



Ratification of international treaties, a comparative law perspective

United States of
America

STUDY

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Abstract

This study forms part of a wider-ranging project which seeks to lay the groundwork for comparisons between legal frameworks governing the ratification of international treaties in different legal systems.

The subject of this study is the ratification of international treaties under the laws of the United States. It describes relevant constitutional, statutory, and other legal provisions with respect to the making and ratification of treaties, as well as legal provisions relating to the making of executive agreements, which also constitute binding international obligations of the United States. The study discusses the approach to international law taken by the U.S. legal system, and the position of treaties and executive agreements within the hierarchy of U.S. laws. The international agreement process and its participants are described. The study then considers the time required for ratification of treaties.

This study is intended to give European Parliament bodies an overview of the ratification process of the respective contracting parties (the United States of America, in this instance). This will enable them, for example, to estimate the time required by other treaty partners to ratify any prospective future treaty and to adjust their work programme accordingly.

AUTHOR

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List of abbreviations*

C.F.R.	Code of Federal Regulations. The official compilation of rules of a permanent and general nature promulgated by the departments and agencies of the federal government. Contains 50 subject titles.
Cert.	Certiorari. A discretionary writ issued by an appellate court directing a lower court to deliver a case record for review, used by the U.S. Supreme Court to select most of the cases it wishes to hear.
Ch.	Chapter. An early designation for public laws published in United States Statutes at Large.
Cl.	Clause
Comm.	Committee
Cong.	Congress
Dall.	Dallas' Reports. An early reporter of U.S. Supreme Court opinions and part of United States Reports.
Dep't	Department
F.2d	Federal Reporter Second. The second series of a private publication of published decisions by the federal courts of appeals of the United States.
How.	Howard's Reports. An early reporter of U.S. Supreme Court opinions and part of United States Reports.
H.R.	House of Representatives
Id.	<i>Idem.</i> Used to refer to the immediately preceding authority cited.
Int'l	International
J.	Justice, or Journal
L.	Law
Pet.	Peters' Reports. An early reporter of U.S. Supreme Court opinions and part of United States Reports.
§	Section
S.	Senate
Serv.	Service
Stat.	United States Statutes at Large. The official chronological publication of laws passed by Congress.
U.S.	United States. Also, when used in citation, United States Reports, the official publication of U.S. Supreme Court opinions and orders.
U.S.C.	United States Code. The official compilation of federal statutes of a permanent and general nature. Comprises 53 subject titles.

* Abbreviations are taken from *The Bluebook: A Uniform System of Citation* (20th ed. 2015). *The Bluebook* is an authoritative citation manual used in legal writing in the United States.

U.S. Const.	United States Constitution. Cited by Article (art.), Section (§ or sec.), and Clause (cl.).
v.	Versus
Wall.	Wallace's Reports. An early reporter of U.S. Supreme Court opinions and part of United States Reports.

Executive summary

The United States of America participates extensively in the international community and is a member of numerous international organizations. Its relationship with the European Union dates back to the 1950s, when it first sent observers to the European Coal and Steel Community, and was formalized in 1990 with the Transatlantic Declaration. Today, the U.S. enjoys extensive governmental and nongovernmental relationships with the EU.

The process for making, approving, and ratifying treaties in the United States is a complex one, involving the President and others in the executive branch; the Senate and its Committee on Foreign Relations; and a framework of legal requirements set forth in the U.S. Constitution, federal statutes enacted by Congress, regulations of the Department of State, and opinions of the U.S. Supreme Court. Treaties are reviewed by the Committee on Foreign Relations of the Senate, approved by the Senate in the form of the “advice and consent” of the Senate, and ratified by the President. In addition to treaties, the United States also enters into other international agreements known as executive agreements. These agreements are not given advice and consent by the Senate nor ratified by the President, but nonetheless constitute binding international obligations on the United States and in some cases require congressional approval.

The Constitution sets forth the process for approval of treaties by the Senate. Some types of executive agreements are entered into under the authority of a federal statute enacted either before or after the agreement is signed. In many cases, Congress must enact implementing legislation in order to give a treaty or executive agreement domestic legal effect. Federal regulations and the U.S. Department of State’s Foreign Affairs Manual govern the process for negotiation and execution of treaties and executive agreements. The laws of the states that comprise the United States do not control the making or ratification of treaties or executive agreements.

The U.S. is viewed as having a hybrid monist-dualist approach in the application of international law in its domestic legal system. Under the Constitution, treaties that do not require implementing legislation have the status of federal law and are superior to state law. In most cases, executive agreements that do not require implementing legislation also have the status of federal law. The U.S. Supreme Court has held that in cases where there is a conflict between (x) a treaty or and executive agreement with federal law status and (y) a federal statute, the later in time of the two will control.

The President and the Department of State play a primary role in the making and ratifying of treaties and the making of executive agreements. The Senate reviews and approves treaties through its constitutional “advice and consent” role; before being considered by the Senate, treaties are first reviewed by the Senate Committee on Foreign Relations. Congress may also review and approve executive agreements entered into pursuant to federal statutes. The U.S. Supreme Court and other federal courts do not participate in the treaty or executive agreement process, although a legal challenge to the validity of a treaty or executive agreement is a matter for the federal courts to decide. The states of the United States do not play a role in the ratification process.

The procedure for adoption of both treaties and executive agreements begins with negotiations by the President, or his designee, and officials of the Department of State. The State Department provides written authorization to those who will be negotiating. Congress as a body does not play a direct, formal part in negotiations, although members of Congress may be included in negotiating delegations or attend as observers, and congressional committees are often consulted during negotiations. Procedures of the State Department

govern the issuance of full powers or other authorization and the process for signature. Once signed, a treaty is sent to the Senate, where it is reviewed by the Committee on Foreign Relations and, if reported out by the committee, considered by the Senate. If the Senate provides its advice and consent, the President may execute an instrument of ratification. The Senate may include in its approval of a treaty such reservations, understandings, declarations, and provisos as it wishes. Treaties and executive agreements are required by federal statute to be published by the Department of State, although certain treaties and executive agreements within specified national security and other categories are exempt from publication.

A selection of recently-ratified treaties shows that the majority were ratified between one and three years after being signed, although in some cases ratification occurred up to ten or more years after signature.

I. Introduction

I.1. The role of the United States in the international community

The United States is an active participant in numerous international organizations around the world. According to the U.S. Central Intelligence Agency's World Factbook, the United States currently participates in 87 international organizations.¹ Among others, the United States is a founding member of the United Nations² and the North Atlantic Treaty Organization.³

The United States provides significant funding to the international organizations in which it participates. The Department of State submits reports annually to Congress regarding the United States' contributions to international organizations; these reports illustrate the scope of U.S. involvement in international organizations, as well as certain other multilateral entities. The most recently-available report indicates total contributions of more than \$11.9 billion dollars for fiscal year 2018.⁴

I.2. United States' relations with the European Union

I.2.1. Early diplomatic ties

The United States has engaged in cooperative diplomatic and economic relations with the European Union and the European institutions that preceded it since the 1950s.⁵ This relationship began in 1953 when the United States first sent observers to the European Coal and Steel Community (ECSC), followed in 1956 by the opening of the U.S. Mission to the ECSC.⁶ The Delegation of the European Commission to the United States was established in 1954 in Washington, D.C.⁷ Seven years later, the U.S. Mission to the European Communities was established in Brussels.⁸

I.2.2. Formalized relationship

The U.S. relationship with the European Community was formalized in 1990 by the Transatlantic Declaration.⁹ The Transatlantic Declaration began regular dialogue between the

¹ *The World Factbook: United States*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (expand "Government" tab) (last updated June 26, 2020).

² *Founding Member States*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/unmembers/founders> (last visited July 3, 2020).

³ *Member Countries*, NORTH ATLANTIC TREATY ORGANIZATION, https://www.nato.int/cps/en/natohq/topics_52044.htm (last updated Mar. 24, 2020).

⁴ U.S. DEP'T OF STATE, UNITED STATES CONTRIBUTIONS TO INTERNATIONAL ORGANIZATIONS: SIXTY-SEVENTH ANNUAL REPORT TO THE CONGRESS FISCAL YEAR 2018 (2018), <https://www.state.gov/u-s-contributions-to-international-organizations-2018/> (follow "Summary Tab 1b" hyperlink)

⁵ *History of the U.S. and the EU*, U.S. MISSION TO THE EUROPEAN UNION, <https://useu.usmission.gov/our-relationship/policy-history/io/> (last visited July 3, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

United States and the European Community on four subjects: economy, education, science, and culture.¹⁰ In 1995, the New Transatlantic Agenda between the United States and the European Union continued this collaborative relationship with a focus on:

- Promoting peace, stability, democracy, and development around the world;
- Responding to challenges of a global nature, such as international crime and drug trafficking, refugees and displaced persons, the environment, and disease;
- Contributing to the expansion of world trade and the promotion of closer economic relations; and
- Building bridges between businesspeople, scientists, educators, and others across the Atlantic.¹¹

A Joint EU-U.S. Action Plan was prepared in connection with the New Transatlantic Agenda to provide a framework for pursuing the goals of the agenda summarized above.¹²

In 1998, the Transatlantic Economic Partnership was developed to increase cooperation on trade.¹³ The partnership document includes multilateral and bilateral elements. The multilateral aspects address cooperative actions in the context of the World Trade Organization.¹⁴ Bilateral aspects include improving cooperation between EU and U.S. regulators, enhancing mutual recognition in order to reduce regulatory barriers to trade, and increasing cooperation on consumer product safety, as well as public procurement, intellectual property, biotechnology, the environment, food safety, and other topics.¹⁵

The Transatlantic Legislators' Dialogue (TLD), formally established in 1999, serves as a mechanism for enhancing communication between the European Parliament and the U.S. Congress.¹⁶ The TLD builds on the existing relationship between the two bodies dating back to 1972.¹⁷

In addition to interparliamentary dialogue, other avenues for improved communication across the Atlantic have been established, including:

- The Transatlantic Business Council, a "cross-sectorial business association representing companies headquartered in the EU and U.S. that serves as the main business interlocutor to both the U.S. government and the EU institutions on issues impacting the transatlantic economy";¹⁸
- The Transatlantic Consumer Dialogue, "a forum of U.S. and EU consumer organisations which develops and agrees on joint consumer policy

¹⁰ *Id.*

¹¹ *Id.*; *New Transatlantic Agenda*, EUR. EXTERNAL ACTION SERV. (1995), http://eeas.europa.eu/archives/docs/us/docs/new_transatlantic_agenda_en.pdf.

¹² *History of the U.S. and the EU*, *supra* note 5; *Joint EU-U.S. Action Plan*, EUR. EXTERNAL ACTION SERV. (1995), http://eeas.europa.eu/archives/docs/us/docs/joint_eu_us_action_plan_95_en.pdf.

¹³ *History of the U.S. and the EU*, *supra* note 5.

¹⁴ *Transatlantic Economic Partnership 1998*, EUR. EXTERNAL ACTION SERV., http://eeas.europa.eu/archives/docs/us/docs/trans_econ_partner_11_98_en.pdf.

¹⁵ *Id.*

¹⁶ *Transatlantic Legislators' Dialogue*, EUR. PARLIAMENT, https://www.europarl.europa.eu/intcoop/tld/what_is/history_en.htm (last visited July 3, 2020).

¹⁷ *Id.*

¹⁸ *History & Mission*, TRANS-ATLANTIC BUS. COUNCIL, <http://transatlanticbusiness.org/about-us/history-mission/> (last visited July 3, 2020).

- recommendations to the U.S. government and European Union to promote the consumer interest in EU and U.S. policy making”;¹⁹ and
- The Transatlantic Policy Network, “a non-governmental network that provides politicians, business, academics and other interested participants from both sides of the Atlantic with opportunities to address both current transatlantic issues and future challenges”.²⁰

I.3. Treaties in force

Treaties in Force, an annual publication of the U.S. Department of State cataloguing treaties and executive agreements in effect to which the U.S. is a party, lists thirty-two bilateral treaties and executive agreements in force between the EU and the U.S. as of January 1, 2019.²¹ These treaties and agreements cover topics including the following:

- U.S. participation in the EU rule of law mission in Kosovo and in EU crisis management operations;
- The security of classified information and defense acquisition;
- Control of chemicals used to make illegal drugs, customs cooperation, extradition, terrorist finance tracking, protection of personal information used in criminal investigations, and other law enforcement topics;
- Galileo and GPS satellite-based navigation systems and related applications;
- Scientific and technical cooperation;
- Numerous agreements on trade and investment including regarding topics such as competition laws, mutual recognition of certain distilled spirits, trade in wine, and prudential measures regarding insurance and reinsurance, among others; and
- Cooperation on regulating civil aviation safety and cooperation on technical assistance regarding civil aviation security infrastructure.²²

The U.S. has also entered into an agreement with Eurojust, the EU’s Juridical Cooperation Unit, to enhance cooperation between Eurojust and the U.S. in combatting terrorism and other transnational crime.²³ In addition to bilateral treaties and agreements between the EU and the U.S., the EU and the U.S. are also party to a number of multilateral treaties. For a listing of these multilateral treaties and agreements, with links to their texts, consult the database available on the website of the Treaties Office of the European External Action Service.²⁴

¹⁹ *About TACD*, TRANS ATLANTIC CONSUMER DIALOGUE, <http://tacd.org/about-tacd/> (last visited July 3, 2020).

²⁰ *Our Mission*, TRANSATLANTIC POLICY NETWORK, <https://www.tponline.org/our-mission/> (last visited July 3, 2020).

²¹ U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2019 140-42 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-TIF-Bilaterals-6.13.2019-web-version.pdf>.

²² *Id.*

²³ *Id.* at 142.

