attempting to clarify a ratified treaty because the "meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it").

[204] For example, the Senate has frequently conditioned its advice and consent to treaties on what has become known as the "Byrd-Biden condition," which provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification.... " 134 CONG. REC. 12849 (1988). *See also* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 129–30 (providing a history of the Byrd-Biden condition and examples of its use).

[205] *See The Diamond Rings*, 183 U.S. at 180.

them.[206] Although the Supreme Court has directly recognized the President's power to conclude certain executive agreements,[207] it has not addressed presidential power to terminate those agreements. The following section discusses historical practice and jurisprudence related to the withdrawal from international agreements.[208]

## Withdrawal from Executive Agreements and Political Commitments

For executive agreements, it appears generally accepted that, when the President has independent authority to enter into an executive agreement, the President may also independently terminate the agreement without congressional or senatorial approval.[209] Thus, observers appear to agree that, when the Constitution affords the President authority to enter into sole executive agreements, the President may also unilaterally terminate those agreements.[210] This same principle would apply to political commitments: To the extent that the President has the authority to make non-binding commitments without the assent of the Senate or Congress, the President may also withdraw unilaterally from those commitments.[211]

For congressional-executive agreements and executive agreements made pursuant to treaties, the mode of termination may be dictated by the underlying treaty or statute on which the agreement is based.[212] For example, with executive agreements made pursuant to a treaty, the Senate may condition its consent to the underlying treaty on a requirement that the President not enter into or terminate executive agreements under the authority of the treaty without senatorial or congressional approval.[213] For congressional-executive agreements, Congress may dictate how termination occurs in the statute authorizing or implementing the agreement. The legislation authorizing the United States to join the World Health Organization, for example, provides that the "United States reserves its right to withdraw from the Organization on a one-year notice....

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[206] *See*, *e.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (plurality opinion) ("[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty."); HENKIN, *supra* note 22, at 211 ("[T]he Constitution tells us only who can make treaties for the United States; it does not tell us who can unmake them.").

[207] *See supra* "Executive Agreements."

[208] For more detailed analysis of international and domestic legal principles related to withdrawal from international agreements, see CRS Report R44761, *supra* note 69.

[209] *See* Bradley & Goldsmith, *supra* note 11, at 1225; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 172; THIRD RESTATEMENT, *supra* note 1, § 339 reporters' n.2.

[210] *See* Bradley & Goldsmith, *supra* note 11, at 1225 ("Presidents clearly have the authority to terminate sole executive agreements and political commitments, since those agreements are made by Presidents based on their own constitutional authority."); THIRD RESTATEMENT, *supra* note 1, § 339 reporters' n.2 ("No one has questioned the President's authority to terminate sole executive agreements.").

[211] *See*, *e.g.*, Julian Ku, *President Rubio/Walker/Trump/Whomever Can Indeed Terminate the Iran Deal on "Day One,"* OPINIO JURIS (Sept. 10, 2015), https://tinyurl.com/ydfodbbo (arguing that, because the JCPOA is a non-binding political commitment, the President can unilaterally terminate the arrangement); Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1226 (2016) ("A political commitment also provides the executive branch with the ability to terminate the agreement unilaterally or to deviate from it without consequences.").

[212] *See* THIRD RESTATEMENT, *supra* note 1, § 339 cmt. a; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 174, 208; Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 926 (1986). *See also* Hathaway, *supra* note 41, at 1362 n.268 ("The President may withdraw from ... a congressional-executive agreement unilaterally unless Congress has expressly limited the President's power to withdraw through ... authorizing legislation.... ").

[213] *See* THIRD RESTATEMENT, *supra* note 1, § 339 cmt. a.

"[214] Congress has also asserted the authority to direct the President to terminate congressional-executive agreements. For example, in the 1986 Comprehensive Anti-Apartheid Act, which was passed over President Reagan's veto, Congress instructed the Secretary of State to terminate an air services agreement with South Africa.[215] In the 1951 Trade Agreements Extension Act, Congress directed the President to "take such action as is necessary to suspend, withdraw or prevent the application of" trade concessions contained in prior trade agreements regulating imports from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."[216]

Presidents have also asserted authority to withdraw unilaterally from congressional-executive agreements. For example, the Department of Justice's Office of Legal Counsel (OLC) opined in 2018 that President Trump possessed authority to withdraw from NAFTA without first seeking congressional approval.[217] OLC reasoned that Presidents may unilaterally withdraw from congressional-executive agreements unless the statute authorizing entry into the agreement restricted withdrawal authority.[218] Some observers disagreed with this reasoning and argued that Congress must approve termination of NAFTA because the agreement implicated the exclusive congressional power over foreign commerce.[219] OLC's analysis was never tested in a legal challenge because President Trump ultimately entered into a new trade agreement that replaced NAFTA, which Congress approved through implementing legislation.[220]

