Reference Sheet on Treaties and International Agreements

Types of International Agreements

The United States may enter into international agreements—meaning agreements that create obligations under international law—using several different sets of domestic legal authorities. The resulting international agreements are generally grouped into several categories, though the boundaries between these categories is not always clear. They include:

- "Article II treaties" that the President negotiates but is only able to enter into with the advice and consent of two-thirds of the Senate, pursuant to Article II, Section 2 of the Constitution;
- "Executive agreements" that the President negotiates and enters into under some other domestic legal authority, including:
    - "Treaty-based executive agreements" that an existing Article II treaty has authorized the President to enter into;
    - "Congressional-executive agreements" that Congress has authorized the President to enter into by statute, including:
        - More common "ex ante" congressional-executive agreements are generally authorized by Congress in advance of being negotiated and signed;
        - Rarer "ex post" congressional-executive agreements are generally taken up and approved by Congress after the agreement in question has been negotiated.
    - "Sole executive agreements" that the President enters into under his or her own constitutional authority, without direct involvement from Congress.

The question of which set of authorities is used to enter into an international agreement is primarily one of U.S. domestic law and policy. As part of internal "Circular 175" procedures, the State Department—in consultation with other relevant agencies and at times with Congress—generally determines which mechanism the executive branch will pursue based on a number of factors, including past U.S. and international practice. Each of these forms of international agreement is equally capable of creating international legal obligations and thus of equal status under international law.

The scope of issues that can be addressed by these different types of international agreements has not been resolved by the courts and remains a subject of debate. As a matter of practice, Article II treaties are generally used to enter into international agreements on certain issues of major concern, including arms control and human rights. Congressional-executive agreements, however, are much more common and have been used to conclude a wide range of international agreements relating to Congress's Article I authority, such as its authority to regulate trade and commerce. Finally, sole executive agreements may only be used to enter into international legal obligations that the president is able to comply with under his own constitutional authority.

At times, countries and their agencies may also enter into agreements that impose legal obligations under one or more domestic legal systems, such as contracts. They may also enter into non-binding arrangements that make political commitments but not formal legal obligations. Neither type of arrangement is considered to be "international agreements" for purposes of these legal frameworks.

Reporting Obligations for Executive Agreements

The Case-Zablocki Act of 1972 (codified as amended at 1 U.S.C. § 112b) requires that the Secretary of State transmit the text of any international agreement that is not an Article II treaty to Congress within 60 days of its entry into force. Pursuant to relevant regulations (22 C.F.R. § 181.7), the State Department also provides Congress with relevant background information for each international agreement it transmits, including "a precise citation of legal authority."

If the President believes public disclosure would prejudice U.S. national security, then an international agreement may instead be transmitted to the House and Senate foreign affairs committees "under an appropriate injunction of secrecy to be removed only upon due notice from the President." Per relevant regulations (22 C.F.R. § 181.7(b)), this applies to classified international agreements.

Publication Requirements

Federal law (1 U.S.C. § 112a) currently directs the executive branch to publish an annual compilation of the Article II treaties and other international agreements that the United States has finalized each calendar year, and to publish any international agreement "proposed to be published" in that volume online within 180 days of it entering into force. As a matter of practice, the State Department's online "Treaties and International Acts Series" website (http://www.state.gov/tias/) has become the main place of publication for the texts of international agreements.

The Secretary of State may determine that certain categories of international agreements do not need to be published if:

- The international agreements are not Article II treaties;
- There is insufficient public interest in publishing the international agreements because:
    - They have not been in force since April 30, 1994;
    - They do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals;
    - Any public interest in publication can adequately be satisfied by alternate means; or
    - Public disclosure would, in the opinion of the President, be prejudicial to U.S. national security; and
- Except for those withheld from publication for reasons of national security, the State Department will make certified copies available upon request.

Any such determinations must be published in the Federal Register. Existing exceptions are codified in federal regulation (22 C.F.R. § 181.8(a)) and include classified international agreements.

Under relevant federal laws (1 U.S.C. 112b(d)) and regulations (22 C.F.R. § 181.8(d)), the State Department must provide Congress with an annual report identifying and summarizing any international agreements not published under these exceptions. As this report may itself be classified, it generally includes classified international agreements and those not published for reasons of national security.