

# THE TREATY-MAKING PROCESS: A GUIDE FOR OUTSIDERS

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## I. INTRODUCTION

This article guides the reader step by step through the process by which treaties are created. It is designed for students and others outside of the world of international law. It lays out the alternative ways in which treaties or international agreements are achieved. It explains both the steps to be taken within a national political system and those that involve interactions between countries. Lastly, this article indicates the points in the process where members of the public can exert some influence on the outcome.

Curiously, in the midst of great quantities of writing about treaties and other international agreements, one does not find in any single place a straightforward account of the whole process through which they come to exist.<sup>1</sup> Knowledge about this process is much less widespread than the

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1. The most helpful work for one interested in how to tackle the treaty process is ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE 1* (2d ed. 2007), though it is written from a British perspective. See also Robert Dalton, *United States*, in *NATIONAL TREATY LAW AND PRACTICE* 765 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005) [hereinafter Dalton]. There is a large quantity of writing on treaties both in books focused on that topic such as, ARNOLD

awareness of the mechanics of making statutes. In this essay, we work through the steps in the making of an international agreement. This way of organizing treaty law and practice will make it clearer to students and others who plan to create new international arrangements just how the endeavor proceeds. It will also address what actors must be involved and what technicalities must be observed and noted. The steps are presented in tabular form in an appendix to this article.

The process described moves back and forth between the international and the domestic spheres. It also moves from the disciplines of international and foreign relations law, to diplomatic practice, to negotiating theory. The process starts with building the momentum for the nation's commencement of international activity. When clearance has been obtained domestically, negotiators sally forth as diplomats to hammer-out an arrangement with the foreign state(s). The rules and practices concerning the negotiation of bilateral and multilateral negotiation are quite different from each other.<sup>2</sup> When an agreement has been finalized at the international level, it may well be that further domestic steps will have to be taken to render it fully binding. Formal exchanges of documents and their registration need to be accomplished.

This is a protracted process with heavy transaction costs. A party considering pushing for a treaty should note that some sort of arrangement or understanding other than a treaty may satisfy the perceived need and be easier to put in place. For example, a U.S. regulatory agency may strike-up an understanding with its counterpart in another country that aligns that country's policies in practical effect even though they remain legally free to change them. In other situations, private parties may join together across national borders to achieve objectives through cooperative investments of money and effort without government action. Examples could be drawn from the efforts to combat disease, pollution, and hunger.

This article does not deal with matters arising after treaties have been concluded. It focuses on U.S. practices, although the reader can find it as a start to understanding the process from another country's perspective.<sup>3</sup>

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DUNCAN MCNAIR, *THE LAW OF TREATIES* 3 (1961) [hereinafter MCNAIR], and in works on international law in general such as IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 607 (6th ed. 2003). Another source of treaty information is the Treaty Affairs Office of the Department of State—The Office of the Assistant Legal Advisor for Treaty Affairs, <http://www.state.gov/s//treaty/> (last visited Oct. 11, 2010).

2. For comparisons see Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 *HARV. INT'L L.J.* 324 (2008).

3. Readers interested in the treaty-making process in other countries can resort to the country-by-country chapters in Dalton, *supra* note 1, at 765.

## II. THE DOMESTIC PHASE

One starts with the germination of the idea, somewhere in the society, that an agreement with one or more foreign countries about topic X is needed. Often, the idea forms within the federal bureaucratic machinery. For example, the need for a new extradition treaty with country Y will be felt only within the Department of Justice. It is considerably more difficult for members of the general public to initiate treaty action rather than legislation. It is also more difficult to lobby members of Congress to initiate action in the case of a treaty rather than of a statute.<sup>4</sup> Even a member of Congress is at a disadvantage since one cannot file a bill on the subject with the clerk of the Senate or the House. If the desire for an international arrangement originates outside of the government, its proponents must set in motion the pieces of the domestic governmental system so to commence negotiation with the other country or countries involved. It might be possible to encourage a foreign government to initiate negotiations, an approach which would ordinarily require a significant ally in that country. Within the U.S. system, the task of preparing for the negotiation of an international agreement is more complex than it would be within a government organized on parliamentary principles and not involved with issues of federalism. Thus, a government like Great Britain need only coordinate within the cabinet and does not have to worry about two independent legislative houses and fifty state governments. An authoritarian state may have even less difficulty reaching a decision. The interplay between domestic politics and international negotiations has been carefully analyzed by international relations theorists under the rubric of “two-level games.”<sup>5</sup>