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[214] Act of June 14, 1948, Pub. L. No. 80-643, 62 Stat. 441, 442. In 2020, the Trump Administration announced its intent to withdraw from the World Health Organization but stated that its withdrawal would become effective one year later, consistent with the statutory notification requirement. *See Briefing on the U.S. Government's Next Steps With Regard to Withdrawal From the World Health Organization*, U.S. DEP'T OF STATE (Sept. 2, 2020), https://2017-2021.state.gov/briefing-with-nerissa-cook-deputy-assistant-secretary-of-state-bureau-of-international-organization-affairs-garrett-grigsby-director-of-the-office-of-global-affairs-department-of-health-and-human/index.html (statement of Nerissa J. Cook, Deputy Assistant Sec'y). The Biden Administration rescinded the withdrawal notice before it became effective. *See* Letter from Joseph R. Biden, Jr., President, White House, to His Excellency António Guterres, Sec'y-Gen., United Nations (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/letter-his-excellency-antonio-guterres/.

[215] Pub. L. No. 99-440, §§ 306(b)(1), 313, 100 Stat. 1086, 1100 ("The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between their Respective Territories.... "), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505. The Reagan Administration complied and provided the requisite notice of termination. *See* South African Airways v. Dole, 817 F.2d 119, 121 (D.C. Cir. 1987), *cert denied*, 484 U.S. 896 (1987).

[216] *See* Pub. L. No. 82-50, § 5, 65 Stat. 72, 73. The Truman Administration relied on this law in terminating certain congressional-executive agreements with the Soviet Union and several Soviet satellite countries. Office of the Historian, *Foreign Relations of the United States, 1951, Europe: Political and Economic Developments, Volume IV, Part 2*, U.S. DEP'T OF STATE, https://history.state.gov/historicaldocuments/frus1951v04p2/d169.

[217] Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. __, slip op. at 1 (Oct. 17, 2018), https://www.justice.gov/olc/file/2018-10-17-nafta-wd/download [hereinafter OLC NAFTA Opinion].

[218] *Id.*

[219] *See* Julian Ku & John Yoo, *Trump Might be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016), https://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html (arguing that Congress's Commerce Clause authority bars the President from terminating NAFTA without congressional authorization); Joel P. Trachtman, *Trump Can't Withdraw from NAFTA Without a 'Yes' from Congress*, HILL (Aug. 16, 2017), https://tinyurl.com/y9byuyed ("If the president, acting alone, were to terminate U.S. participation in NAFTA, he would be imposing regulation on commerce, without congressional participation. This would be an unconstitutional usurpation of the powers granted to Congress.").

[220] United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, § 101, 134 Stat. 11, 14–15 (2020).

## Withdrawal from Treaties

Whereas withdrawal from executive agreements is largely a new phenomenon and has not generated extensive opposition from Congress,[221] the constitutional requirements for the termination of Senate-approved, ratified treaties have been the subject of debate and litigation between some Members of Congress and the executive branch.[222] Some commentators have argued that terminating treaties is analogous to terminating federal statutes.[223] Because domestic statutes may be terminated only through the same process in which they were enacted[224]—i.e., through a majority vote in both houses and with the signature of the President or a veto override—these commentators contend that treaties must likewise be terminated through a similar procedure.[225]

On the other hand, treaties do not share every feature of federal statutes. Whereas statutes can be enacted over the President's veto, treaties can never be concluded without the Senate's advice and consent.[226] Moreover, while an enacted federal statute can be rescinded only by a subsequent act of Congress, some argue that, just as the President has some unilateral authority to remove executive officers who were appointed with senatorial consent, the President may unilaterally terminate treaties made with the Senate's advice and consent.[227]

The United States terminated a treaty under the Constitution for the first time in 1798. On the eve of possible hostilities with France, Congress passed, and President Adams signed, legislation stating that four U.S. treaties with France "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[228] Thomas Jefferson referred to the episode as support for the notion that only an "act of the legislature" can terminate a treaty.[229] However, commentators have since come to view the 1798 statute as a historical anomaly, because it is the only instance in which Congress purported to terminate a treaty directly through legislation without relying on the President to provide a notice of termination to the foreign government.[230] Further, because the 1798 statute was part of a series of congressional measures authorizing

[221] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 208 ("[T]he President's authority to terminate executive agreements ... has not been seriously questioned in the past."); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1639 (2018) ("Congress has not indicated that it views congressional-executive agreements as special with respect to the issue of presidential termination authority.").

[222] *See* notes 223, 243–244, 246 (citing academic literature and litigation involving Members of Congress challenging the President's unilateral treaty withdrawal power).

[223] *See, e.g.*, Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 199–200 (1979).