²⁴ *List of Treaties by Country: United States of America*, Treaties Office Database, EUROPEAN EXTERNAL ACTION SERVICE, <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=6063&countryName=United%20States%20of%20America&countryFlag=treaties>.

II. The internal legal regime

II.1. Laws governing the making and ratification of international agreements

The United States enters into two types of international agreements: treaties and executive agreements. Although international law does not distinguish between treaties and executive agreements,²⁵ and these terms are not clearly defined in the United States Constitution,²⁶ there are different requirements under U.S. law for how each type is made. Additional requirements with respect to advice and consent by the Senate and ratification by the President apply to treaties.

II.1.1. United States Constitution

II.1.1.1 Treaties

The United States Constitution establishes the mechanism by which treaties are made and ratified. The President has constitutional authority to negotiate and execute a treaty, which is then presented to the Senate for advice and consent by the Senate. If the Senate provides its advice and consent to the treaty, it is returned to the President, who ratifies it by executing an instrument of ratification. As a matter of terminology, although the role of the Senate is sometimes referred to as “ratification,” it is the President who formally ratifies treaties.

Article II, Section 2, Clause 2 of the Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”²⁷ The U.S. Supreme Court in 1919 confirmed that the requirement of concurrence of two-thirds of the Senators present refers to two-thirds of a quorum;²⁸ the Constitution provides that a quorum for business requires the presence of a majority of the members of the Senate.²⁹

II.1.1.2 Executive agreements

Most of the international agreements to which the United States is a party are executive agreements rather than treaties.³⁰ Unlike a treaty, an executive agreement is neither submitted to the Senate for advice and consent nor ratified by the President thereafter; the validity of an executive agreement thus depends on having been made on adequate

²⁵ CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 4 (Comm. Print 2001) [hereinafter SFRC TREATY STUDY], <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>. This committee print was prepared for the Senate Foreign Relations Committee by the Congressional Research Service.

²⁶ The United States Constitution refers separately to treaties, agreements, and compacts, but does not define these terms or specify how they differ. Cong. Research Serv., *Alternatives to Treaties: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C3-2-2-1-1-1/ALDE_00001148/ (last visited July 3, 2020) [hereinafter CONSTITUTION ANNOTATED]. Prepared by the Congressional Research Service, the Constitution Annotated provides comprehensive analysis and interpretation of the U.S. Constitution with clause-by-clause annotations based on cases decided by the U.S. Supreme Court.

²⁷ U.S. CONST. art. II, § 2, cl. 2.

²⁸ *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 283-84 (1919).

²⁹ U.S. CONST. art. I, § 5, cl. 1.

³⁰ STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL 32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT ON U.S. LAW 6 (2018); SFRC TREATY STUDY, *supra* note 25, at 38-39.

constitutional authority. The State Department Circular 175 rules,³¹ described in section II.1.4 of this study, include criteria for determining whether an international agreement should be made in the form of a treaty or an executive agreement.³²

There are three categories of executive agreements.

- The first category, referred to as “congressional-executive agreements,” includes executive agreements authorized by Congress either before or after they are made.
- The second type includes executive agreements entered into pursuant to treaties that have themselves been previously ratified.
- The third category, referred to as “sole executive agreements,” is made up of executive agreements that have been entered into solely pursuant to the President’s authority under the Constitution.

It is “well established” that congressional-executive agreements are valid under the U.S. Constitution.³³ A congressional-executive agreement is authorized by a statute or, in some cases, a joint resolution that is passed by both chambers of Congress pursuant to the legislative process.³⁴ One of the most significant examples a statute authorizing the making of executive agreements was the Lend-Lease Act enacted in 1941, pursuant to which the President was given broad authority to have the federal government manufacture and sell, transfer, lease, or lend munitions and other defensive articles to any country “whose defense the President deem[ed] vital to the defense of the United States.”³⁵ The Lend-Lease Act enabled the President to make mutual aid agreements by which the United States provided \$40 billion worth of military materials to its allies in World War II.³⁶ Other important types of congressional-executive agreements include trade agreements authorized by acts of Congress³⁷ and participation in international organizations.³⁸ Although most congressional-

³¹ *Circular 175 Procedure*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/l/treaty/c175/index.htm> (last visited July 3, 2020).

³² Notwithstanding these criteria, executive agreements have varied in scope, significance, and subject matter. A leading constitutional scholar has observed that “executive agreements can be used for any purpose; that is, anything that can be done by treaty can be done by executive agreement.” EDWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 401 (6th ed. 2019).

³³ SFRC TREATY STUDY, *supra* note 25, at 5. See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 215-18 (2d ed. 1996).

³⁴ SFRC TREATY STUDY, *supra* note 25, at 5.

³⁵ Act to Promote the Defense of the United States (Lend-Lease Act), ch. 11, § 3(a)(2), 55 Stat. 31 (1941).

³⁶ *Congressional Executive Agreements*, CONSTITUTION ANNOTATED, *supra* note 26, https://constitution.congress.gov/browse/essay/artII-S2-C3-2-2-1-1-3/ALDE_00001151/ (last visited July 3, 2020).

³⁷ *Id.* Some examples of trade agreements made by the U.S. as congressional-executive agreements include the North American Free Trade Agreement, the Agreement Establishing the World Trade Organization, the Canada-United States Free-Trade Agreement, and the United States-Israel Free Trade Area Agreement. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (approved in 107 Stat. 2057); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (approved in 108 Stat. 4809); Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 (approved in 102 Stat. 1851); and Free Trade Agreement, Apr. 22, 1985, U.S.-Isr., 24 I.L.M. 653 (approved in 99 Stat. 82), respectively.

³⁸ *Id.* Congressional-executive agreements authorizing U.S. involvement in international organizations include, for example, the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the International Bank for Reconstruction and Development. The articles for these organizations were adopted at the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire in July 1944. See Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1512, 2 U.N.T.S. 39; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945,

executive agreements are authorized in advance by a federal statute, some agreements of this type are submitted to Congress for authorization only after signature.³⁹

The constitutionality of executive agreements made pursuant to treaties is also well-grounded,⁴⁰ with many such agreements having been made in order to implement treaty provisions. In *Wilson v. Girard*,⁴¹ the U.S. Supreme Court upheld an administrative agreement entered into by the United States in connection with a security treaty between Japan and the United States that became effective in 1952 and a related protocol agreement entered into the following year. The Court stated that by consenting to the security treaty, article II of which authorized the making of the administrative and protocol agreements, the Senate had impliedly approved the latter two agreements.⁴² It has also been argued that Article II, Section 3 of the Constitution confers upon the President the power to make executive agreements pursuant to treaties. This section requires the President to “take Care that the Laws be faithfully executed[.]” Under this argument, because a treaty duly made and consented to in accordance with the constitutional requirements described above has the status of federal law, the President’s duty to faithfully execute such a law provides authorization to conclude an executive agreement under it.⁴³ See section II.3 of this study below regarding the status of treaties as federal law.

Sole executive agreements are those made by the President on the basis of presidential powers under Article II of the Constitution, without reliance on authorization pursuant to an act of Congress or an existing treaty. Presidents have derived support for this agreement-making power from various provisions of Article II, including the following:⁴⁴

- Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States of America.”⁴⁵ Such executive power includes the power to conduct foreign relations and can be viewed as a constitutional basis for making sole executive agreements with other nations.⁴⁶ The U.S. Supreme Court has repeatedly upheld sole executive agreements on the basis of this executive power. In *United States v. Pink*, the Court affirmed the validity of the Litvinov Agreement of 1933, in which the United States and the Soviet Union agreed to settle certain claims in connection with the United States’ recognition of the Soviet Union.⁴⁷ The Court stated that the power to enter into a sole executive

60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 (both approved in 59 Stat. 512 (1945)). Other notable examples include US participation in the World Health Organization; the United Nations Educational, Scientific, and Cultural Organization (UNESCO); and the International Labour Organization. See Constitution of the World Health Organization, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 (approved in 62 Stat. 441 (1998)); Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 Stat. 2495, 4 U.N.T.S. 275 (approved in 60 Stat. 712 (1946)); and Constitution of the International Labour Organization, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35 (approved in 48 Stat. 1182 (1934)).

³⁹ Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1256 & n.49 (2008).

⁴⁰ SFRC TREATY STUDY, *supra* note 25, at 5.

⁴¹ *Wilson v. Girard*, 354 U.S. 524 (1957).

⁴² *Id.* at 528-29.

⁴³ See SFRC TREATY STUDY, *supra* note 25, at. 92.

⁴⁴ See SFRC TREATY STUDY, *supra* note 25, at 5-6.

⁴⁵ U.S. CONST. art. II, § 1.

⁴⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. g (AM. LAW INST. 1987).

⁴⁷ *United States v. Pink*, 315 U.S. 203 (1942).

agreement in order to resolve those claims and enable full recognition is “certainly . . . a modest implied power of the President who is the ‘sole organ of the federal government in the field of international relations.’”⁴⁸

- Article II, Section 2, Clause 1 appoints the President as “Commander in Chief of the Army and Navy of the United States[.]”⁴⁹ The U.S. Supreme Court in 1902 seemed to confirm the commander-in-chief power as the constitutional basis for executive agreements in *Tucker v. Alexandroff*.⁵⁰ The *Tucker* case involved an alleged deserter from a Russian warship and whether the terms of a treaty between the United States and Russia required the sailor’s return to Russian authorities. In its decision, the Court recounted circumstances under which executive branch officials had previously allowed foreign soldiers to enter the United States.⁵¹ The Court stated that “[w]hile no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.”⁵²
- Article II, Section 2, Clause 2 of the Constitution provides for the President’s treaty-making power, described above in this section. This clause is seen as a source of authority for entering into sole executive agreements in connection with the making of treaties.⁵³
- Article II, Section 3 of the Constitution provides that the President “shall receive Ambassadors and other public Ministers [.]”⁵⁴ This power may, it has been argued, provide a constitutional basis for the making of sole executive agreements.⁵⁵ In *United States v. Belmont*, the U.S. Supreme Court stated that the President’s recognition of the Soviet Union, establishment of diplomatic relations, exchange of ambassadors, assignment of certain expropriated funds by the Soviet government to the U.S. and related agreements “were all parts of one transaction, resulting in an international compact between the two governments.”⁵⁶ The Court further stated that the foreign relations power is held by the national government, that the executive was authorized to speak on its behalf, and that the assignment of the funds and related agreements that were at issue in the case did not constitute a treaty requiring advice and consent of the Senate.⁵⁷
- It has also been argued that the President’s duty to take care that the laws be faithfully executed⁵⁸ provides constitutional support for the making of sole

⁴⁸ *Id.* at 229 (quoting *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 320 (1936)).

⁴⁹ U.S. CONST. art. II, § 2, cl. 1.

⁵⁰ *Tucker v. Alexandroff*, 183 U.S. 424, 435 (1902).

⁵¹ *Id.* at 434-35. For a discussion of these executive agreements with Mexico, see SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 104-05 (2d ed. 1916); see also SFRC TREATY STUDY, *supra* note 25, at 90.

⁵² *Tucker*, 183 U.S. at 435.

⁵³ SFRC TREATY STUDY, *supra* note 25, at 90.

⁵⁴ U.S. CONST. art. II, § 3.

⁵⁵ SFRC TREATY STUDY, *supra* note 25, at 91.

⁵⁶ *United States v. Belmont*, 301 U.S. 324, 330 (1937).

⁵⁷ *Id.*

⁵⁸ U.S. CONST. art. II, § 3.

executive agreements. In 1822, the U.S. Attorney General opined that this duty encompassed not only the Constitution, statutes, and treaties, but also “general laws of nations which govern the intercourse between the United States and foreign nations [.]”⁵⁹ The Supreme Court in *In re Neagle* appeared to accept this interpretation, albeit in dicta, when it implied that this duty is not “limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms [. . . but also] include[s] the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution[.]”⁶⁰ Based on that interpretation, it is asserted that this presidential power includes the ability not only to make agreements in connection with existing treaties, but also agreements to fulfill other international law obligations.⁶¹ This claim of authority to make sole executive agreements has, however, been challenged as “a minority [view that] is too open-ended to be acceptable.”⁶²

When executive agreements are made in accordance with the constitutional authority described above, they do not require the advice and consent of the Senate or ratification by the President to become effective. Thus, the advice and consent provisions in Article II, Section 2, Clause 2 of the Constitution, related Senate rules described in Section II.1.2.1 of this study, and Senate advice-and-consent and presidential ratification procedures addressed in Sections IV.3 and IV.4 of this study are not applicable. The validity of an executive agreement could be at issue if it were challenged in court.

II.1.2. Rules of the Senate and Senate Committees

II.1.2.1 Treaties

The Rules of the Senate establish the process for consideration of a treaty by that chamber of Congress. After being received from the President, the treaty is read once⁶³ and the injunction of secrecy provided for in Senate Rules XXIX and XXX is removed, either by unanimous consent of Senators or, in the absence of such consent, pursuant to a resolution approved by the Senate.⁶⁴ The removal of the injunction of secrecy and consideration of the treaty is done while the Senate is in executive session.⁶⁵ The Senate Rules call for the treaty then to be referred to the Senate Committee on Foreign Relations,⁶⁶ which is the Senate committee responsible for reviewing and reporting to the Senate regarding treaties submitted for consideration.⁶⁷

⁵⁹ 1 Op. Att’y Gen. 566, 570 (1822).

⁶⁰ *In re Neagle*, 135 U.S. 1, 64 (1890).

⁶¹ Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 248 (1945), https://digitalcommons.law.yale.edu/fss_papers/2487.

⁶² 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.8(a) n.4 (5th ed. 2012).

⁶³ STANDING RULES OF THE SENATE, R. XXX.1(a), S. Doc. No. 113-18, at 43 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.

⁶⁴ *Id.*, R. XXIX.3, at 42.

⁶⁵ SFRC TREATY STUDY, *supra* note 25, at 120.