### A. Choice of Instrument

As one charts the process for bringing an international agreement into effect for the United States, one starts at an important fork in the road—will this be a treaty in the sense of Article II of the U.S. Constitution or will it be an executive agreement? This is a problem unique to the United States and irrelevant from an international law perspective; it is customary elsewhere, as in the Vienna Convention on the Law of Treaties, to use the word “treaty” to cover all types of international agreements regardless of the

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4. One contemplating such an effort might have to comply with the rules of the Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601–12 (2000).

5. Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 434 (1988); PRINCETON N. LYMAN, *THE GROWING INFLUENCE OF DOMESTIC FACTORS IN MULTILATERALISM AND U.S. FOREIGN POLICY 75–97* (Stewart Patrick & Shepard Forman eds., 2002).

label they carry.<sup>6</sup> The term executive agreement is used in the United States to denote an agreement that is entered into either with the advance authorization of a statute or with later confirmation by action of the Senate and House.<sup>7</sup> There are some executive agreements entered upon by the President acting under authority derived from his constitutional commander-in-chief or foreign relations powers.<sup>8</sup> An argument was developed a few years ago to the effect that the Senate's treaty power is exclusive and that executive agreements violate the Constitution.<sup>9</sup> This view was hotly contested and did not achieve a victory in the courts.<sup>10</sup> The choice is regarded as a political question and not one in which the courts have the deciding authority. The proponents of an agreement still have the option of which route to follow, and making the right choice is important. Especially in relation to curtailing political difficulties, such as not obtaining approval from the House of Representatives or causing Senators to feel their role in the process is being usurped.

There are several pragmatic factors that may point to selecting the executive agreement. For example, it may well be that an agreement in treaty form cannot be self-executing; therefore, it will require supporting legislation. Furthermore, it will cause the House of Representatives to participate before it can become an effective U.S. law.<sup>11</sup> Obtaining dual Senate approvals of treaty and statute would involve wasted effort. Each treaty in a series must be given the advice and consent of the Senate; a single statute can be used as the basis for a long string of parallel agreements with different countries. One of the first of such authorizations was the Statute of 1792, authorizing the Postmaster General to enter into agreements for the handling of mail across national boundaries.<sup>12</sup>

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6. Vienna Convention on the Law of Treaties, art. 3, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention 1969]. The Vienna Convention establishes underlying rules for treaties. Although the United States is not a party to the Convention, it recognizes many of its provisions as representing customary international law.

7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. a (1987).

8. *Id.* § 303(4).

9. Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1226 (1995). *Contra* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 809 (1995).

10. *Made in Am. Found. v. United States*, 242 F.3d 1300, 1302, 1313–14 (11th Cir. 2001).

11. *See* U.S. CONST. art. VI (Although Article VI of the U.S. Constitution declares treaties to be the "Supreme Law of the Land," the cases have frequently said that some treaties are not self-executing and are not enforced by the courts.). The most striking recent case is *Medellin v. Texas*, 552 U.S. 491, 505 (2008).

12. Act of Feb. 20, 1792, § 26, 1 Stat. 232, 239 (1845).

Authorization *ex ante* of an executive agreement has the further advantage of enabling American negotiators to tell their counterparts, as the document is signed, that at that moment an effective international commitment has been reached—and that there need be no wait while the document is submitted to the Senate for debate. It is easier to obtain fifty-one percent of the votes in both Senate and House than to win two-thirds of the Senate. Indeed, there are several volumes to the comprehensive collection of failed treaties that did not pass through the Senate.<sup>13</sup> Finally, it would generally be true that it is easier to keep matters confidential in an executive agreement; the authorizing statute need not set forth all the details that appear in the agreements themselves, which could be kept secret.<sup>14</sup> The text of a treaty would have to be published, in order to achieve Senate approval and ratification.