[224] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); INS v. Chadha, 462 U.S. 919, 954 (1983) ("[R]epeal of statutes, no less than enactment, must conform with Art. I.").

[225] *See, e.g.*, DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 89–110 (1986).

[226] *Compare* U.S. CONST. art. I, § 7, cl. 2 (authorizing congressional vetoes over legislation), *with id.* art. II, § 2, cl. 2 (requiring advice and consent for treaties).

[227] *See, e.g.*, ADLER, *supra* note 225, at 94.

[228] Act of July 7, 1798, ch. 68, 1 Stat. 578.

[229] *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 51 (Samuel Harrison Smith ed., 1801) ("Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.").

[230] *See, e.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789 (2014); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 207.

limited hostilities against the French Republic, some view the statute as an exercise of Congress's war powers rather than precedent for a permanent congressional power to terminate treaties.[231]

During the 19th century, government practice treated the power to terminate treaties as shared between the legislative and executive branches.[232] Congress often authorized[233] or instructed[234] the President to provide notice of treaty termination to foreign governments during this time. On rare occasions, the Senate alone passed a resolution authorizing the President to terminate a treaty.[235] Presidents regularly complied with the legislative branch's authorization or direction.[236] On other occasions, Congress or the Senate approved the President's termination after the fact, when the executive branch had already provided notice of termination to the foreign government.[237]

At the turn of the 20th century, government practice began to change, and a new form of treaty termination emerged: unilateral termination by the President without approval by the legislative branch. During the Franklin Roosevelt Administration and World War II, unilateral presidential termination increased markedly.[238] Although Congress occasionally enacted legislation authorizing or instructing the President to terminate treaties during the 20th century,[239] unilateral presidential termination became the norm.[240]

The President's exercise of treaty termination authority did not generate opposition from the legislative branch in most cases, but there have been occasions in which Members of Congress sought to block unilateral presidential action. In 1978, a group of Members filed suit seeking to prevent President Carter from terminating a mutual defense treaty with the government of

[231] *See* S. REP. NO. 34-97, at 5 (1856) (Senate Foreign Relations Committee describing the 1798 treaty abrogation statute as a "rightful exercise of the war power, without viewing it in any manner as a precedent establishing in Congress alone, and under any circumstances, the power to annul a treaty."). *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) (treating the 1798 statute as one in a bundle of congressional acts declaring a limited "public war" on the French Republic).

[232] For analysis of 19th-century understanding and practice related to treaty termination, see Bradley, *supra* note 230, at 788–801; CRANDALL, *supra* note 27, at 423–66.

[233] *See*, *e.g.*, Joint Resolution of April 27, 1846 Concerning the Oregon Territory, 9 Stat. 109; Joint Resolution of June 17, 1874, 18 Stat. 287.

[234] *See*, *e.g.*, Joint Resolution of Jan. 18, 1865, 13 Stat. 566; Joint Resolution of Mar. 3, 1883, 22 Stat. 641.

[235] *See*, *e.g.*, Franklin Pierce, Third Annual Message (Dec. 31, 1855), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2860, 2867 (James D. Richardson ed., 1897).

[236] For example, after Congress enacted a joint resolution calling for the termination of the Oregon Territory Treaty, *supra* note 233, the Secretary of State informed the U.S. ambassador to Great Britain that "Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President's) and your duty to conform." S. DOC. 29-489, at 15 (1846). As required by the Joint Resolution of January 18, 1865, *supra* note 234, the Andrew Johnson Administration terminated an 1854 treaty with Great Britain concerning trade with Canada. Letter from William H. Seward, U.S. Sec'y of State, to Charles Francis Adams, Minister to the U.K. (Jan. 18, 1865), *in* PAPERS RELATING TO FOREIGN AFFAIRS, pt. 1, at 93 (1866).

[237] *See*, *e.g.*, Joint Resolution to Terminate the Treaty of 1817 Regulating the Naval Force on the Lakes, 13 Stat. 568; Joint Resolution of Dec. 21, 1911, 37 Stat. 627.

[238] *See* Bradley, *supra* note 230, at 807–09.

[239] *See*, *e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 313, 100 Stat. 1086, 1104, *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505; Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 339–40 (1976) (codified in 16 U.S.C. § 1822).

[240] *See* Bradley, *supra* note 230, at 807–15.