⁶⁶ STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(a), at 43.

⁶⁷ *Id.*, R. XXV.1(j)(1), at 23.

The Rules of the Committee on Foreign Relations set forth the parameters under which that committee considers treaties. Rule 9(a) states that the committee is the only Senate committee “with jurisdiction to review and report to the Senate on treaties submitted by the President for Senate advice and consent to ratification” and notes that, because the House of Representatives does not participate in the advice and consent process, that committee is “the only congressional committee with responsibility for treaties.”⁶⁸ Rule 9(b) provides that unlike proposed legislation, which can be enacted into law only in the Congress in which it was introduced,⁶⁹ once a treaty has been submitted by the President to the Senate for advice and consent and referred to the committee, the treaty “remains on its calendar from Congress to Congress” until the committee acts upon it or the Senate discharges the committee from considering the treaty.⁷⁰ Rule 9(c) provides that if a treaty is reported to the Senate by the committee, but the Senate has not taken action by the end of that Congress, the process will begin anew at the start of the next Congress as if there had been no proceedings on it.⁷¹ Under Rule 9(d), the committee “should conduct a public hearing on each treaty as soon as possible after its submission” and, in the absence of “extraordinary circumstances,” must provide a written report when reporting a treaty out of the committee to the Senate.⁷²

After the Committee on Foreign Relations reports a treaty out, the Rules of the Senate govern its further disposition by that body.⁷³ Senate Rule XXX.1(b) provides that the Senate may choose to make amendments to the treaty.⁷⁴ Rule XXX.1(c) calls for a resolution of ratification, which may include amendments, to state the decision of the Senate regarding the treaty.⁷⁵

II.1.2.2 Executive Agreements

Although executive agreements do not go through the same advice-and-consent process in the Senate used for treaties, the Rules of the Senate nonetheless provide for consideration of executive agreements by Senate committees. Rule XXV, which sets forth the areas of responsibility of the Senate standing committees, directs that the Committee on Foreign Relations has jurisdiction over executive agreements other than reciprocal trade agreements and that the Committee on Finance has jurisdiction over reciprocal trade agreements.⁷⁶ Rule 1(a) of the Foreign Relations Committee also states that the committee has jurisdiction over matters relating to executive agreements other than reciprocal trade agreements,⁷⁷ although the committee rules do not specify procedures for consideration of executive agreements as they do for treaties. Similarly, the Rules of Procedure of the Senate Finance Committee reproduce the statement of that committee’s jurisdiction over reciprocal trade agreements

⁶⁸ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, R. 9(a), S. Prt. No. 115-23, at 7 (2018), https://www.foreign.senate.gov/imo/media/doc/Rules_115-23.pdf.

⁶⁹ See THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. Doc. No. 114-192, § 588, at 311 (2017), <https://www.govinfo.gov/content/pkg/HMAN-115/pdf/HMAN-115.pdf>. Each Congress typically consists of two sessions of one year each.

⁷⁰ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 9(b), at 7. Most treaties are considered within a year of receipt from the President. SFRC TREATY STUDY, *supra* note 25, at 123.

⁷¹ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 9(c), at 7.

⁷² *Id.*, R. 9(d), at 7.

⁷³ See STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(b)-(d), at 43.

⁷⁴ *Id.*, R. XXX.1(b), at 43.

⁷⁵ *Id.*, R. XXX.1(c), at 43.

⁷⁶ *Id.*, R. XXV.1(j)(i), at 23-24, and R. XXV.1(i), at 23.

⁷⁷ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 1(a)(17), at 1.

contained in the Senate Rules,⁷⁸ although there are no specified procedures for those agreements.

II.1.3. Federal statutes

II.1.3.1 Treaties

Although the Senate does not perform its advice-and-consent role until after the President has negotiated a treaty, the Senate will often play a consultative role before negotiations are concluded.⁷⁹ Historically, this has included informal consultations with individual Senators, meetings with Senate committees, oversight hearings held by committees, and discussions and correspondence with members and their staff regarding proposed treaties.⁸⁰

Congress has also enacted legislation to require consultation on treaty negotiations or the text of proposed agreements. For example, the International Financial Institutions Act does so in the context of negotiation of future financial contributions by the United States to multilateral development banks. The act mandates consultation with the chairmen and ranking minority members of the House Committee on Banking, Finance and Urban Affairs, the House Committee on Appropriations, the Senate Committee on Foreign Relations, and the Senate Committee on Appropriations (and appropriate subcommittees of each) before the start of such negotiations, during the course of negotiations, and before any negotiating session at which the United States may agree to such contributions.⁸¹ The International Development and Food Assistance Act of 1978 requires the Secretary of State to provide the Senate Committee on Foreign Relations, the House Committee on Foreign Affairs, and the Senate and House Committees on Appropriations with a copy of the text of any agreement with a foreign government for debt relief no less than thirty days prior to its entry into force, along with a detailed justification of the interest of the United States in such debt relief.⁸²

II.1.3.2 Executive agreements

In addition to the statutes addressing the making of certain treaties described above, Congress has also enacted legislation that governs the making of certain executive agreements. The Case-Zablocki Act imposes reporting requirements for all executive agreements. Congress has also put in place additional requirements for the making of executive agreements in certain subject areas.

The Case-Zablocki Act requires the Secretary of State to send to Congress the text of any executive agreement entered into by the United States within 60 days after the agreement enters into force.⁸³ This statute does not, however, condition the effectiveness of an executive agreement on transmittal to Congress, nor does it provide a mechanism for disapproval of an executive agreement by Congress.

There are a number of other statutes that impose more onerous requirements on the making of executive agreements based upon the subject matter of the agreement.⁸⁴ In most cases,

⁷⁸ RULES OF PROCEDURE OF THE SENATE COMMITTEE ON FINANCE, S. Prt. 115-2, R. XXV.1(i), at 9 (2017), <https://www.finance.senate.gov/imo/media/doc/115th%20Rules.pdf>.

⁷⁹ SFRC TREATY STUDY, *supra* note 25, at 106-07.

⁸⁰ *Id.* at 107.

⁸¹ International Financial Institutions Act § 1201, 22 U.S.C. § 262g-3 (2018).

⁸² International Development and Food Assistance Act of 1978 § 603(a), 22 U.S.C. 2395a (2018).

⁸³ Case-Zablocki Act § 1, 1 U.S.C. § 112b (2018).

⁸⁴ For a table listing these statutes and indicating which require advance transmittal and include approval

these statutes require notification and transmittal of the proposed agreement to Congress.⁸⁵ In some subject areas, congressional approval is also required before an executive agreement can become effective.⁸⁶ Some examples of these statutes are described below.

In the context of international trade, Congress has enacted legislation that imposes requirements on the negotiation of and conditions to the effectiveness of certain trade agreements made by the President. The Trade Act of 1974 requires the President, before making a trade agreement addressing barriers to international trade, to consult with the House of Representatives' Committee on Ways and Means, the Senate's Finance Committee, and any other committee with jurisdiction over the subjects of the agreement.⁸⁷ The President must also submit any trade agreement that is made to Congress, along with a draft implementing bill and a statement of proposed administrative action needed for implementation.⁸⁸ The agreement will not become effective unless three conditions are satisfied:

- The President shall have notified the House and Senate of his intention to enter into a trade agreement at least 90 days in advance and published notice of that intent in the Federal Register;⁸⁹
- After making the agreement, the President submits the final text of it to the House and the Senate, along with proposed implementing legislation, a statement of proposed administrative action needed, an explanation of how the proposed legislation and administrative action would modify existing law, and a justification for how the agreement serves U.S. commerce and for the proposed implementing legislation and administrative action; and
- Congress enacts the proposed implementing legislation.⁹⁰

Congress has imposed similar requirements for the making of executive agreements regarding nuclear cooperation. The Atomic Energy Act of 1954 requires that Congress be given a copy of the proposed agreement for cooperation at least 60 days in advance of entry into force.⁹¹ If Congress enacts a joint resolution disapproving of the proposed agreement during that time period, it will not become effective.⁹² This act also conditions the effectiveness of an agreement for cooperation on the advance submittal of the proposed agreement to specified congressional committees.⁹³

Another example of this type of statute governs the making of executive agreements with respect to international fisheries. The Magnuson-Stevens Fishery Conservation and

requirements, see Annex to this study, reproduced from SFRC TREATY STUDY, *supra* note 25, at 236-37.

⁸⁵ SFRC TREATY STUDY, *supra* note 25, at 235-38.

⁸⁶ *Id.* at 238.

⁸⁷ Trade Act of 1974 § 102(c), 19 U.S.C. § 2112(c) (2018).

⁸⁸ *Id.* § 102(d), 19 U.S.C. § 2112(d).

⁸⁹ The Federal Register is the official daily publication of proposed and final rules and notices by United States federal agencies, as well as Presidential executive orders and proclamations. See *Federal Register Office*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.federalregister.gov/agencies/federal-register-office> (last visited July 3, 2020).

⁹⁰ Trade Act of 1974 § 102(e), 19 U.S.C. § 2112(e) (2018).

⁹¹ Atomic Energy Act of 1954 § 123(d), 42 U.S.C. § 2153(d) (2018).

⁹² *Id.*

⁹³ *Id.* §123(c)-(d), 42 U.S.C. § 2153(c)-(d).

Management Act provides that an agreement regarding international fisheries will not become effective until 120 days after having been sent to the House and the Senate.⁹⁴ As with the Atomic Energy Act, if Congress enacts a joint resolution disapproving of the proposed agreement, it will not become effective.⁹⁵ This act also requires that proposed international fisheries agreements be referred to the appropriate committees of the Senate and House of Representatives having subject matter jurisdiction for review.⁹⁶

II.1.3.3 Implementing legislation

Although some treaties and executive agreements are self-executing,⁹⁷ for those that are not, Congress must enact implementing legislation give them effect in the United States.⁹⁸ Whether or not a treaty or executive agreement is self-executing or executory (i.e., not self-executing) is typically determined by the executive branch, although in some cases the question becomes the subject of litigation and is resolved by a court.⁹⁹

A treaty or executive agreement is customarily viewed as executory rather than self-executing if it falls within one of three categories:

- The treaty or executive agreement “manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”;
- Either the Senate, in consenting to a treaty, or Congress, by enacting a resolution, requires implementing legislation; or
- “[I]mplementing legislation is constitutionally required”.¹⁰⁰

The U.S. Supreme Court has found treaties to be executory based on what it determined to be the intention of the treaty. In 1829, the Supreme Court held that a provision in an 1829 treaty between the United States and Spain calling for the ratification of certain grants of land by Spain was not self-executing because such ratification would require action by the legislature.¹⁰¹ In 1913, the Supreme Court relied on a statement of congressional intent by the committee on patents in the House of Representatives and Senate in ruling that a provision in the Treaty of Brussels of December 14, 1900 regarding industrial property was not self-executing.¹⁰² More recently, in 2008, the Supreme Court held that Article 94 of the United

⁹⁴ Magnuson-Stevens Fishery Conservation and Management Act, § 203(a), 16 U.S.C. § 1823(a) (2018).

⁹⁵ *Id.* § 203(c), 16 U.S.C. § 1823(c).

⁹⁶ *Id.*

⁹⁷ Self-executing treaties have “automatic domestic effect as federal law upon ratification.” *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008).

⁹⁸ In the 1829 case *Foster v. Neilson*, the Supreme Court stated that a treaty is

the law of the land [and] to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the Court.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829 (Marshall, C.J.)), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

⁹⁹ SFRC TREATY STUDY, *supra* note 25, at 4.

¹⁰⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 46, § 111.

¹⁰¹ *Foster*, 27 U.S. at 314-15.

¹⁰² *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 49 (1913).

Nations Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [International Court of Justice] in any case to which it is a party[.]" did not suffice to make a decision of the International Court of Justice self-executing such that it would have immediate effect in a United States court.¹⁰³

The Senate can expressly condition its advice and consent to a treaty on the passage of legislation to implement provisions of a treaty. For example, the International Covenant on Civil and Political Rights was signed by the United States in 1977 and ratified in 1992. The Senate expressly made its advice and consent subject to the understanding "[t]hat the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."¹⁰⁴ In a case involving claims by a Mexican national against the United States and several other Mexican individuals for the alleged unlawful kidnapping of the claimant from Mexico and his arrest in the United States, the Supreme Court stated that "although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."¹⁰⁵

Implementing legislation is required for treaties or executive agreements that address matters reserved to Congress by the Constitution. Although the Supreme Court has not ruled on this issue directly, lower federal courts have confirmed that a treaty alone cannot impose spending, taxation, or criminal law obligations on the United States. A federal appellate court in 1978 held that a treaty cannot commit the federal government to spend money—a power assigned only to Congress under the Constitution¹⁰⁶—on a self-executing basis; an appropriations measure passed by Congress would be required.¹⁰⁷ That court also stated that because the Constitution provides that the House of Representatives must initiate any revenue-raising legislation,¹⁰⁸ a treaty cannot by itself impose a requirement for the imposition of taxes in the United States.¹⁰⁹ In another case, a federal appellate court held that because the creation of crimes at the federal level is a power reserved to Congress under the Constitution, a treaty cannot impose criminal liability without the enactment of implementing legislation.¹¹⁰

The U.S. Supreme Court has held that the President cannot circumvent the requirement for implementing legislation to give domestic effect to an executory treaty by issuing a memorandum that would make the obligations of such a treaty binding on United States courts.¹¹¹ In that case, the Court was not persuaded by the argument that the President's memorandum was implicitly authorized by the Senate's consent to the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention and the UN

¹⁰³ *Medellín v. Texas*, 552 U.S. 491, 507-08 (2008).

¹⁰⁴ Resolution of Ratification, International Covenant on Civil and Political Rights, S. Res., 138 CONG. REC. 8071 (1992) (enacted).