In this context, it is not surprising that executive agreements outnumber treaties by something like ten to one.<sup>15</sup> If one looks at the historical record, one sees that there are persistent patterns. Agreements with respect to income or estate taxes are all treaties. However, a good case could have been made for bringing such agreements before the House, which supposedly has a more intense interest in revenue matters as the heir of the House of Commons.<sup>16</sup> Alliances are, of course, treaties as are peace treaties. Extradition agreements are treaties, although they rest upon extensive implementing legislation. The same pattern was followed in 1976 for the first prisoner transfer treaties with Canada and Mexico, even though they also acquired legislative support as to the details of the imprisonment of those prisoners the United States received.<sup>17</sup> Arrangements that directly affect private law are routed through the Senate;

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13. CHRISTIAN WIKTOR, *UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776–1976*, at xi (Ocean Publications Inc., vol.9 1994) [hereinafter WIKTOR]. The series encompasses nine volumes.

14. 1 U.S.C. § 112a(b)(2) (2000) (permitting a non-treaty agreement to remain unpublished if the President deems publication “prejudicial to the national security of the United States”).

15. The most recent collection of numbers as to treaties and executive agreement appears in Oona A. Hathaway, *Treaties’ End: The Past, Present and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1288 (2008) [hereinafter Hathaway]. An earlier compilation appears in HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS* 560 (4th ed. 1994).

16. See U.S. CONST. art. I, § 7 (requiring that “[a]ll bills for raising Revenue shall originate in the House of Representatives”).

17. Treaty with Mexico on the Execution of Penal Sentences, Nov. 25, 1976, 28 U.S.T. 7399, T.I.A.S. No. 8718; Treaty with Canada on the Execution of Penal Sentences, Mar. 2, 1977, 30 U.S.T. 6263, T.I.A.S. No. 9552. For implementing legislation see 18 U.S.C. §§ 4100–15 (2006).

this is true of the Hague Convention on the Service of Process Abroad,<sup>18</sup> the Convention on the Production of Evidence,<sup>19</sup> and the Convention on Contracts for the International Sale of Goods.<sup>20</sup> It is also true that treaties of friendship, commerce, and navigation can have the effect of setting aside state rules restricting the rights of foreigners. On the other hand, agreements with respect to the reduction of tariffs and other trade barriers are nowadays characteristically executive agreements. This was not always the case, for in the nineteenth century, one can find quite a few tariff-reducing understandings imposed in treaties.<sup>21</sup> A wide variety of agreements, whose effects are little felt outside of the executive branch, are created by executive agreements such as those that implement defense programs, foreign aid, investment insurance, and so forth. The Foreign Affairs Manual of the Department of State advises that if the agreement is not clear from the prior practice, then the question of choice of instrument should be the subject of advance consultations with the pertinent congressional committees.<sup>22</sup>

The choice of instrument determines the first step to be taken in the process of working toward an agreement. If it is to be a treaty, the proponents need to work toward an executive branch decision to start negotiations. If it is to be a pre-authorized executive agreement, the proponents must start the regular process for having a statute enacted. If the form is to be an executive agreement approved by Congress after it has been negotiated—typical for trade agreements—no action outside the executive branch need be taken at this point.

### *B. Gathering Domestic Consensus*

Before one begins to negotiate with the foreign country or countries involved, one has to line-up the domestic coalition needed to make it function. The starting point may be a private party or coalition, though this is less likely to be the case with a treaty than with domestic legislation. The

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18. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 1, Nov. 15, 1965, 20.1 U.S.T. 361, 658 U.N.T.S. 163.

19. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, Mar. 18, 1970, 23.3 U.S.T. 2555, 847 U.N.T.S. 231.

20. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) (last visited Sept. 15, 2010).

21. *B. Altman & Co. v. United States*, 224 U.S. 583, 584 (1912) (marking a change in tariff reducing treaties).

22. It is usually known as Circular 175 and can be found at 22 C.F.R. § 181.4 (2007).

standard lobbying practices may be brought into play to move the government towards beginning the process. For example, in the case of the agreement with Mexico permitting the transfer of prisoners to their home country, the parents of the Americans held in Mexican prisons contacted their congressional membership to urge action and generated interest of the problem through the media. There can also be public opposition to a treaty, as when Irish-American groups sought to stop an agreement with the United Kingdom. This treaty was designed to amend the existing bilateral extradition agreement so that it was lawful to extradite to Britain members of the Irish Republican Army accused of terrorist acts.<sup>23</sup> Sometimes foreign interests take part in the push for action. Such efforts require observance of the Foreign Agents Registration Act<sup>24</sup> which requires the agent to register and file copies of the literature it employs to persuade people to support its position.

Finally, a government agency begins to act. It is normal to send a memorandum around to all of the interested agencies within the Department of State, so to obtain their approvals. In the case of the prisoner transfer treaties, this included the assistant secretaries responsible for inter-American affairs and for consular matters. Then one thinks about the rest of the federal government and its essential players; such as in the case of prisoner transfers, the Department of Justice and its Assistant Attorney General in charge of international criminal matters, as well as the Bureau of Prisons. The prison authorities of some states were also interested in the proposed agreement. A proponent of the agreement should contact the committees on Capitol Hill in charge of foreign relations and the committees whose fields of inter-American law are likely to be affected in order to obtain and understand their preferences and concerns.

Very special procedures are in place for involving parties with an interest in trade matters. The interests affected by a trade agreement are quite specific and often strongly defended by the businesses involved. The trade concessions for which one negotiates have to be balanced by things one gives to its partners, which diminish its barriers on imports. As a result, domestic interests become conflicted. From time to time, Congress gives the President the authority to negotiate trade agreements. In exercising those powers, the Trade Act of 1974 requires, first, that the President give the International Trade Commission a list of items that might be affected by the proposed negotiations, so that the Commission may

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23. Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, 155 U.N.T.S. 369, T.I.A.S. No. 12050.

24. 22 U.S.C. §§ 611-21 (2000).

investigate and analyze before giving its advice.<sup>25</sup> The President shall also seek advice from interested executive departments, such as the Agriculture, Commerce, Defense, Interior Labor, State, and Treasury departments. Public hearings should be held and information and advice should be sought from the private sector and the non-Federal governmental sectors.<sup>26</sup>

Finally, some words about the role of the fifty states. States frequently have an intense interest in the negotiation of international agreements, particularly when their industries or their procurement policies may be affected. It is a matter of controversy whether there are subjects which cannot be dealt with by treaty because they would impinge on state prerogatives.<sup>27</sup> States themselves are, in theory, excluded from making agreements with foreign countries; although, they may make compacts with Congressional approval, and do in fact enter into agreements with foreign nations or subdivisions of nations.<sup>28</sup>

### C. *Selecting the Negotiators*

Persons must be selected to conduct the negotiations on behalf of the state. In bilateral matters, it has sometimes been the ambassador accredited to the other country that performs the task. Ideally, he or she is well acquainted with the country and its political elite and thus, it is likely a bargaining stance. In other cases, a team from the Department of State is sent forth to act for the United States, including both specialists in the substantive subject matter that is being tackled and country experts—commonly with support from the Legal Adviser's office. Some treaties are negotiated by agents from outside the Department of State who possess special expertise. For example, U.S. Treasury representatives characteristically negotiate tax treaties. Department of Defense personnel may negotiate and handle agreements on military matters; matters that may need to be kept secret. The Department of Energy handles agreements on nuclear matters. These agencies outside the Department of State must

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25. The Tariff and Related Provisions, 19 U.S.C. § 131 (repealed 2006); Trade Act of 1974, 19 U.S.C. § 2151 (2000) (effective Aug. 6, 2002).