Taiwan[241] as part of the United States' recognition of the government of mainland China.[242] In *Goldwater v. Carter*,[243]a divided Supreme Court ultimately ruled that the litigation should be dismissed, but it did so without reaching the merits of the constitutional question and with no majority opinion.[244] Citing a lack of clear guidance in the Constitution's text and a reluctance "to settle a dispute between coequal branches of our Government each of which has resources available to protect and assert its interests[,]" four Justices concluded that the case presented a nonjusticiable political question.[245] This four-Justice opinion, written by Justice Rehnquist, proved influential, and federal district courts invoked the political question doctrine as a basis to dismiss challenges to unilateral treaty terminations by President Reagan[246] and President George W. Bush.[247]

In a 2020 opinion from the OLC, the executive branch took the view, for the first time, not only that the executive branch shares the power to withdraw from treaties but that treaty withdrawal is an *exclusive* presidential power that Congress cannot restrict in legislation.[248] OLC's opinion concerned a provision in federal law that required the President to provide Congress at least 120 days' notice before withdrawing from the multilateral Treaty on Open Skies.[249] Reasoning that treaty withdrawal interferes with the President's "exclusive authority to execute treaties and to conduct diplomacy," OLC concluded that the notice requirement was unconstitutional.[250] OLC's opinions are "controlling" on questions of law within the executive branch,[251] but they are not

[241] Mutual Defense Treaty, Taiwan-U.S., Dec. 2, 1954, 6 U.S.T. 433.

[242] For background on *Goldwater v. Carter*, see VICTORIA MARIE KRAFT, THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY 1–52 (1991).

[243] 444 U.S. 996 (1979).

[244] *See id.* at 996 (vacating with instructions to dismiss with no majority opinion).

[245] *See id.* at 1002–05 (Rehnquist, J., concurring) (joined by Stewart, Stevens, JJ. & Burger, C.J.). Justice Powell also voted for dismissal but did so based on the grounds that the case was not ripe for judicial review until the Senate passed a resolution disapproving of the President's termination. *See id.* at 998 (Powell, J., concurring). Justice Brennan would have held that President Carter possessed the power to terminate the Mutual Defense Treaty with Taiwan, but his opinion centered on the President's power over recognition of foreign governments and not because he believed the President possessed a general, constitutional power to terminate treaties. *See id*. at 1006–07 (Brennan, J., dissenting).

[246] In 1986, a federal district court dismissed a suit brought by a group of private plaintiffs seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua. *See* Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

[247] In 2002, the U.S. District Court for the District of Columbia dismissed as nonjusticiable a challenge brought by 32 Members of Congress to President George W. Bush's termination of the Anti-Ballistic Missile Treaty with Russia. *See* Kucinich v. Bush, 236 F. Supp. 2d 1, 14–17 (D.D.C. 2002).

[248] Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. ___, slip op. at 14–15 (Sept. 22, 2020), https://www.justice.gov/olc/file/1348136/download [hereinafter OLC Open Skies Opinion]. For more background on OLC's Open Skies Treaty memorandum and its implications for Congress, see CRS Legal Sidebar LSB10600, *OLC: Congressional Notice Period Prior to Withdrawing from Treaty Unconstitutional*, by Jennifer K. Elsea.

[249] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L No. 116-92, § 1234, 133 Stat. 1198, 1648 (codified in 22 U.S.C. § 2593a note).

[250] OLC Open Skies Opinion, slip op. at 31.

[251] *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), https://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (OLC's core function ... is to provide controlling advice to Executive Branch officials on questions of law.")

"law" that is binding outside the executive branch.[252] Some observers argue that recent OLC opinions overstate the scope of the President's power over treaties and diplomacy.[253]

**Changing Practice in Treaty Withdrawal**

United States' treaty withdrawal practice can be summarized in several key events and stages.

**1798**: In the first treaty withdrawal after the Constitution's adoption, Congress enacted legislation stating that four treaties "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[254]

**19th century**: Treaty withdrawal was treated as a shared power between the legislative and executive branches, and both branches authorized or approved withdrawal.[255]

**20th century**: Unilateral withdrawal by the executive branch became the predominant practice.[256]

**2020**: In an OLC opinion, the executive branch claimed exclusive constitutional authority to withdraw from treaties and asserted that Congress cannot limit or condition this power in legislation.[257]

# Customary International Law

Beyond the United States' international obligations that stem from international agreements are its obligations that derive from the body of law known as customary international law. Customary international law is formed by "a general and consistent practice of States followed by them from a sense of legal obligation."[258] To meet this definition, all (or nearly all) countries must consistently follow that practice, and they must do so because they believe themselves legally bound—a concept often called *opinio juris sive necessitatis* (*opinio juris*).[259]

If nations generally follow a particular practice but do not feel bound by it, it does not constitute customary international law.[260] There are also ways for nations to avoid being subject to customary international law. First, a nation that is a persistent objector to a particular requirement of customary international law is exempt from it.[261] Second, the United States can exempt itself from customary international law requirements by passing a contradictory statute under the "last-in-time" rule.[262] As a result, the effect of customary international law that conflicts with other domestic law appears limited.

[252] *See*, *e.g.*, McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are entitled to some weight but do not have the force of judicial decisions).