¹⁰⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

¹⁰⁶ U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]").

¹⁰⁷ *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978).

¹⁰⁸ U.S. CONST. art 1, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives[.]").

¹⁰⁹ *Edwards* at 1058.

¹¹⁰ *Hopson v. Krepes*, 622 F.2d 1375, 1380 (9th Cir. 1980); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 46, § 111, reporters' note 6.

¹¹¹ *Medellín v. Texas*, 552 U.S. 491, 525-26 (2008).

Charter, stating that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”¹¹²

Even when lawmaking by Congress may be required in order to implement a treaty or executive agreement that is not self-executing, obligations arising under it are nonetheless considered to be binding on the United States.¹¹³ Although failure to do so might put the United States in default of its obligations as a matter of contract, it is not clear that Congress has a duty or obligation to enact implementing legislation to give domestic effect to an executory treaty or executive agreement.¹¹⁴ In practice, Congress has typically provided the laws needed, although the question has not been definitively resolved.¹¹⁵

II.1.4. Federal regulations

The U.S. Department of State has promulgated regulations, codified in the Code of Federal Regulations,¹¹⁶ to implement the Case-Zablocki Act¹¹⁷ (described in Section II.1.3.2 of this study). These regulations provide criteria for determining whether a proposed arrangement would constitute either an executive agreement or a document that is not legally binding but intended to have political or moral weight.¹¹⁸ These criteria are set forth in the regulations and include the following:

- The nature of the parties, i.e., whether they are states, state agencies, or international organizations, and their intention to create a legally binding obligation;
- Whether the significance of the arrangement rises to the level of an international agreement;
- The specificity of the language used, including as to performance and enforcement;
- Whether there are two or more parties; and
- Whether the document uses the customary form for international agreements.¹¹⁹

For an executive agreement, consultation with—and in some cases approval by—the Secretary of State is required, after which the agreement must be transmitted to Congress.

In addition to the regulations described above, the State Department’s Foreign Affairs Manual sets forth required procedures for making treaties and executive agreements.¹²⁰ These

¹¹² *Id.*

¹¹³ MULLIGAN, *supra* note 30, at 17.

¹¹⁴ *Id.* at 17-18.

¹¹⁵ HENKIN, *supra* note 33, at 205; MULLIGAN, *supra* note 30, at 18.

¹¹⁶ The Code of Federal Regulations, or C.F.R., is the codified collection of general and permanent regulations promulgated by federal agencies. See Gov’t Publ’g Office, *About the Code of Federal Regulations*, GOVINFO, <https://www.govinfo.gov/app/collection/CFR> (last visited July 3, 2020).

¹¹⁷ 22 C.F.R. pt. 181 (2019).

¹¹⁸ *Id.* § 181.2(a)(1).

¹¹⁹ *Id.* § 181.2(a)(1)-(5).

¹²⁰ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL ch. 720, <https://fam.state.gov/fam/11fam/11fam0720.html> (last visited July 3, 2020). The Department of State describes the Foreign Affairs Manual, and the related Foreign Affairs Handbook, as follows:

The Department articulates official guidance, including procedures and policies, on matters relating to Department management and personnel in the Foreign Affairs Manual (FAM) and the Foreign Affairs Handbook (FAH) series. Some of these directives are promulgated pursuant to statute, such as the

requirements, along with the regulations contained in the Code of Federal Regulations described above, are often referred to as the “Circular 175 procedure” because these procedures were originally included in State Department Circular No. 175, December 13, 1955, which was intended to provide for the “negotiation, conclusion, reporting, publication, and registration of United States treaties and international agreements” and “maintenance of complete and accurate records on such agreements.”¹²¹

The Circular 175 procedure includes criteria for determining whether a particular international agreement should be cast as a treaty or an executive agreement:

- (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;
- (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- (4) Past United States 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.¹²²

The Foreign Affairs Manual also summarizes the constitutional parameters of treaties and executive agreements. Regarding treaties, the manual states that “[t]he President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations, so long as the agreement does not contravene the United States Constitution.”¹²³ Regarding executive agreements, referred to in the Foreign Affairs Manual as “international agreements other than treaties,” the manual states that such agreements may be made in reliance upon one or more of three constitutional bases: an existing treaty, legislation by Congress, or the constitutional authority of the President.¹²⁴

Elaborating on those categories of executive agreements, the Foreign Affairs Manual provides that the President can make an executive agreement “pursuant to a treaty brought into force with the advice and consent of the Senate, the provisions of which constitute authorization for the agreement without subsequent action by the Congress.”¹²⁵ The manual indicates that the President can enter into a congressional-executive agreement “on the basis of existing legislation, or subject to legislation to be adopted by the Congress, or upon the failure of Congress to adopt a disapproving joint or concurrent resolution within designated time

Secretary of State's authority to prescribe regulations for the Foreign Service as provided in Section 206 of the Foreign Service Act of 1980, as amended, 22 U.S.C. 3926. The FAMs and FAHs that are publicly available are located on the Department's public website, at <https://fam.state.gov/>.

22 C.F.R. § 5.5 (2019).

¹²¹ 11 FOREIGN AFFAIRS MANUAL § 721, *supra* note 120. See also *Circular 175 Procedure*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/s/l/treaty/c175/index.htm> (last visited July 3, 2020); *Treaty Procedures*, U.S. DEP'T OF STATE (Nov. 26, 2018), <https://www.state.gov/treaty-procedures/>.

¹²² 11 FOREIGN AFFAIRS MANUAL § 723.3, *supra* note 120.

¹²³ *Id.* § 723.2-1.

¹²⁴ *Id.* § 723.2-2.

¹²⁵ *Id.* § 723.2-2(A).

periods.”¹²⁶ The manual describes presidential power for making sole executive agreements as encompassing “any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority”¹²⁷ and includes the following:

- (1) The President’s authority as Chief Executive to represent the nation in foreign affairs;
- (2) The President’s authority to receive ambassadors and other public ministers, and to recognize foreign governments;
- (3) The President’s authority as “Commander-in-Chief”; and
- (4) The President’s authority to “take care that the laws be faithfully executed.”¹²⁸

The Foreign Affairs Manual also includes requirements for authorizing, negotiating, and concluding treaties and executive agreements (see section IV of this study).

The Foreign Affairs Manual sets forth a number of areas that must be addressed by an action memorandum that requests authority to negotiate and/or conclude a treaty or executive agreement. These requirements include the following:

- An explanation of arrangements for consultation with Congress and opportunity for the public to comment on the proposed treaty or executive agreement.¹²⁹
- A statement of whether the proposed treaty or executive agreement would commit the United States to provide funds, goods, or services in excess of an approved budget and any planned consultation with the Office of Management and Budget (OMB) to address the commitment.¹³⁰ Authorization requires that amounts be included in a budget approved by the President or that the President has determined to seek such funds.¹³¹
- A statement of whether the proposed treaty or executive agreement could reasonably be expected to require a “significant regulatory action” and, if so, any planned consultation with OMB, which is required for authorization.¹³²
- An explanation of any concerns regarding public disclosure of the treaty or executive agreement.¹³³

¹²⁶ *Id.* § 723.2-2(B).

¹²⁷ *Id.* § 723.2-2(C).

¹²⁸ *Id.* § 723.2-2(C).

¹²⁹ *Id.* § 724.3(c).

¹³⁰ *Id.* § 724.3(d).

¹³¹ *Id.* § 724.3(d).

¹³² *Id.* § 724.3(e). “Significant regulatory action” is defined in § 3 of Executive Order 12,866 as one likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

Exec. Order No. 12,866 § 3, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2018).

¹³³ 11 FOREIGN AFFAIRS MANUAL, *supra* note 120, § 724.3(f).

- If there is a possibility of an adverse environmental impact from the treaty or executive agreement, a statement as to whether it will “significantly affect the quality of the human environment.”¹³⁴
- The United States’ draft of the document to be negotiated or the text of the treaty or executive agreement to be signed, along with a memorandum of law prepared by the Office of the Legal Adviser.¹³⁵

In some cases, the State Department may provide a “blanket” authorization covering multiple agreements of the same “general type” that will be “negotiated according to a more or less standard formula.”¹³⁶ A separate authorization may, however, be required for a treaty or executive agreement made under the auspices of an international organization, even if the instrument pursuant to which the U.S. joined the organization was previously authorized.¹³⁷

II.1.5. State laws and regulations

The laws of the states that comprise the United States do not regulate the process for making or ratifying treaties or making executive agreements. This is consistent with the constitutional precept that treaties “made, under the Authority of the United States,” along with the Constitution itself and federal law thereunder, are “the supreme law of the Land” and bind the states, notwithstanding their respective constitutions and laws.¹³⁸ Within a decade after the ratification of the Constitution, the U.S. Supreme Court confirmed that the provisions of a treaty were superior to a conflicting state statute when it struck down an act of the Virginia state legislature concerning debts owed to British creditors that stood in opposition to a provision of the Treaty of Paris that brought peace between the United States and Great Britain.¹³⁹ See sections II.2 and II. 3 of this study regarding when treaties and executive agreements prevail over conflicting state laws.

The United States Constitution forbids any of the states that comprise the United States from entering into a treaty.¹⁴⁰

II.2. International and domestic law in the United States

The United States is generally viewed as having a “mixed” or “hybrid” approach in regard to the relationship between its national and international law, with elements of both monism and dualism in the application of international law domestically. Under a monist approach to international law, treaties are incorporated into a nation’s framework of laws without the need

¹³⁴ *Id.* § 724.3(g).

¹³⁵ *Id.* § 724.3(h).

¹³⁶ *Id.* § 724.5.

¹³⁷ *Id.* § 724.4(b).

¹³⁸ U.S. CONST. art. VI, cl. 2.

¹³⁹ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

¹⁴⁰ U.S. CONST. art. I, § 10, cl. 1. It can be argued that the states nonetheless have a voice in the making of treaties. As Professor Henkin observed:

The Constitution responds to concerns of federalism in that the President, the principal treaty-maker, is elected by a process reflecting our origins as a union of states, and, especially, in that the Senate, the other participant in the treaty process, historically has been particularly representative of the states and of state interests.

HENKIN, *supra* note 33, at 189 n.**.

for domestic lawmaking and can supersede existing domestic law.¹⁴¹ In a dualist system, the legislature must enact legislation in order to give treaties legal effect domestically.¹⁴²

The text of the U.S. Constitution's Supremacy Clause implies a monist approach to international law; however, other elements of the Constitution and the development of U.S. Supreme Court jurisprudence suggest a dualist framework. The Supremacy Clause provides that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁴³

Providing further support for a monist argument, the Supreme Court has also stated that "[i]nternational 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."¹⁴⁴

There are, however, constitutional limits on the use of treaties to create legal requirements that operate domestically within the United States. A treaty that would impose obligations on matters that are reserved to Congress by the Constitution would require Congress to enact implementing legislation to give domestic effect to those obligations.¹⁴⁵

The U.S. Supreme Court has also narrowed the monistic principle articulated in the Supremacy Clause. In 1828, the Court stated that a treaty is

to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the Court.¹⁴⁶

More recently, the Supreme Court rejected a presumption in favor of considering treaties to be self-executing. In 2007, the Court stated in *Medellín v. Texas* that a treaty was to be considered self-executing only if it includes "stipulations [which] require no legislation to make them operative."¹⁴⁷ The majority opinion held that Article 94 of the United Nations Charter, which provides that each U.N. member "undertakes to comply with the decision of the [ICJ] in any case in which it is a party[,]'" was not self-executing.¹⁴⁸

¹⁴¹ Curtis A. Bradley, 'Breard', *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

¹⁴² *Id.*

¹⁴³ U.S. CONST. art. VI, cl. 2.

¹⁴⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁴⁵ See section II.1.3.3 of this study.

¹⁴⁶ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

¹⁴⁷ *Medellín v. Texas*, 552 U.S. 491, at 505 (2008).

¹⁴⁸ *Id.* at 507-08. Article 94 did not require a U.S. state court to comply with a decision of the ICJ; rather, the article signified members' commitment to act "through their political branches to comply with an ICJ decision." *Id.* at

II.3. Position of international agreements in the hierarchy of norms

A self-executing treaty is subordinate to the U.S. Constitution,¹⁴⁹ equal in stature to federal law,¹⁵⁰ and superior to the laws of the states.¹⁵¹ Self-executing executive agreements are subordinate to the Constitution¹⁵² and have been held by the U.S. Supreme Court to have the status of federal law,¹⁵³ although in some circumstances a sole executive agreement may be subordinate to conflicting federal law when on a subject that is under the express constitutional authority of Congress.¹⁵⁴ Self-executing executive agreements have also been held to be superior to state law.¹⁵⁵ Treaties and executive agreements that are not self-executing require implementing legislation enacted by Congress in order to have domestic effect in federal law.¹⁵⁶

If there is a conflict between a treaty or an executive agreement (other than an executive agreement that would be subordinate to federal law in the circumstances mentioned above) and a federal statute, the Supreme Court has resolved the inconsistency by applying the “last-in-time” rule. Under this rule, the later in time of (x) the treaty or executive agreement and (y) the federal statute will prevail.¹⁵⁷ In multiple cases, this rule has been used to uphold statutes that were in conflict with earlier treaties.¹⁵⁸ A clear expression of Congress’ intention to rescind or amend a treaty must be expressed in a statute in order for a federal court to give it effect.¹⁵⁹ The Supreme Court has also invoked the last-in-time rule to prioritize a later treaty over an earlier federal statute.¹⁶⁰ In cases where a treaty or executive agreement is not in direct conflict with a federal statute, a court will attempt to construe the two in such a way as to give effect to both.¹⁶¹

Although the last-in-time rule, in a circumstance where a federal statute overrides a conflicting treaty or executive agreement, can change its domestic application, the United States’ international obligations thereunder remain in effect.¹⁶²

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¹⁴⁹ See, e.g., *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416-17 & n.9 (2003); *Boos v. Barry*, 485 U.S. 312, 324 (1988).