26. 19 U.S.C. §§ 131 (repealed 2006); 19 U.S.C. § 133 (repealed 1930); 19 U.S.C. § 134 (repealed 1953); 19 U.S.C. § 135 (repealed 1939); Trade Act of 1974 §§ 2153–2155.

27. Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *Treaty Power and American Federalism Part II, The Correspondence*, 99 MICH. L. REV. 98, 99 (2000) with David M. Golove, *Treaty-Making and The Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1077–78 (2000).

28. U.S. CONST. art. I, § 10. For data on the activity of states in international affairs through compacts or arrangements not consented to by Congress see Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1072 (2008).



consult with the Secretary of State before committing the United States to the agreement.<sup>29</sup> In complex negotiations, the U.S. delegation must include representatives of different departments, which makes it possible for delegations to have conflicts of interest and to engage in internecine battles.

One notes that many countries that are members of the United Nations cannot match the U.S. delegation to a multilateral negotiation, which may consist of up to 100 persons. These countries cannot find the needed experts at home or afford to hire them from abroad.

In general, it is unwise for individuals to become involved in the negotiating process since there is a real need for a united front in bargaining for the United States. Separate, parallel negotiations by private parties with a foreign power may even be in violation of the Logan Act, although that statute has never actually resulted in a conviction.<sup>30</sup>

Congress has promulgated quite elaborate provisions for obtaining advice on trade and negotiation questions. First of all, it created the Office of the Special Trade Representative (USTR) within the executive office of the President.<sup>31</sup> Congress has also specified that members of the House and the Senate shall be selected as congressional advisers on trade policy and negotiations. They are also to be accredited by the USTR "as official advisers to the United States delegations to international conferences, meetings and negotiating sessions relating to trade agreements."<sup>32</sup>

Obviously the process of gathering a domestic consensus, which we reviewed above, has an impact on the international bargaining that is to develop. Negotiators are limited in what they can offer and accept by the views and guidelines of those involved in the process. On the other hand, they can represent to their foreign counterparts that they have a solid position to the extent they have cleared matters with their home forces.

### III. THE INTERNATIONAL NEGOTIATING PHASE

When this domestic process is over and the negotiators have been named, the international part of the process is ready to begin. Formal plenipotentiary letters seem to be obsolete, but they still appear in practice and they do provide some clarity as to who will be conducting the negotiations.<sup>33</sup> A state will generally not be bound to commitments made

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29. 1 U.S.C. § 112b(c) (2000).

30. 18 U.S.C. § 953 (2006).

31. Trade Act of 1974 § 2171; 19 U.S.C. § 141 (repealed 1939).

32. Trade Act of 1974 § 2211(a); 19 U.S.C. § 161 (repealed 1979).

33. The learning, together with forms of full powers derived from British practice can be found in SATOW'S GUIDE TO DIPLOMATIC PRACTICE 56 (Lord Gore-Booth ed., 5th ed. 1979) [hereinafter SATOW]. For a United States example see Dalton, *supra* note 1, at 809.

for it by unauthorized persons. There can be genuine disputes as to who can speak for the state, particularly if there is open political conflict in the country and different groups are vying for control of the government. A state will not negotiate with a state that it does not recognize; although, it may negotiate with a state with which it does not have normal diplomatic relationships. For example, the United States completed a maritime boundary agreement with Cuba in 1978, even though we did not have an embassy in Havana. While a state may be bound by an agreement signed on its behalf by a group of individuals who are soon superseded by their rivals, another state may shun negotiations under those circumstances because it anticipates difficulties with the newcomers in the fulfillment of the agreed upon solution.