[253] *See*, *e.g.*, Jean Galbraith, *The Runaway Presidential Power Over Diplomacy*, 108 VA. L. REV. 81 (2022).

[254] Act of July 7, 1798, ch. 68, 1 Stat. 578.

[255] *See supra* notes 232–237.

[256] *See supra* notes 238–240.

[257] *See supra* notes 248–250.

[258] THIRD RESTATEMENT, *supra* note 1, § 102(2).

[259] *Id.* § 102 cmt. c.

[260] *Id.*

[261] *Id.* § 102, reporters' n.2. The philosophy underlying the consistent objector exemption is that countries are bound by customary international law because they have at least tacitly consented to it. Binding them to abide by customary practices despite their explicit rejection of these norms would violate their sovereign rights—though countries are likely still bound in the case of peremptory, *jus cogens* norms, which are thought to permit no derogation of customary international law, such as the international prohibition against genocide or slavery. *See* Colombia v. Peru, 1950 I.C.J. 266 (Nov. 20, 1950); United Kingdom v. Norway, 1951 I.C.J. 116 (Dec. 18, 1951).

[262] *See supra* "Conflict with Existing Laws."

In examining countries' behavior to determine whether *opinio juris* is present, courts might look to different sources, including relevant treaties, unanimous or near-unanimous declarations by the General Assembly of the United Nations about international law,[263] and whether non-compliance with an espoused universal rule is treated as a breach of that rule.[264] Uncertainties and debate often arise about how *customary international law* is defined and how firmly established a particular norm must be to become binding.[265]

Some particularly prevalent rules of customary international law can acquire the status of *jus cogens* norms—peremptory rules that permit no derogation, such as the international prohibition against slavery or genocide.[266] For a particular area of customary international law to constitute a *jus cogens* norm, state practice must be extensive and almost uniform.[267]

**What Is Customary International Law?**

Customary international law is the body of law that derives from countries' general and consistent practice when performed out of a sense of legal obligation.[268] In the modern era, international law has largely been developed through international agreements, but customary international law was the main source of international law until the mid-19th century.[269] In contrast to international agreements, countries can become bound to a rule of customary international law without affirmatively expressing assent if they have demonstrated the necessary national practice.[270]

## Relationship Between Customary International Law and Domestic Law

For much of American history, courts[271] and U.S. officials[272] understood customary international law to be binding U.S. domestic law absent any controlling executive or legislative act. By 1900,

[263] THIRD RESTATEMENT, *supra* note 1, §102 (2) cmt. c. For a discussion of potential difficulties in relying U.N. General Assembly Resolutions as evidence of customary international law, see Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 REC. DES COURS 111–121 (1982-V).

[264] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (declining to apply protections espoused by the Universal Declaration of Human Rights because it "does not of its own force impose obligations as a matter of international law").

[265] *See, e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124–28 (2005) (discussing uncertainties associated with customary international law). *See also* Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012) (Kavanaugh, J.) ("It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm."), *overruled on unrelated grounds by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[266] THIRD RESTATEMENT, *supra* note 1, § 702, cmt. n.

[267] Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001) (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); THIRD RESTATEMENT, *supra* note 1, § 102 (2) cmt. k & reporters' n.6).

[268] *See id*. § 102(2).

[269] BRADLEY, *supra* note 92, at 138.

[270] *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, § 102 cmt. b (discussing the practice of states necessary for a rule of customary international law to become binding).

[271] *See* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land.); Respublica v. De Longchamps, 1 U.S. 111, 116 (Pa. O. & T. 1784) (describing a "crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State."). *See also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) ("[T]he law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.").

[272] *See, e.g.*, 1 Op. Att'y Gen. 26, 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially the law of the land."); 1 Op. Att'y Gen. 69, 69 (1797) ("[T]he common law has (continued...)

the Supreme Court stated in *The Paquete Habana* that international law is "part of our law."[273] Although this description seems straightforward, 20th-century developments complicated the relationship between customary international law and domestic law.

In a landmark 1938 decision, *Erie Railroad Co. v. Tompkins*, the Supreme Court rejected the then-long-standing notion that there was a "transcendental body of law" known as the general common law that federal courts may identify and describe in the absence of a conflicting statute.[274] *Erie* held that the "law in the sense in which courts speak of it today does not exist without some definite authority behind it" in the form of a state or federal statute or constitutional provision.[275] Some jurists and commentators have argued that, because judicial application of customary international law requires courts to rely on the same processes used in discerning and applying the general common law, *Erie* should be interpreted to foreclose application of customary international law in U.S. courts.[276] Many commentators disagree with this view and contend that customary international law remains a form of judicially enforceable law.[277]

Although the Supreme Court has not passed directly on the issue, in 1964, it discussed with approval a law review article in which then-professor and later judge of the International Court of Justice Philip C. Jessup argued that it would be "unsound" and "unwise" to interpret *Erie* to bar federal courts' application of customary international law.[278] In a 2004 case, the Court rejected the view that federal courts have lost "all capacity" to recognize enforceable customary international norms as a result of *Erie*.[279] Consequently, the precise status of customary international law in the U.S. legal system remains the subject of debate.[280]

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adopted the law of nations in its full extent, made it a part of the law of the land.); 5 Op. Att'y Gen. 691, 692 (1802) ("[T]he law of nations is considered as part of the municipal law of each State.").