¹⁵⁰ U.S. CONST. art. VI, cl. 2; see *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹⁵¹ U.S. CONST. art. VI, cl. 2; see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796).

¹⁵² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 46, § 115(3).

¹⁵³ See *United States v. Belmont*, 301 U.S. 324, 330-31 (1937); *United States v. Pink*, 315 U.S. 203, 229 (1942).

¹⁵⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 46, § 115, cmt. c, reporters’ note 5.

¹⁵⁵ See *Belmont*, 301 U.S. at 330-31; *Pink*, 315 U.S. at 229.

¹⁵⁶ See *Foster v. Neilson*, 27 U.S. at 315; RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 46, § 111(4).

¹⁵⁷ See, e.g., *Cook v. United States*, 288 U.S. 102, 118-19 (1933); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888)

¹⁵⁸ See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998); *The Chinese Exclusion Case*, 130 U.S. 581, 600-01 (1889); *Whitney*, 124 U.S. at 194.

¹⁵⁹ *Cook*, 288 U.S. at 120.

¹⁶⁰ *Id.* at 118-19.

¹⁶¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 82 (1804).

¹⁶² *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

III. Actors in the making and ratification of international agreements

III.1. The executive branch

Under the U.S. Constitution, the making of treaties is the prerogative of the President. Article II of the Constitution expressly provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”¹⁶³ The President also holds the constitutional power to appoint, with Senate advice and consent, “Ambassadors, other public Ministers and Consuls”¹⁶⁴ and to “receive Ambassadors and other public Ministers.”¹⁶⁵

Ambassadors and Foreign Service officers in the Department of State negotiate treaties and executive agreements on behalf of the executive.¹⁶⁶ In some cases, representatives of the President who have not been confirmed by the Senate negotiate treaties, such as the Assistant to the President for National Security Affairs (also known as the National Security Advisor) and negotiators upon whom the President has granted the “personal rank” of ambassador without Senate advice and consent.¹⁶⁷ The Secretary of State is responsible for ensuring that proposed treaties and executive agreements are “fully consistent with United States foreign policy objectives.”¹⁶⁸

III.2. The legislative branch

The role of the legislature varies depending on the nature of the agreement. In the case of a treaty, the Senate performs its constitutional advice and consent role, described in section II.1.1.1 of this study. For an executive agreement, Congress’ involvement may include authorizing the making of such an agreement, reviewing and approving or disapproving a proposed agreement, or merely receiving the agreement after it has been signed.

Under Article II, Section 2, Clause II of the Constitution, the Senate receives a treaty executed by the President and determines whether to provide its advice and consent to the treaty. Before the Senate determines whether to advise and consent to a treaty transmitted by the President, at least one Senate committee, and at times more,¹⁶⁹ play a role in the process. The treaty is referred to the Senate Committee on Foreign Relations, which may report the treaty to the Senate or take no action on it. If the committee reports the treaty out, two-thirds of

¹⁶³ U.S. CONST. art. II, § 2, cl. 2.

¹⁶⁴ U.S. CONST. art. II, § 2, cl. 2.

¹⁶⁵ U.S. CONST. art. II, § 3.

¹⁶⁶ SFRC TREATY STUDY, *supra* note 25, at 103.

¹⁶⁷ *Id.* at 105-06.

¹⁶⁸ 22 C.F.R. § 181.4 (2019).

¹⁶⁹ Although the Committee on Foreign Relations is the only congressional committee with the authority to formally recommend action on treaties, other Senate committees have at times held hearings on and issued reports about treaties, such as hearings held by the Senate Committee on Armed Forces regarding the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms and the Protocol Thereto (known as SALT II) and other major arms control treaties. *Id.* at 121-22.

Senators present and voting may (provided a quorum is present) vote to approve a resolution of advice and consent to ratification.¹⁷⁰

Although the House of Representatives does not participate in the constitutional advice-and-consent process with respect to treaties, if a treaty is not self-executing the cooperation of the House and Senate will be needed to pass implementing legislation in order to give it full effect.¹⁷¹ In the case of an executive agreement, the approval of the House and the Senate may also be required for the agreement to go into effect.¹⁷² The House does have the power to effectively block a treaty that requires the appropriation of funds for its performance.¹⁷³

In some cases, the Senate or the Senate and the House of Representatives have taken action that expressed criticism or disapproval of treaties while they were being negotiated by the executive branch or after they had been made. For example, in 1988 the Senate and the House adopted a joint resolution that criticized the Convention on Regulation of Antarctic Mineral Resource Activities that had been negotiated and signed by the President.¹⁷⁴ The joint resolution stated that the President should not send the convention to the Senate for consideration until specified environmental protections for Antarctica had been put in place.¹⁷⁵ Another example of Senate disapproval of a treaty prior to its submission for advice and consent relates to the Kyoto Protocol to the United Nations Framework Convention on Climate Change. In 1997, as the protocol was being negotiated, the Senate passed a resolution indicating that it would not approve any binding agreement to reduce greenhouse gases that did not include commitments by developing as well as developed nations.¹⁷⁶ Additionally, as described in section IV.1 of this study, members of the Senate, the House, and their committees may also provide input in the absence of legislation, whether on their own initiative or at the request of the executive branch.

III.3. The judicial branch

Under the Constitution, the federal courts do not play a role in the ratification process. In addition, neither the U.S. Supreme Court nor other federal courts approve executive agreements. The Supreme Court has stated that, under the Constitution, the Senate must approve a treaty in order for it to become the law of the land, although the government's obligations under a treaty, once so approved, relate back to the date of execution.¹⁷⁷ The Court has also confirmed that the Senate may modify a treaty in the course of its advice and consent process.¹⁷⁸ The power of the President to enter into executive agreements has also been upheld by the Court—see section II.1.1.2 of this study for a discussion of selected cases

¹⁷⁰ See section II.1.2.1 of this study for a description of the procedures mentioned in this paragraph.

¹⁷¹ See section II.1.3.3 of this study.

¹⁷² See section II.1.3.2 of this study.

¹⁷³ CRANDALL, *supra* note 51, at 210-11; Louis Fisher, *Arms Control Treaty Reinterpretation: Commentary: Congressional Participation in the Treaty Process*, 137 U. Pa. L. Rev. 1511, 1521 (1989).

¹⁷⁴ SFRC TREATY STUDY, *supra* note 25, at 108-09.

¹⁷⁵ See *id.* at 109 nn.58-59.

¹⁷⁶ *Id.* at 276. The Kyoto Protocol did not meet the requirements included in the Senate resolution (S. Res. 98) and has not been transmitted to the Senate. *Id.*

¹⁷⁷ *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869).

¹⁷⁸ *Id.*

on that topic that outline the constitutional parameters of executive authority to make international agreements other than treaties.

The Supreme Court has stated that a treaty that violated or conflicted with the Constitution would be invalid.¹⁷⁹ The Court does not, however, appear to have invalidated a treaty on that basis.¹⁸⁰ Nor has the Court invalidated an executive agreement for bypassing the Senate advice-and-consent process required for treaties.¹⁸¹ The Court will not provide an advisory opinion about the constitutionality of a treaty that has not yet been ratified.¹⁸² The Court has dismissed, as a nonjusticiable political question, a challenge to the termination of a treaty by the President done without the prior approval of the Senate.¹⁸³ The Court has also held that an agreement with another country cannot expand the power of the government beyond the restraints imposed by the Constitution.¹⁸⁴

III.4. The states

Action by one or more of the states that comprise the United States is not required in order for a treaty or executive agreement to become effective, and states do not play a role in the ratification process. Although there are some “rights, activities, and properties” of states that the Constitution shields from interference by a treaty agreed to by the federal government,¹⁸⁵ the ratification or approval of individual states is not required for the making of a treaty or executive agreement. Moreover, the rights reserved to the states by the Tenth Amendment to the Constitution do not limit the power of the federal government to make treaties.¹⁸⁶ The Constitution prohibits U.S. states from making treaties with other nations and restricts states from making agreements or compacts with other nations (or other U.S. states) without the consent of Congress.¹⁸⁷

¹⁷⁹ Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1871).

¹⁸⁰ CONSTITUTION ANNOTATED, *supra* note 26, at 536.

¹⁸¹ CHEMERINSKY, *supra* note 32 at 401.

¹⁸² Neither the Supreme Court nor the lower federal courts provide advisory opinions to Congress or the executive branch on any topic. See Joan R. Gundersen, *Advisory Opinions*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 21 (Kermit L. Hall et al. eds., 2d ed. 2005).

¹⁸³ *Goldwater v. Carter*, 444 U.S. 996 (1979); see also William C. Banks, *Treaties and the Treaty Power*, in THE OXFORD COMPANION, *supra* note 182, at 1026-27.

¹⁸⁴ *Reid v. Covert*, 354 U.S. 1 (1956). For additional discussion of the jurisdiction of the Supreme Court over treaty matters, see sections IV.4 and IV.5 of JAMES W. MARTIN, DIRECTORATE-GENERAL FOR PARLIAMENTARY RESEARCH SERVICES OF THE GENERAL SECRETARIAT OF THE EUROPEAN PARLIAMENT, THE ROLE OF CONSTITUTIONAL COURTS IN MULTI-LEVEL GOVERNANCE: A COMPARATIVE LAW PERSPECTIVE – UNITED STATES OF AMERICA: THE SUPREME COURT, (2016) [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/593503/EPRS_STU\(2016\)593503_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/593503/EPRS_STU(2016)593503_EN.pdf).

¹⁸⁵ HENKIN, *supra* note 33, at 193. These would likely include transferring the territory of a state to another country, changing a state’s form of government, and prohibiting state militias. *Id.*

¹⁸⁶ *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

¹⁸⁷ U.S. CONST., art I, § 10, cl. 1 and 3.

IV. Procedure for making and ratifying international agreements

IV.1. Negotiation

The negotiation of treaties and executive agreements is primarily the domain of the executive branch of the federal government.¹⁸⁸ In some cases, however, the impetus for proposing a treaty on a subject may come from Congress through legislation or resolutions enacted by it, as well as from congressional committees or individual members of Congress.¹⁸⁹

The President utilizes a representative (or representatives) to negotiate a treaty.¹⁹⁰ The State Department provides written authorization to those who will negotiate a treaty or executive agreement. Written authorization from the Secretary of State or an officer specifically authorized by the Secretary must be obtained before engaging in negotiations of treaties or “significant” executive agreements (or extensions or amendments of them).¹⁹¹

Negotiation authority is requested under the Circular 175 procedure that is set forth in the Foreign Affairs Manual of the Department of State. A request for authority under the Circular 175 procedure may be one of two types. The first is a request for a full power for the negotiator to sign a treaty that will be submitted by the President to the Senate for advice and consent to ratification.¹⁹² The second is made in the form of an action memorandum from a bureau or office in the Department of State seeking authority to (a) negotiate, (b) conclude, or (c) negotiate and conclude a treaty or executive agreement.¹⁹³ In order to request authorization to enter into and/or execute a treaty or executive agreement, an action memorandum must be (1) submitted to the Secretary of State or other official having delegated authority and (2) cleared with the State Department’s Office of the Legal Adviser, other appropriate bureaus, and any other federal agency with “primary responsibility or a substantial interest in the subject matter.”¹⁹⁴ Authority may be requested to negotiate a treaty or executive agreement, to conclude a treaty or executive agreement, or to negotiate and conclude.¹⁹⁵ Any substantive changes in the draft text are to be cleared with the State Department’s Office of the Legal Adviser and specified regional and/or functional bureaus within the Department in advance of a definitive agreement.¹⁹⁶

When negotiating a proposed treaty or executive agreement, the responsible office or officer must adhere to guidelines in the Foreign Affairs Manual. The responsible office or officer must, among other things, stay within the parameters of the negotiation authority provided and not

¹⁸⁸ SFRC TREATY STUDY, *supra* note 25, at 97-98.

¹⁸⁹ *Id.* at 98, 100-03.

¹⁹⁰ *Id.* at 98. The President typically selects negotiators with diplomatic experience: “usually an ambassador, minister, or foreign service officer, or a delegation[.]” *Id.*

¹⁹¹ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, § 724.1, <https://fam.state.gov/fam/11fam/11fam0720.html> (last visited July 3, 2020).

¹⁹² *Circular 175 Procedure*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/l/treaty/c175/index.htm> (last visited July 3, 2020).

¹⁹³ 11 FOREIGN AFFAIRS MANUAL, *supra* note 191, § 724.3(a)-(b).

¹⁹⁴ *Id.* § 724.3(a).

¹⁹⁵ *Id.* § 724.3(b).

¹⁹⁶ *Id.* § 724.3(b).

sign until authorized; keep the Secretary of State (or other principal involved) informed of significant developments; consult with appropriate leaders in Congress and congressional committees and keep them informed of developments and of implementing legislation that will be needed; and consider the interest of the public and, if so determined by the Secretary of State or the Secretary's designee, offer an opportunity for public comment.¹⁹⁷

The process for making multilateral treaties and executive agreements is similar to the process in a bilateral context in broad terms,¹⁹⁸ with some differences in practice due to there being more than two parties. Negotiations are typically conducted at an international conference, particularly when larger numbers of parties are participating.¹⁹⁹ Often, one of the prospective parties will host the conference, or it may be hosted by an international organization.²⁰⁰ The invitation to participate may include a statement of purpose for the agreement or a draft text for consideration.²⁰¹ U.S. representatives are usually given a position paper by the State Department that includes instructions on negotiating.²⁰²

While the negotiation of treaties and executive agreements is often viewed as the exclusive prerogative of the President, Congress may nonetheless play a formal and informal role. At the outset, the representatives used by the President to negotiate a treaty are nominated by the President and appointed with advice and consent of the Senate.²⁰³ Members of Congress themselves have at times been involved in or present at the negotiation of treaties. In some cases, congressional members have served on the delegation negotiating a treaty; in other instances, members have attended in an advisory or observational capacity.²⁰⁴ Members of Congress and relevant congressional committees are customarily consulted during the treaty negotiation process.²⁰⁵ In addition, Congress has enacted statutes, described in section II.1.3.1 of this study, that require consultation with Congress or congressional committees during the negotiation phase.

