International Agreements and U.S. Law

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There is confusion in the media and elsewhere about United States law as it relates to international agreements, including treaties. The confusion exists with respect to such matters as whether "treaty" has the same meaning in international law and in the domestic law of the United States, how treaties are ratified, how the power to enter into international agreements is allocated among the Executive Branch, the Senate and the whole Congress, whether Congress may override an existing treaty, and the extent to which international agreements are enforceable in United States courts.

Under international law a "treaty" is any international agreement concluded between states or other entities with international personality (such as public international organizations), if the agreement is intended to have international legal effect. The Vienna Convention on the Law of Treaties sets out an elaborate set of international law standards for treaties, broadly defined.

"Treaty" has a much more restricted meaning under the constitutional law of the United States. It is an international agreement that has received the "advice and consent" (in practice, just the consent) of two-thirds of the Senate and that has been ratified by the President. The Senate does not ratify treaties. When the Senate gives its consent, the President--acting as the chief diplomat of the United States--has discretion whether or not to ratify the instrument. Through the course of U. S. history, several instruments that have received the Senate's consent have nonetheless remained unratified. Those instruments are not in force for the United States, despite the Senate's consent to them.

Not all international agreements negotiated by the United States are submitted to the Senate for its consent. Sometimes the Executive Branch negotiates an agreement that is intended to be binding only if sent to the Senate, but the President for political reasons decides not to seek its consent. Often, however, the Executive Branch negotiates agreements that are intended to be binding without the consent of two-thirds of the Senate. Sometimes these agreements are entered into with the concurrence of a simple majority of both houses of

Congress ("Congressional-Executive agreements"); in these cases the concurrence may be given either before or after the Executive Branch negotiates the agreement. On other occasions the President simply enters into an agreement without the intended or actual participation of either house of Congress (a "Presidential," or "Sole Executive" agreement). The extent of the President's authority to enter into Sole Executive agreements is controversial, as will be noted below.

Although some Senators have at times taken the position that certain important international agreements must be submitted as treaties for the Senate's advice and consent, the prevailing view is that a Congressional-Executive agreement may be used whenever a treaty could be. This is the position taken in the American Law Institute's Restatement Third of Foreign Relations Law of the United States, § 303, Comment e. Under the prevailing view, the converse is true as well: a treaty may be used whenever a Congressional-Executive agreement could be.

The President's authority to enter into Sole Executive agreements, however, is thought not to be so broad. Clearly, the President has some authority to do so in his capacities as commander in chief of the armed forces and as "chief diplomat." Thus, armistice agreements and certain agreements incidental to the operation of foreign embassies in the United States could be done as Sole Executive Agreements. The agreement-making scope of these two sources of Presidential authority is nevertheless somewhat vague.

Congress has attempted to curb the President's claimed authority as commander in chief to commit U. S. armed forces to positions of peril by adopted the well-known War Powers Joint Resolution in 1973, over a presidential veto. The War Powers Resolution in practice has had the effect of inducing Presidents to consult with, and report to, Congress when U. S. armed forces are used in combat situations, but it has not significantly limited the President's practical power to commit the United States to use military force.

Presidents have sometimes asserted agreement-making authority stemming directly from the basic constitutional grant to the President of executive power. If this grant includes some authority to enter into Sole Executive agreements independently from more specific grants of presidential power, it would be difficult to ascertain what limits, short of those imposed on the government itself by the Bill of Rights, there might be to it. For this reason, many members of Congress and others have disputed any claim by a President to base agreement-making authority solely on the grant of executive power.

At one time there was some doubt whether a treaty (adopted with the consent of two-thirds of the Senate) must comply with the Bill of Rights, and the Supreme Court has yet to hold a treaty unconstitutional. Nevertheless, there is very little doubt that the Court would do so today if a treaty clearly violated the Bill of Rights. Even more certainly, it would hold unconstitutional a Congressional-Executive agreement or a Sole Executive agreement that is inconsistent with the Bill of Rights.

As a matter of domestic law within the United States, Congress may override a pre-existing treaty or Congressional-Executive agreement of the United States. To do so, however, would place the United States in breach of the obligation owed under international law to its treaty partner(s) to honor the treaty or agreement in good faith. Consequently, courts in the United States are disinclined to find that Congress has actually intended to override a treaty or other internationally binding obligation. Instead, they struggle to interpret the Congressional act and/or the international instrument in such a way as to reconcile the two.

Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are "self-executing" or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. Courts in this country have been reluctant to find such provisions self-executing, but on several occasions they have found them so--sometimes simply by giving direct effect to the provisions without expressly saying that they are self-executing. There are varying formulations as to what tends to make a treaty provision self-executing or non-self-executing, but within constitutional constraints (such as the requirement that appropriations of money originate in the House of Representatives) the primary consideration is the intent--or lack thereof--that the provision become effective as judicially-enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing. A provision in an international agreement may be self-executing in U. S. law even though it would not be so in the law of the other party or parties to the agreement. Moreover, some provisions in an agreement might be self-executing while others in the same agreement are not.

All treaties are the law of the land, but only a self-executing treaty would prevail in a domestic court over a prior, inconsistent act of Congress. A non-self-executing treaty could not supersede a prior inconsistent act of Congress in a U. S. court. A non-self-executing treaty nevertheless would be the supreme law of the land in the sense that--as long as the treaty is consistent with the Bill of Rights--the President could not constitutionally ignore or contravene it.

Even if a treaty or other international agreement is non-self-executing, it may have an indirect effect in U. S. courts. The courts' practice, mentioned above, of interpreting acts of Congress as consistent with earlier international agreements applies to earlier non-self-executing agreements as well as to self-executing ones, since in either case the agreement is binding internationally and courts are slow to place the United States in breach of its international obligations. In addition, if state or local law is inconsistent with an international agreement of the United States, the courts will not allow the law to stand. The reason, if the international agreement is a self-executing treaty, is that such a treaty has the same effect in domestic courts as an act of Congress and therefore directly supersedes any inconsistent state or local law. If the international agreement is a non-self-executing treaty, it would not supersede inconsistent state or local law in the same way a federal statute would, but the courts nevertheless would not permit a state of the union to force the United States to

breach its international obligation to other countries under the agreement. The state or local law would be struck down as an interference with the federal government's power over foreign affairs.

To summarize: the Senate does not ratify treaties; the President does. Treaties, in the U. S. sense, are not the only type of binding international agreement. Congressional-Executive agreements and Sole Executive agreements may also be binding. It is generally understood that treaties and Congressional-Executive agreements are interchangeable; Sole Executive agreements occupy a more limited space constitutionally and are linked primarily if not exclusively to the President's powers as commander in chief and head diplomat. Treaties and other international agreements are subject to the Bill of Rights. Congress may supersede a prior inconsistent treaty or Congressional-Executive agreement as a matter of U. S. law, but not as a matter of international law. Courts in the United States use their powers of interpretation to try not to let Congress place the United States in violation of its international law obligations. A self-executing treaty provision is the supreme law of the land in the same sense as a federal statute that is judicially enforceable by private parties. Even a non-self-executing provision of an international agreement represents an international obligation that courts are very much inclined to protect against encroachment by local, state or federal law.

About the Author:

Frederic L. Kirgis is Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. He is the author of several books and articles on international law, has served as a member of the Board of Editors of the American Journal of International Law, and currently chairs the ASIL Insight Committee.

Further Reading:

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