[273] 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

[274] 304 U.S. 64, 79 (1938) (describing the "assumption that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" as a fallacy) (internal quotation marks omitted).

[275] *Id.*

[276] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 745–46 (2004) (Scalia, J., concurring) (arguing that customary international law would have been considered part of the "general common law" abolished by *Erie*); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–55 (1997) ("After *Erie* ... a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so, as it could under the regime of general common law.").

[277] *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, § 111 reporters' n.3 ("[T]he modern view is that customary international law in the United States is federal law.... "); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998) ("[F]ederal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law."); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397 (1997) ("[T]he suggestion that *Erie* tossed the law of nations out of federal court along with the general common law rests on several misconceptions.").

[278] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (discussing Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)).

[279] *See Sosa*, 542 U.S. at 730 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.").

[280] *See, e.g.*, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. __, slip. op. at 7, 143 S. Ct. 940, 955 (2023) (Gorsuch, J., concurring in part and dissenting in part) ("Perhaps Article III incorporated customary international law into federal common law. But since [*Erie*] federal courts have largely disclaimed the power to develop federal common law outside of a few reserved areas.... And whether customary international law survives as a form of federal common law after *Erie* is a matter of considerable debate among scholars.") (internal citations omitted); BRADLEY, *supra* note 92, at 140–58. (providing an overview of competing views on customary international law's post-*Erie* status).

While there is some uncertainty about the customary international law's role in domestic law, the debate has largely focused on circumstances in which customary international law does not conflict with an existing federal statute. In *The Paquete Habana*, the Supreme Court explained that customary international law may be incorporated into domestic law but only to the extent that "there is no treaty, and no controlling executive or legislative act or judicial decision" in conflict.[281] When a federal statute does conflict with customary international law, lower courts have consistently concluded that the statute prevails.[282]

While it appears that federal statutes will generally prevail over conflicting custom-based international law, customary international law can potentially affect how courts construe domestic law. Under the canon of statutory construction known as the *Charming Betsy* canon, when two constructions of an ambiguous statute are possible, one of which aligns with international legal obligations and one of which does not, courts will often construe the statute to avoid violating international law, presuming such a statutory reading is reasonable.[283]

## Statutory Incorporation of Customary International Law and the Alien Tort Statute

Customary international law plays a direct role in the U.S. legal system when Congress incorporates it into federal law via legislation. Some statutes expressly reference customary international law and thereby permit courts to interpret its requirements and contours.[284] For example, federal law prohibits "the crime of piracy as defined by the law of nations."[285] Similarly, the Foreign Sovereign Immunities Act of 1976 removes the protections from lawsuits afforded to foreign sovereign nations in certain classes of cases in which property rights are "taken in violation of international law."[286]

One of the clearest examples of U.S. law incorporating customary international law is the Alien Tort Statute (ATS).[287] The ATS originated as part of the 1789 Judiciary Act and establishes federal court jurisdiction over tort claims brought by aliens for violating either a treaty of the United States or "the law of nations."[288] Until 1980, this statute was rarely used, but in *Filártiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit relied upon it to assert jurisdiction and

[281] The Paquete Habana, 175 U.S. 677, 700 (1900).

[282] *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties.").

[283] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.... "). *But see* Sampson v. Fed. Republic of Ger. & Claims Conf., 250 F.3d 1145, 1151–54 (7th Cir. 2001) (suggesting that given the "present uncertainty about the precise domestic role of customary international law," application of this canon of construction to resolve differences between ambiguous congressional statutes and customary international law should be used sparingly); Al-Bihani v. Obama, 619 F.3d 1, 32–36, 42 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (arguing against the application of the *Charming Betsy* canon).

[284] *See infra* notes 285–287.

[285] 18 U.S.C. § 1651 ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.").

[286] 28 U.S.C. § 1605(a)(3) (providing an exception to foreign sovereign immunity in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state").

[287] 28 U.S.C. § 1350.