The Foreign Affairs Manual provides that a treaty or executive agreement that includes a foreign language text may not be entered into until a language officer at the State Department has certified that the foreign language version and English version conform and have the same substantive meaning.²⁰⁶

¹⁹⁷ *Id.* § 725.1.

¹⁹⁸ 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 741, <https://fam.state.gov/fam/11fam/11fam0740.html> (last visited July 3, 2020).

¹⁹⁹ *Id.* § 742.1.

²⁰⁰ *Id.* § 742.2.

²⁰¹ *Id.* § 742.3.

²⁰² *Id.* § 742.4.

²⁰³ U.S. CONST. art. II, § 2, cl. 2. See SFRC TREATY STUDY, *supra* note 25, at 103-05.

²⁰⁴ *Id.* at 110; *Treaties: Chapter 1: The Senate's Role in Treaties*, UNITED STATES SENATE, <https://www.cop.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited July 3, 2020).

²⁰⁵ SFRC TREATY STUDY, *supra* note 25, at 98. The United States Department of State has established procedures for negotiating treaties that include consulting with Congress regarding "the intention to negotiate significant new agreements, the form of the agreement, legislation that might be necessary, and other developments concerning treaties." *Id.* Congress has in some cases enacted legislation that required congressional consultation before entering into treaties on specified topics, such as additional contributions to multilateral development banks, or that required information be given to Congress about the matters being negotiated. *Id.* at 107-08. See section II.1.3.1 of this study. Congress has also at times expressed its disapproval of treaties being negotiated. See section III.2 of this study.

²⁰⁶ *Id.* § 724.6(a). This may not be required in the case of a treaty or executive agreement that states that the English

The Foreign Affairs Manual requires that the text of a treaty or executive agreement must be finalized and approved by the responsible officers far enough in advance of the date of execution to allow the Secretary of State (or a person with delegated approval authority) to review and to address any issues.²⁰⁷ The text must be sent expeditiously and, unless otherwise allowed by the Secretary of State, must be sent before the parties agree to its final form and decide upon a date for signature.²⁰⁸

Under the regulations of the Department of State, an agency that plans to negotiate an executive agreement must provide that Department with the proposed text (or a summary) of the agreement, a citation to the constitutional or other legal authority for making the agreement, and other specified information about it no later than fifty days prior to the expected date of signing.²⁰⁹ The Secretary of State has a duty to ensure that executive agreements are “fully consistent with United States foreign policy objectives.”²¹⁰ As part of that duty, the Secretary of State must approve executive agreements negotiated under the Secretary’s authorization.²¹¹ Executive agreements negotiated by agencies under their own authority do not require the approval of the Secretary of State; for those agreements, the Secretary provides an opinion.²¹² In cases where an agency proposes to enter into a “series of agreements of the same general type[,]” the agency may satisfy its obligation to consult with the Secretary of State by doing so as to the overall series, and thereafter when planning to make a specific agreement must provide the proposed text to the State Department’s Office of the Legal Adviser at least 20 days in advance.²¹³

The Foreign Affairs Manual provides for consultation with the State Department’s Legal Adviser for Treaty Affairs if there is a question about whether an agreement should be made as a treaty or an executive agreement.²¹⁴ In cases where the Assistant Legal Adviser for Treaty Affairs believes that the question may be significant enough to merit consultation with Congress, the Assistant Adviser for Legal Affairs will consult with the Assistant Secretary for Legislative Affairs and other affected bureaus within the State Department, and potentially with congressional leaders and committees.²¹⁵

IV.2. Signature

When negotiations on a treaty or executive agreement have been brought to a successful conclusion by the negotiators, the document is signed.²¹⁶ A full power²¹⁷ is issued to the

language text controls if there is a difference in the texts. *Id.* § 724.6(b).

²⁰⁷ *Id.* § 724.7.

²⁰⁸ *Id.* § 724.7.

²⁰⁹ *Id.* 22 C.F.R. § 181.4(d).

²¹⁰ *Id.* § 181.4(a).

²¹¹ *Id.* § 181.4(b).

²¹² *Id.* § 181.4(b).

²¹³ *Id.* § 181.4(f).

²¹⁴ 11 FOREIGN AFFAIRS MANUAL, *supra* note 191, § 723.4(b).

²¹⁵ *Id.* § 723.4(b), (c).

²¹⁶ Agreement on the terms of the document negotiated may also be evidenced by initialing it or exchanging notes. SFRC TREATY STUDY, *supra* note 25, at 111.

²¹⁷ The State Department’s Foreign Affairs Handbook defines “full powers” as “[a] document, issued by a head of state, head of government, or minister of foreign affairs, empowering a diplomatic agent or representative to

representative who will sign a treaty.²¹⁸ A full power may be provided for the signing of an executive agreement, although full powers are not customarily issued for agreements other than treaties.²¹⁹

The agreed-upon form of the document is reviewed multiple times before the parties affix their signatures. Before a treaty or executive agreement may be signed, the text is completed and sent to the Secretary (or other person with approval authority) far enough in advance to allow for review, and the text must be received before declared final and before a signing is scheduled.²²⁰ When the document is ready, the negotiators on each side confirm that the text in the document is the agreed text.²²¹ Before a treaty or executive agreement that includes any foreign language text may be signed, a language officer at the State Department certifies that the English language text and the foreign language text conform to one another and have substantively the same meaning.²²²

For a bilateral agreement, two originals are prepared so that each government may have one.²²³ Each of the originals must include the same full text in all the languages to be used for the agreement and must be identical except as permitted by the principle of the “alternat.”²²⁴ In the case of a treaty or executive agreement in English and another language, the texts are arranged in tandem (one after the other), in columns on the same page, or on facing pages.²²⁵ The parties’ names and signatures are displayed such that in the original kept by a party, its name and signature appear first.²²⁶

The host government arranges a mutually-acceptable time and place for signing once a treaty or executive agreement in the form of a single instrument is completed.²²⁷ The seals of the representatives who are signing may also be included, although the State Department prefers not to use them.²²⁸

For a multilateral agreement to be signed at an international conference, a full power is usually issued at the beginning of the conference, although in some cases the full power may be delayed “until it is relatively certain” that the United States will sign.²²⁹ The full power is usually

conduct special business with a foreign government, such as drawing up and signing a treaty”. 5 FOREIGN AFFAIRS HANDBOOK-1 Exhibit H-611, <https://fam.state.gov/FAM/05FAH01/05FAH010610.html> (scroll down to “5 FAH-1 EXHIBIT H-611”) (last visited July 3, 2020).

²¹⁸ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 733(a), <https://fam.state.gov/fam/11fam/11fam0730.html> (last visited July 3, 2020).

²¹⁹ *Id.* § 733(a).

²²⁰ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 724.7, <https://fam.state.gov/fam/11fam/11fam0720.html> (last visited July 3, 2020).

²²¹ 11 FOREIGN AFFAIRS MANUAL, *supra* note 218, § 732.

²²² 11 FOREIGN AFFAIRS MANUAL, *supra* note 220, § 724.6.

²²³ 11 FOREIGN AFFAIRS MANUAL, *supra* note 218, § 731.4(a).

²²⁴ *Id.* § 731.4(a).

²²⁵ *Id.* § 731.5-1.

²²⁶ *Id.* § 731.5-2.

²²⁷ *Id.* § 734.

²²⁸ *Id.* § 734.

²²⁹ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 745(a), <https://fam.state.gov/fam/11fam/11fam0740.html> (last visited July 3, 2020).

presented to the secretary general of the conference when the representatives arrive,²³⁰ and submitted for examination to the credentials committee for the conference.²³¹

A multilateral treaty or executive agreement is done as one original document that includes the text in the languages of all the parties and is held by a depositary that provides certified copies to the parties.²³² The texts of the languages of the instrument are arranged in tandem, in columns, or on facing pages.²³³ The order of signatures on the instrument is arranged at the conference; an alphabetical arrangement of the names of the countries signing is most common, although other methods may be used.²³⁴

The mechanics of signature for a multilateral treaty or executive agreement are similar to those for bilateral agreements. In some cases, the instrument is not signed by all parties; rather, the governments involved may instead deposit instruments of adherence, accession, or acceptance.²³⁵ Seals are generally not used for multilateral treaties.²³⁶

Once a treaty or executive agreement has been signed, executive branch officials have further duties. The officer of the Department of State responsible for the signature of a treaty or executive agreement must report the title or subject matter, parties, and date and location of signature within twenty-four hours.²³⁷ The responsible officer must also transmit the signed original text, as expeditiously as possible, to the Assistant Legal Adviser for Treaty Affairs within the Department of State.²³⁸ In the case of an executive agreement, the Secretary of State transmits the agreement to Congress in accordance with the Case-Zablocki Act, described in section II.1.3.2 of this study. The Foreign Affairs Manual also requires officers to “be especially diligent in cooperating to assure compliance with” the requirement under the Case-Zablocki Act to transmit executive agreements to Congress within 60 days after signing.²³⁹ In the case of a treaty, the President ratifies, after the Senate has provided its advice and consent, by signing an instrument of ratification prepared by the Secretary of State.²⁴⁰

IV.3. Approval

IV.3.1. Treaties

The Senate does not, technically speaking, ratify treaties—it is the President who takes that final step. Nonetheless, the approval of a treaty by the Senate through the advice-and-consent process is a condition precedent to the President’s act of ratification.

²³⁰ *Id.* § 745(a).

²³¹ *Id.* § 745(b).

²³² *Id.* § 744.2.

²³³ *Id.* § 744.2-1.

²³⁴ *Id.* § 744.2-2.

²³⁵ *Id.* § 746.1.

²³⁶ *Id.* § 746.2.

²³⁷ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 725.6, <https://fam.state.gov/fam/11fam/11fam0720.html> (last visited July 3, 2020).

²³⁸ *Id.* § 725.7(b).

²³⁹ *Id.* § 726.

²⁴⁰ SFRC TREATY STUDY, *supra* note 25, at 148.

Once the negotiations on a treaty have been concluded and it has been signed (or agreement otherwise evidenced), the treaty is then presented to the Senate for its consideration.²⁴¹ Delivery of a treaty to the Senate for review is done by means of a letter of transmittal from the President that is accompanied by the official text of the treaty and the Letter of Submittal from the Secretary of State by which the Secretary formally submitted the treaty to the President.²⁴²

After being received from the President, the treaty is read once²⁴³ and the injunction of secrecy provided for in Senate Rules XXIX and XXX is removed, either by unanimous consent of Senators or, in the absence of such consent, pursuant to a resolution approved by the Senate.²⁴⁴ The removal of the injunction of secrecy and consideration of the treaty is done while the Senate is in executive session.²⁴⁵ Thereafter, the treaty is referred to the Senate Committee on Foreign Relations,²⁴⁶ which is the Senate committee designated for treaty review.²⁴⁷

The Senate Committee on Foreign Relations is the only Senate committee “with jurisdiction to review and report to the Senate on treaties submitted by the President for Senate advice and consent to ratification”; because the House of Representatives does not participate in the advice and consent process, that committee is “the only congressional committee with responsibility for treaties.”²⁴⁸ Unlike proposed legislation, which can be enacted into law only in the Congress in which it was introduced,²⁴⁹ a treaty that has been submitted by the President to the Senate for advice and consent and referred to the committee remains on the committee’s calendar until the committee acts upon it (or until the Senate discharges the committee from considering the treaty).²⁵⁰ If a treaty is reported to the Senate by the committee, but the Senate has not taken action by the end of that Congress, the process will be taken up at the start of the next Congress as if there had been no proceedings on it.²⁵¹ The committee “should conduct a public hearing on a treaty as soon as possible after submission” and, in the absence of “extraordinary circumstances,” must provide a written report when reporting a treaty out of the committee to the Senate.²⁵²

²⁴¹ SFRC TREATY STUDY, *supra* note 25, at 117. Although members and committees of the Senate may be consulted by the executive branch negotiators of a treaty before it is concluded, the advice of the Senate as a body is typically not sought until the treaty is formally transmitted to the Senate after the treaty has been negotiated. *Id.*

²⁴² *Id.* at 118.

²⁴³ STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(a), at 43 (2013).

²⁴⁴ *Id.*, R. XXIX.3, at 42.

²⁴⁵ SFRC TREATY STUDY, *supra* note 25, at 120.

²⁴⁶ STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(a), at 43.

²⁴⁷ *Id.*, R. XXV.1(j)(1), at 23.

²⁴⁸ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 9(a), at 7.

²⁴⁹ See CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 69, § 588, at 311. Each Congress typically consists of two sessions of one year each.

²⁵⁰ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 9(b), at 7. Most treaties are considered within a year of receipt from the President. SFRC TREATY STUDY, *supra* note 25, at 123.

²⁵¹ RULES OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 68, R. 9(c), at 7.

²⁵² *Id.*, R. 9(d), at 7.

If the Committee on Foreign Relations votes to report a treaty out, the Rules of the Senate govern its further disposition by that body.²⁵³ If the committee reports a treaty, it must (unless the Senate elects otherwise by unanimous consent) lie over one calendar day for consideration.²⁵⁴

To consider a treaty, the Senate must be in—or must agree to enter—executive session.²⁵⁵ The Senate considers the text of the treaty and any amendments proposed by the Committee on Foreign Relations, and then any other amendments proposed by Senators.²⁵⁶ When the Senate is ready to act on the treaty, a resolution of advice and consent to ratification (also referred to as a resolution of ratification), including any amendments, is introduced; this resolution provides the Senate’s advice and consent to the treaty.²⁵⁷ The Senate must wait one calendar day before considering a resolution of ratification, unless this requirement is waived by unanimous consent.²⁵⁸ When considering the resolution of ratification, the Senate may amend it to include reservations, declarations, statements, or understandings.²⁵⁹ The Constitution requires the affirmative vote of two thirds of the Senators present and voting, with a quorum present, to approve the resolution of ratification.²⁶⁰ A motion to postpone consideration of the resolution of ratification and the treaty indefinitely also requires a two-thirds vote.²⁶¹ Amendments, reservations, and other votes relating to the treaty prior to consideration of the resolution of ratification require a majority vote.²⁶²

If the Senate approves the resolution of ratification, the treaty and the resolution are sent to the President, and then to the Department of State.²⁶³ If the resolution is not approved, the Senate may elect to pass a resolution returning the treaty to the President.²⁶⁴ If the rejected treaty is not so returned, the Senate may alternatively pass a resolution notifying the President that the resolution of ratification was not approved, with the treaty being placed on the executive calendar of the Senate and referred back to the Committee on Foreign Relations at the end of the current Congress.²⁶⁵ Notwithstanding the foregoing procedure, in many instances a treaty that will not receive the advice and consent of the Senate will not be reported by the Committee on Foreign Relations or, if it is reported, will not receive a vote in the Senate.²⁶⁶

²⁵³ See STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(b)-(d), at 43.

²⁵⁴ *Id.*, R. XXX.1(b), at 43.

²⁵⁵ VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 98-384, SENATE CONSIDERATION OF TREATIES 1, <https://crsreports.congress.gov/product/pdf/RS/98-384>.

²⁵⁶ *Id.*

²⁵⁷ STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(c), at 43. Amendments approved by the Senate in this resolution may lead to a renegotiation of the treaty. See SFRC TREATY STUDY, *supra* note 25, at 112.

²⁵⁸ STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(b), at 43.

²⁵⁹ *Id.*, R. XXX.1(c), at 43.

²⁶⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁶¹ HEITSHUSEN, *supra* note 255, at 2.

²⁶² STANDING RULES OF THE SENATE, *supra* note 63, R. XXX.1(d), at 43.

²⁶³ SFRC TREATY STUDY, *supra* note 25, at 143.

²⁶⁴ *Id.* at 143.

²⁶⁵ *Id.* at 143.

²⁶⁶ *Id.* at 145.

IV.3.2. Executive Agreements

Although executive agreements do not go through the same advice-and-consent process in the Senate used for treaties, some types of executive agreements require notification to, consultation with, and/or approval by Congress. As discussed in section II.1.1.2 of this study, congressional-executive agreements are authorized by a statute or joint resolution passed by Congress,²⁶⁷ and the authorizing legislation can impose such requirements for congressional participation before the agreement may be finalized. Examples of these types of agreements involving international trade, nuclear cooperation, and fisheries, and the requirements involving Congress that must be satisfied, are described in section II.1.3.2 of this study.

IV.4. Ratification

Although the Senate's advice-and-consent role in treaty approval is often referred to as "ratification," that function is performed by the executive. After the Senate has provided its favorable advice and consent to a treaty, the President may ratify the treaty.²⁶⁸ If the treaty was amended by the Senate, the President may choose to resubmit a version of the treaty that reflects further negotiations with the other party regarding the Senate amendments.²⁶⁹ The President may also choose not to ratify the treaty—the President is not obligated to ratify even if the Senate has provided its advice and consent.²⁷⁰

After the Senate has passed a resolution of ratification evidencing its approval of a treaty, an instrument of ratification is prepared.²⁷¹ The instrument of ratification includes the title of the treaty, the date it was signed, the parties, and the language or languages of the treaty, with a copy of the treaty attached.²⁷² The instrument may include reservations, understandings, declarations, and provisos.²⁷³ Two originals of the instrument of ratification are customarily prepared, with one original exchanged (in the case of a bilateral treaty)²⁷⁴ or deposited (in the case of a multilateral treaty)²⁷⁵ and one original retained.²⁷⁶

In the case of an executive agreement, ratification is not required. Provided that any congressional approval that is required has been obtained, an executive agreement, once signed by the parties, enters into force in accordance with its terms.²⁷⁷

²⁶⁷ *Id.* at 5.

²⁶⁸ *Id.* at 147.

²⁶⁹ *Id.* at 147.

²⁷⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 46, § 303, cmt. d, reporters' note 3. The President's ability to refrain from ratifying a treaty that has received Senate advice and consent is inherent in the executive, even if not specified in the Constitution. SFRC TREATY STUDY, *supra* note 25, at 152.

²⁷¹ 14 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 46 (1963).

²⁷² *Id.*

²⁷³ SFRC TREATY STUDY, *supra* note 25, at 148.

²⁷⁴ 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 735.2, <https://fam.state.gov/fam/11fam/11fam0730.html> (last visited July 3, 2020).

²⁷⁵ 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 748.2, <https://fam.state.gov/fam/11fam/11fam0740.html> (last visited July 3, 2020).

²⁷⁶ SFRC TREATY STUDY, *supra* note 25, at 149.

²⁷⁷ *Id.* at 10.

In a section regarding the publication of concluded treaties and executive agreements, the Foreign Affairs Manual notes that some such agreements do not immediately enter into force once they are signed, but may require further action.²⁷⁸ This may take the form of executive action, such as an exchange of notes to confirm the parties' domestic procedures have been fulfilled, or, in the case of a treaty, the advice and consent of the Senate.²⁷⁹

The Foreign Affairs Manual also prescribes procedures for the formal exchange of instruments of ratification. Under these procedures, the U.S. representative provides to the representative of the other party a duplicate original of the President's instrument of ratification and receives a similar instrument signed by the chief executive of the other party.²⁸⁰ This exchange is attested to by a protocol, sometimes referred to as "Protocol of Exchange of Ratifications" or *procès-verbal*.²⁸¹

The Foreign Affairs Manual includes procedures for making multilateral agreements that differ from those for bilateral agreements.²⁸² Among others, if a foreign government or international organization is acting as the depository for a multilateral agreement, the manual calls for the Office of the Assistant Legal Adviser for Treaty Affairs to send the United States' instrument of ratification to the permanent U.S. representative to the depository organization (if there is such a representative) or to the appropriate Foreign Service mission.²⁸³

IV.5. Reservations, understandings, declarations, and provisos

The Senate may, if it chooses, stipulate that its approval of a treaty is subject to one or more specified conditions. Although not expressly provided for in the Constitution, the attaching of conditions to treaties by the Senate was first done in connection with the Jay Treaty with Great Britain in 1795,²⁸⁴ and the Senate's power to do so has been confirmed by the U.S. Supreme Court.²⁸⁵ These conditions, set forth in the resolution of advice and consent to ratification approved by the Senate with respect to a treaty, may include reservations, understandings, declarations, or provisos.

- A reservation changes the legal effect of a provision of a treaty and may take the form of an amendment to the text or a change in the obligations under a treaty without amending the text.²⁸⁶
- An understanding is a statement that sets forth an interpretation of a treaty that is intended to clarify treaty provisions without modifying them.²⁸⁷

²⁷⁸ 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 725.3(c)(1), <https://fam.state.gov/fam/11fam/11fam0720.html> (last visited July 3, 2020).

²⁷⁹ *Id.* § 725.3(c)(1).

²⁸⁰ 11 FOREIGN AFFAIRS MANUAL, *supra* note 274, § 735.2(a).

²⁸¹ *Id.* § 735.2(a).

²⁸² 11 FOREIGN AFFAIRS MANUAL, *supra* note 275, § 741.

²⁸³ *Id.* § 748.2(a).

²⁸⁴ CRANDALL, *supra* note 51, at 81, 82.

²⁸⁵ *See Haver*, 76 U.S. (9 Wall.) at 35 (noting that "the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it, as was done with the treaty under consideration").

²⁸⁶ SFRC TREATY STUDY, *supra* note 25, at 125; Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE 765, 774 (Duncan B. Hollis et al. eds., 2005).

²⁸⁷ SFRC TREATY STUDY, *supra* note 25, at 125-26; Dalton, *supra* note 286 at 775.

- A declaration provides the view of the Senate on an issue that relates to the treaty as opposed to the provisions of the treaty itself and does not alter the legal effect of the treaty.²⁸⁸
- A proviso addresses a matter of domestic United States law and is not included in the instrument of ratification that is provided to the other party to a bilateral treaty or deposited with the depositary for a multilateral treaty.²⁸⁹

In the case of a multilateral treaty, in the event that the Senate attaches a reservation or other condition to its advice and consent, this is communicated to the depositary for the treaty, which notifies the other parties.²⁹⁰

Recent examples of reservations, understandings, declarations, and provisos to treaties approved by the Senate include the following.

- On March 29, 2016, the Extradition Treaty with the Republic of Kosovo was signed at Pristina. In its resolution of advice and consent to ratification, approved on July 26, 2018, the Senate included a declaration stating that the treaty is self-executing.²⁹¹
- The opposite declaration was included in the resolution of advice and consent to ratification, approved on the same date, for the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which stated that the treaty is not self-executing.²⁹²
- More extensive conditions are contained in the resolution of advice and consent to ratification, approved on January 2, 2019, for the U.N. Convention on the Assignment of Receivables in International Trade. The resolution provides that the Senate's advice and consent is subject to understandings regarding the exclusion of certain types of receivables, the meaning of references to the location of the central administration of the assignor or assignee, the definition of financial contracts, the non-applicability of the convention to interests other than contractual rights to receive money, and the power of a contracting state to provide rights in proceeds in addition to those in article 24 of the convention.²⁹³ The resolution further makes declarations under specified articles of the convention as to certain matters of insolvency law, secured transactions law, and conflict-of-laws issues; that the United States will not be bound by article V of the convention; that the convention does not affect anti-assignment provisions for debtors that are governmental or public purpose entities; and that the convention is self-executing.²⁹⁴

Although executive agreements are not constitutionally required to receive Senate advice and consent, Congress can impose reservations on an executive agreement that it is approving by

²⁸⁸ SFRC TREATY STUDY, *supra* note 25, at 126; Dalton, *supra* note 286, at 775.

²⁸⁹ SFRC TREATY STUDY, *supra* note 25, at 126; Dalton, *supra* note 286, at 775. For example, a proviso may require the President to refrain from depositing an instrument of ratification until Congress has enacted implementing legislation. *Id.*

²⁹⁰ 11 FOREIGN AFFAIRS MANUAL, *supra* note 275, § 748.1.

²⁹¹ S. EXEC. REP. NO. 115-5, at 10 (2018).

²⁹² S. EXEC. REP. NO. 115-6, at 4 (2018).

²⁹³ S. EXEC. REP. NO. 115-7, at 7-10 (2018).

²⁹⁴ *Id.* at 10-12.

statute.²⁹⁵ Congress can also impose *ex ante* conditions that apply to executive agreements that are entered into under the authority of a federal statute. For example, the Atomic Energy Act of 1954 provides that, unless the President exempts a proposed executive agreement from this requirement, an agreement for cooperation must include specified provisions, such as requirements for safeguarding nuclear materials and equipment, non-proliferation of nuclear weapons, and security of nuclear materials.²⁹⁶

IV.6. Entry into force and treaty publication

In order for a treaty to become effective, the exchange or deposit of instruments of ratification is typically necessary.²⁹⁷ A bilateral treaty will customarily provide that the parties will exchange instruments of ratification “as soon as possible at a designated capital” and that the treaty will enter into force on that date or on a specified date after the exchange.²⁹⁸ The representatives of the parties who effect the exchange of instruments of ratification also sign a protocol of exchange of ratifications, or *procès-verbal*.²⁹⁹ The U.S. representative must confirm that the ratification of the other party is unqualified or subject only to agreed reservations or understandings before exchanging instruments of ratification or signing the *procès-verbal*.³⁰⁰ A multilateral treaty may require the deposit of a minimum number of instruments of ratification before entering into force and may, as in the case of a bilateral treaty, enter into force on that date or a specified date thereafter.³⁰¹

As mentioned in section IV.4 of this study, once an executive agreement has been signed by the parties and has received any required congressional approval, if applicable, it enters into force in accordance with its terms.

An executive agreement with a foreign language text may not be entered into until a foreign language officer at the State Department or the agency making the agreement has certified that the foreign language version and English version conform and have substantially the same meaning.³⁰²

Once concluded, an executive agreement must be transmitted to the Office of the Assistant Legal Adviser for Treaty Affairs in the State Department no later than 20 days after signing.³⁰³ The State Department must send all concluded executive agreements to Congress within 60 days after signing.³⁰⁴ Generally, executive agreements are transmitted to the President of the Senate and the Speaker of the House of Representatives.³⁰⁵ Executive agreements that are classified (i.e., those containing information restricted for national security reasons), however,

²⁹⁵ Dalton, *supra* note 286, at 774.

²⁹⁶ 42 U.S.C. § 2153(a) (2018).

²⁹⁷ SFRC TREATY STUDY, *supra* note 25, at 148.

²⁹⁸ 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 735.1, <https://fam.state.gov/fam/11fam/11fam0730.html> (last visited July 3, 2020).

²⁹⁹ *Id.* § 735.2(a).

³⁰⁰ *Id.* § 735.2(b).

³⁰¹ SFRC TREATY STUDY, *supra* note 25, at 148.

³⁰² *Id.* § 181.4(h).

³⁰³ *Id.* § 181.5.

³⁰⁴ *Id.* § 181.7(a).