[288] For more in-depth treatment of the ATS, see CRS Report R44947, *The Alien Tort Statute: A Primer*, by Stephen P. Mulligan.

award a civil judgment against a former Paraguayan police official who had allegedly tortured the plaintiffs while still in Paraguay.[289] In doing so, the *Filártiga* court determined that torture constitutes a violation of the law of nations and gives rise to a cognizable claim under the ATS.[290]

*Filártiga* was a highly influential decision that caused the ATS to "skyrocket" into prominence as a vehicle for asserting civil claims in U.S. federal courts for human rights violations even when the events underlying the claims occurred outside the United States.[291] However, the expansion of the claims grounded in the ATS was short-lived. Beginning with a 2004 decision, *Sosa v. Alvarez-Machain*, the Supreme Court began to place outer limits on the statute's application.[292] *Sosa* held that not all violations of international norms are actionable under the ATS—only those that "rest on a norm of international character accepted by the civilized world" and are defined with sufficient clarity and particularity.[293] Even when a claim meets these standards, *Sosa* explained that federal courts must exercise "great caution" before deeming a claim actionable.[294]

Since *Sosa* the Supreme Court has ruled against plaintiffs seeking to assert ATS-based claims three times, and it has never ruled in favor of allowing an ATS case to move forward.[295]Although the ATS remains a clear example of a U.S. statute incorporating customary international law, the Supreme Court's narrowing of ATS has caused some commentators to question its continued relevance in addressing human rights abuses.[296]

# Conclusion

Although the United States has long understood international legal commitments to be binding both internationally and domestically, the relationship between international law and the U.S. legal system implicates complex legal dynamics. In some areas, courts have established settled rules. Courts have clearly recognized that the Constitution permits the United States to make binding international commitments through both treaties and executive agreements,[297] and the Supreme Court has held that only self-executing international agreements have the status of

[289] 630 F.2d 876, 887–88 (2d Cir. 1980).

[290] *Id.* at 878.

[291] *See* Anthony D'Amato, *Preface in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY vii (1999). *See also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013) ("Since [*Filártiga*], the ATS has given rise to an abundance of litigation in U.S. district courts."); Balintulo v. Daimler AG, 727 F.3d 174, 179 (2d Cir. 2013) (describing the ATS as "a statute, passed in 1789, that was rediscovered and revitalized by the courts in recent decades to permit aliens to sue for alleged serious violations of human rights occurring abroad"); Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) ("Since the 1980 court of appeals decision in *Filártiga v. Peña-Irala* permitting a wide of range human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.").

[292] 542 U.S. 692 (2004).

[293] *Id.* at 725.

[294] *Id.* at 728.

[295] *See Kiobel*, 569 U.S. at 124 (holding that the ATS does not apply extraterritorially in cases involving foreign plaintiffs against foreign defendants for conduct that occurred overseas); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (holding that foreign corporations are not subject to the ATS claims); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) (concluding that allegations of "general corporate activity" and corporate decision-making from within the United States were not sufficient to plead the domestic conduct necessary for an ATS claim).

[296] *See, e.g.*, Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1206, 1209–10 (2022); Chimène Keitner, *ATS, RIP?*, LAWFARE (Apr. 25, 2018), https://lawfareblog.com/ats-rip.

[297] *See supra* "Executive Agreements."

judicially enforceable domestic law.[298] Other issues about international agreements have never been fully resolved.[299] The scope of presidential power to make sole executive agreements and the role of non-self-executing agreements and customary international law have long been—and remain—the subject of debate.[300]

Courts have described some outstanding international law issues as political questions that are unlikely to be resolved in the judicial branch. These issues include whether certain agreements must be entered into as treaties rather than executive agreements[301] and whether congressional consent is required for the United States to withdraw from treaties and international agreements.[302] Congress may use its traditional authorities, such as its legislative authority and oversight powers,[303] to guide how these political questions are resolved.

Together with its traditional tools, the legislative branch possesses a suite of unique international-law-oriented powers that can influence international agreements and their relationship to the U.S. legal system. Key congressional authorities include:

- the power to authorize, or to withdraw existing authorizations for, executive agreements;[304]
- legislative authority to require greater transparency into the executive branch's treaty and agreement-making actions;[305]
- the ability to use implementing legislation to shape international law's role in the domestic legal system;[306]
- constitutional power to pass laws that conflict with international law through the "last-in-time" rule;[307] and
- the Senate's ability to guide treaties' interpretation and effects through its advice and consent power and RUDs.[308]

Because the legislative branch possesses significant powers to shape and define the United States' international obligations, Congress is likely to continue to play a critical role in defining the effects of treaties and other international agreements upon U.S. law in the future.

[298] *See infra* "Self-Executing vs. Non-Self-Executing Agreements."

[299] *See* BRADLEY, *supra* note 92, at 335.

[300] *See supra* "Choosing Between a Treaty and an Executive Agreement;" "Self-Executing vs. Non-Self-Executing Agreements;" "Relationship Between Customary International Law and Domestic Law."

[301] *See supra* "Choosing Between a Treaty and an Executive Agreement."

[302] *See supra* "Withdrawal from International Agreements."

[303] For background on Congress's oversight and investigation powers, see CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Todd Garvey, Mark J. Oleszek, and Ben Wilhelm.

[304] *See supra* "Executive Agreements."

[305] *See supra* "Transparency Requirements."

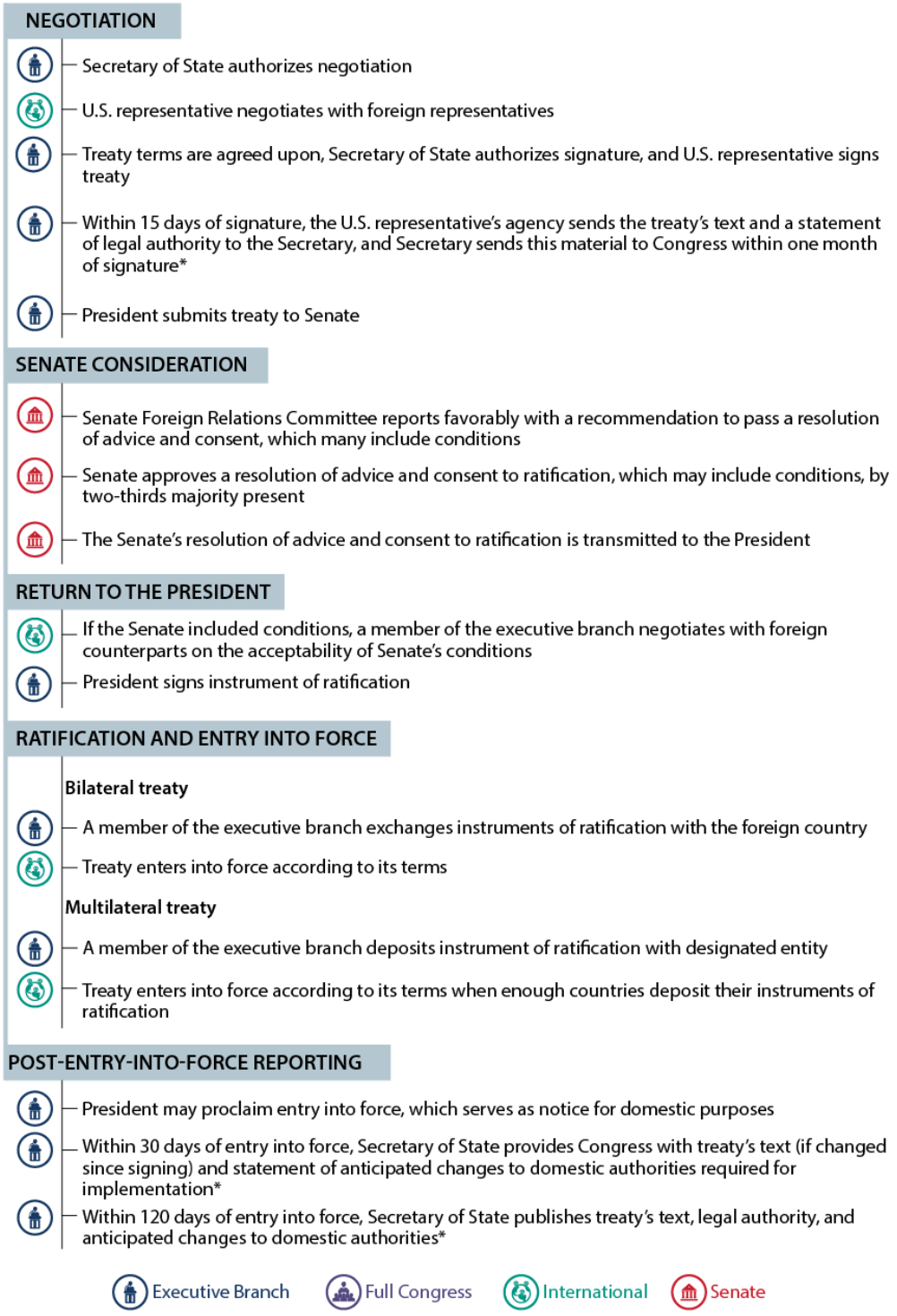
[306] *See supra* "Congressional Implementation of International Agreements."

[307] *See supra* "Conflict with Existing Laws."

[308] *See supra* "Treaties."

# Appendix. **Steps in Making a Treaty or Executive Agreement**

**Figure A-1: Steps in Making a Treaty**



**Source:** TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 8-9; 2023 NDAA, § 5947.
*Requirement takes effect on September 19, 2023, under Section 5947 of the 2023 NDAA.

**Figure A-2: Steps in Making an Executive Agreement**


**Source:** TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 11, at 8-9; 2023 NDAA, § 5947.
*Requirement takes effect on September 19, 2023, under Section 5947 of the 2023 NDAA.

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