³⁰⁵ *Id.* § 181.7(a).

are sent to the Senate Committee on Foreign Relations and the House Committee on International Relations.³⁰⁶ The Assistant Legal Adviser for Treaty Affairs must also send background information on each executive agreement transmitted to Congress, including a specific citation to legal authority for the agreement.³⁰⁷

Treaties and executive agreements are generally required to be published. The U.S. Code provides that the Secretary of State will publish an annual compilation known as *United States Treaties and Other International Agreements* containing

all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year.³⁰⁸

The Secretary of State has the authority to exempt certain categories of treaties and executive agreements from the publication requirement. The Secretary may determine not to publish if the following criteria are satisfied:

- (1) such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2(2) of Article II of the Constitution of the United States;
- (2) the public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force, (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States; and
- (3) copies of such agreements (other than those in paragraph (2)(D)), including certified copies where necessary for litigation or similar purposes, will be made available by the Department of State upon request.³⁰⁹

A determination by the Secretary not to publish a category of treaties or executive agreements must itself be published in the Federal Register.³¹⁰ The Secretary has published several such determinations in the Federal Register, now codified in the Code of Federal Regulations.³¹¹

³⁰⁶ *Id.* § 181.7(b).

³⁰⁷ *Id.* § 181.7(c).

³⁰⁸ 1 U.S.C. § 112a(a) (2018). For more information on the publication of treaties and executive agreements, see *Publication of TIAS*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/s/l/treaty/tias/pubtias/index.htm> (last visited July 3, 2020).

³⁰⁹ 1 U.S.C. § 112a(b) (2018).

³¹⁰ 1 U.S.C. § 112a(c) (2018).

³¹¹ Treaties and executive agreements exempted from publication include the following:

- Bilateral agreements for rescheduling intergovernmental debt payments;
- Bilateral textile agreements on the importation of products containing specified textile fibers;
- Bilateral agreements between postal administrations on technical arrangements;
- Bilateral agreements on specified military exercises;
- Bilateral agreements on military personnel exchange;

By statute, *United States Treaties and Other International Agreements* constitutes legal evidence of the treaties and executive agreements it contains in federal and state courts in the United States.³¹² The Secretary is also required to make available on the website of the Department of State each treaty or executive agreement that will be published in *United States Treaties and Other International Agreements* within 180 days after its entry into force.³¹³

-
- Bilateral agreements on judicial assistance regarding specified civil or criminal investigations or prosecutions;
 - Bilateral mapping agreements;
 - Tariff and other schedules under the General Agreement on Tariffs and Trade and under the Agreement of the World Trade Organization;
 - Agreements given a national security classification;
 - Bilateral agreements on specific activities and programs financed with foreign assistance funds administered by the United States Agency for International Development;
 - Letters of agreements and memoranda of understanding on bilateral assistance for counter-narcotics and other anti-crime purposes;
 - Bilateral agreements on specified education and leadership development programs designed to acquaint United States and foreign armed forces, law enforcement, homeland security, or related personnel with specialized aspects of each other's practices or operations;
 - Bilateral agreements between aviation agencies on specified aviation technical assistance projects for the provision of managerial, operational, and technical assistance in developing and modernizing the civil aviation infrastructure;
 - Bilateral agreements on acquisition and cross servicing and logistics support;
 - Bilateral agreements for the provision of health care to military personnel on a reciprocal basis; and
 - Bilateral agreements on the reduction of intergovernmental debts.

22 C.F.R. § 181.8(a) (2019).

³¹² 1 U.S.C. § 112a(a) (2018).

³¹³ 1 U.S.C. § 112a(d) (2018).

V. Time required for ratification of treaties

Most United States treaties receive the favorable advice and consent of the Senate “within a reasonable period of time”³¹⁴ and are ratified in due course thereafter.

To illustrate the time required for Senate approval and presidential ratification, the table below (see next page) lists treaties that received the advice and consent of the Senate during the 114th Congress (which began January 6, 2015 and adjourned January 3, 2017) and were published in the Department of State’s *Texts of International Agreements to which the United States is a Party*, along with key dates on the path to ratification.³¹⁵

Of these treaties, the Protocol to the North Atlantic Treaty of 1949 on the Accession of Montenegro had the quickest path to ratification: it was signed by the United States on May 19, 2016, approved by the Senate on March 28, 2017, and ratified by the President on April 11, 2017.

The Treaty on Plant Genetic Resources for Food and Agriculture took the longest time to be ratified: it was signed by the United States on November 1, 2002, approved by the Senate on September 28, 2016, and ratified by the President on December 2, 2016.

³¹⁴ SFRC TREATY STUDY, *supra* note 25, at 117.

³¹⁵ The information in this table was obtained from treaty documents available on Congress.gov and from the United States Department of State website. The Department of State is obligated, under 1 U.S.C § 112a(d) (2018), to make treaties and executive agreement that will be published in United States Treaties and Other International Agreements available within 180 days after entry into force. See also *Treaties and Other International Acts Series (TIAS)*, U.S. DEP’T OF STATE, <https://www.state.gov/tias/> (last visited July 3, 2020).

Treaty	United States signature	Transmittal by President to Senate	Reported favorably by Senate Foreign Relations Committee	Advice and Consent to Ratification by Senate	Ratified by President	Exchange or deposit of instrument of ratification	Entry into force
Protocol to the North Atlantic Treaty of 1949 on the Accession of Montenegro	May 19, 2016	June 28, 2016	January 11, 2017	March 28, 2017	April 11, 2017	April 21, 2017	June 1, 2017
Treaty with Kazakhstan on Mutual Legal Assistance in Criminal Matters	February 20, 2015	March 17, 2016	June 23, 2016	September 15, 2016	November 14, 2016	December 6, 2016	December 6, 2016
Extradition Treaty with the Dominican Republic	January 12, 2015	February 10, 2016	June 23, 2016	July 14, 2016	September 22, 2016	December 15, 2016	December 15, 2016
Extradition Treaty with the Republic of Chile	June 5, 2013	September 17, 2014	June 23, 2016	July 14, 2016	September 22, 2016	December 14, 2016	December 14, 2016
Treaty with Algeria on Mutual Legal Assistance in Criminal Matters	April 7, 2010	October 5, 2015	June 23, 2016	September 15, 2016	January 13, 2017	April 20, 2017	April 20, 2017
Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary	July 5, 2006	May 17, 2012	June 23, 2016	September 28, 2016	November 30, 2016	December 15, 2016	April 1, 2017
Treaty on Plant Genetic Resources for Food and Agriculture	November 1, 2002	July 7, 2008	December 14, 2010	September 28, 2016	December 2, 2016	December 13, 2016	March 13, 2017

VI. Conclusions

Understanding the making and, if applicable, ratification, of international agreements in the U.S. requires familiarity with the complex system of constitutional, statutory, and regulatory requirements that apply. For comparative purposes, it is important to be aware that these legal rules, and the processes that follow from them, vary depending upon whether the international agreement in question is a treaty or an executive agreement, although some requirements and procedures apply to each.

The making and ratification of treaties in the United States is governed by legal rules that include the U.S. Constitution and opinions interpreting it issued by the Supreme Court; federal statutes and regulations; the rules of the Senate and its Committee on Foreign Relations; and the procedures of the Department of State set forth in its Foreign Affairs Manual. Although executive agreements are not subject to the same constitutional requirement for advice and consent in the Senate, their validity can depend on sources of authority within the Constitution or in federal statute, and they are subject to similar regulations and State Department procedures with respect to how they are made.

The making of international agreements, is primarily the realm of the executive branch, although the legislative branch plays a key part with respect to treaties and most executive agreements. The President and others in the executive branch negotiate treaties, and it is the President who formally ratifies treaties. The approval of the Senate in the form of its advice and consent to a treaty is, however, a condition precedent to ratification. Executive branch officials negotiate executive agreements. Congress may also play a formal role, either by authorizing congressional-executive agreements or through Senate ratification of treaties pursuant to which executive agreements are made. Action by Congress is also required to give domestic legal effect to treaties and executive agreements that are not self-executing.

The United States legal system has elements of monism and dualism in its approach to international law. The relationship between international agreements and the hierarchy of laws within the United States is a multilevel one. A self-executing treaty enjoys the status of federal law, superior to the law of the states of the U.S. and subordinate only to the Constitution. Many self-executing executive agreements have similar stature. When a self-executing treaty or executive agreement conflicts with a federal statute, the later in time will prevail.

Annex

Table X-3. – Statutory Requirements for Transmittal of Agreements to Congress

Source: SFRC TREATY STUDY, *supra* note 25, at 236-37.

Title of Act and Public Law Citation [U.S.C.]	Subject of Agreement	Transmittal Before or After Entry into Force?	Approval Required for Entry into Force? How?	Disapproval Provisions? How?	Specified Recipients of Agreements	Are Congressional Procedures Set Forth?
Atomic Energy Act of 1954, as amended (P.L. 83-703); Sections 123 & 130 (g), (h) & (i) [42 U.S.C. 2153 & 2159 (g), (h), & (i)].	Nuclear Cooperation Agreements.	Before; 30-day waiting period.	Yes; Joint Resolution.	Yes; Joint Resolution.	SFRC, HFAC ³¹⁶	Yes, general provisions
Atomic Energy Act of 1954, as amended (P.L. 83-703); Sections 91 c, 144 b or c; and Sections 123 & 130 (g), (h), & (i) [42 U.S.C. 2153 & 2159 (g), (h) & (i)].	Nuclear Cooperation Agreements relating to defense materials or military uses.	Before; 60-day waiting period.	Yes; Joint Resolution.	Yes; Joint Resolution.	SFRC, HFAC, HASC, SASC	Yes, general provisions
Fishery Conservation and Management Act of 1976, as amended (P.L. 94-265) Section 203 [16 U.S.C. 1823].	International Fisheries Agreements (GIFAs).	Before; 60-day waiting period.	No; will enter into force if no action within 60 days. ³¹⁷	Yes; Joint Resolution.	House & Senate; HMM&F, SFRC, S Commerce	Yes, detailed provisions
Taiwan Relations Act (P.L. 96-8), Section 12 [22 U.S.C. 3311].	Agreements made by the American Institute in Taiwan.	After	No	No	Congress	No

³¹⁶ Guide to abbreviations of committee names: SFRC—Senate Committee on Foreign Relations; HFAC—House Committee on Foreign Affairs, now House Committee on International Relations [now again named the House Committee on Foreign Affairs]; HASC—House Armed Services Committee; SASC—Senate Armed Services Committee; HMM&F—House Merchant Marine and Fisheries Committee, now House Committee on Resources [now House Committee on Natural Resources]; S Commerce—Senate Committee on Commerce, Science, and Transportation; S Agriculture—Senate Committee on Agriculture, Nutrition, and Forestry.

³¹⁷ Many GIFAs have been approved by Congress and entered into force before the end of the 60-day period.

Title of Act and Public Law Citation [U.S.C.]	Subject of Agreement	Transmittal Before or After Entry into Force?	Approval Required for Entry Force? How?	Disapproval Provisions? How?	Specified Recipients of Agreements	Are Congressional Procedures Set Forth?
Social Security Amendments of 1977 (P.L. 95-216), Section 317 [42 U.S.C. 433].	Social security agreements between U.S. and foreign social security systems.	Before; 60-day waiting period.	No; will enter into force if no action within 60 days	Yes; resolution of either house	Congress	No
International Development and Food Assistance Act of 1978, as amended (P.L. 95-424), Section 603 (a)(2) [22 U.S.C. 2395a (2)].	International agreements concerning debt relief 30 days.	Before	No	No	SFRC, HFAC, H & S Appropriations	No
Enterprise for the Americas Initiative Act of 1992 (P.L. 102-532), Section 2 [7 U.S.C. 1738q].	Any agreement with any foreign government resulting in any debt relief under Title VI of the Agricultural Trade Development & Assistance Act of 1954, as amended.	30 days before	No	No	HFAC, SFRC, & S Agriculture	No
Trade Act of 1974, as amended (P.L. 93-618), Section 405 [19 U.S.C. 2435].	Agreements on trade relations with non-market-economy countries.	Before; Section 151 process.	Yes; Joint Resolution.	No	Congress	Yes
OTCA of 1988, as amended³¹⁸ (P.L. 100-418), Sections 1102 (b) & 1103 (a) and Trade Act of 1974, as amended (P.L. 93-618), Section 151 [19 U.S.C. 2191].	Agreements on elimination of non-tariff barriers.	Before; Section 151 process.	Yes; Joint Resolution.	No	House; Senate	Yes, detailed process
OTCA of 1988, as amended (P.L. 100-418), Sections 1102 (c) & 1103 (a) [19 U.S.C. 2903] Trade Act of 1974, as amended (P.L. 93-618), Section 151 [19 U.S.C. 2191].	Bilateral agreements regarding tariff and non-tariff barriers.	Before; Section 151 process.	Yes; Joint Resolution.	No	House; Senate	Yes, detailed process

³¹⁸ OTCA is the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418.

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This study forms part of a wider-ranging project which seeks to lay the groundwork for comparisons between legal frameworks governing the ratification of international treaties in different legal systems.

The subject of this study is the ratification of international treaties under the laws of the United States. It describes relevant constitutional, statutory, and other legal provisions with respect to the making and ratification of treaties, as well as legal provisions relating to the making of executive agreements, which also constitute binding international obligations of the United States. The study discusses the approach to international law taken by the U.S. legal system, and the position of treaties and executive agreements within the hierarchy of U.S. laws. The international agreement process and its participants are described. The study then considers the time required for ratification of treaties.

This study is intended to give European Parliament bodies an overview of the ratification process of the respective contracting parties (the United States of America, in this instance). This will enable them, for example, to estimate the time required by other treaty partners to ratify any prospective future treaty and to adjust their work programme accordingly.

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