Although there are analogies between domestic contract law and treaty law,<sup>34</sup> some rules about obtaining consent to contract have little relevance at the international level. The Vienna Convention does speak of mistake, fraud, and coercion. However, there is a dearth of cases in practice standards to give body to this abstract formulation. Treaties are negotiated by sophisticated professionals, usually operating face-to-face and not by exchanges of messages. That makes it unlikely that the problems faced by courts in private contracts will occur in treaty negotiations.

The provision about coercion raises issues very different from its private law counterpart. The Vienna Convention refers only to the threat of use of force. The diplomats at Vienna clearly had in mind a prohibition on extracting agreements by force. They invoked the 1939 example of Nazi Germany and the remnants of the Czechoslovakian state creating an agreement where Germany accepted protectorate over its territory. That rule would not apply if the use of force had been legitimate—if, for example, a victim of aggression had succeeded in winning the war and laid down terms for peace with the attacker.<sup>35</sup> The Vienna participants were tempted by the idea of adding economic coercion to the mix. They remembered that in the colonial epoch, the advanced industrialized countries had procured agreements from less developed countries that would otherwise not have been entered into by states of equal sophistication and power. But it soon became apparent that opening up the topic of economic coercion in an international context would lead to enormous difficulties of line drawing. Rules about economic coercion in domestic legal systems operate in contexts very different from the international

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34. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 3, introductory note (1987); HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 155–80 (1927).

35. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 reporter's note 2 (1987).

arena; and so, the participants were content with a separate declaration, basically of a precatory character, abjuring such pressures.<sup>36</sup> Claims of coercion are in fact rare and would be politically sensitive.

A special rule of treaty law will be strange to American lawyers, arising as it does from civil law concepts of *culpa in contrahendo* or misbehavior in the contracting process. The outcome is represented by Article 18 of the Vienna Convention and it is a limited expression of that idea. It states that a country, which has signed a treaty, presumably en route to its ratification, may not take actions that would defeat the object and purpose of the treaty.<sup>37</sup> A proposal was defeated that would have made this rule apply between the commencement of negotiations and ratification. Thus, the United States can participate vigorously in a multilateral conference and even vote on the final text, but never join it. Therefore, the rule comes into play only after the process of international negotiation has been completed. Americans had their attention called to this rule in 2002 when the U.S. government decided to “unsign” the agreement creating the International Criminal Court. The purpose of this step was to relieve the United States of its obligation not to frustrate the treaty, which had begun when President Clinton signed it in 2000.<sup>38</sup> The United States thereupon embarked on a vigorous effort to frustrate the object and purpose of the treaty.<sup>39</sup> The process of treaty ratification can last for years, as witnessed by the protracted delays in having the Genocide Convention and the Human Rights Covenants pass through the Senate. There has to be a way of terminating the stage of quasi-obligation during that period.

#### A. Getting to Yes

Much of the modern learning about the negotiation process stems from scholarship concerning international negotiations. This is particularly true of the analysis developed by Professor Roger Fisher. An experience that generated a good deal of early theorizing was the negotiation of the United Nations Convention on the Law of the Sea, which started in the 1970s.<sup>40</sup> Much of the focus in this literature was on the special problems

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36. *Id.* § 331 reporter’s note 3.

37. *Id.* § 312(3); Vienna Convention 1969, *supra* note 6, art. 18.

38. Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2061–62 (2003).

39. This included negotiating agreements with a number of countries who promised not to cooperate in prosecutions of Americans before the Court.

40. A pioneering study was FRED CHARLES IKLÉ, *HOW NATIONS NEGOTIATE*, 3–4 (1976). Pieces on U.N.C.L.O.S. include Barry Buzan, *Negotiating by Consensus; Developments in Technique at the United Nations Conference on the Law of the Seas*, 75 AM. J. INT’L L. 324, 418 (1981); JAMES K.

that are introduced when one shifts focus from bilateral to multilateral negotiation. We start here with some commentary on the bilateral process. On top of the problems that make international negotiation more complex than the domestic version is the difficulty of seeing the other side's point of view. To begin, there is usually another language involved and the parties must decide, at an early stage, which language the negotiations are to be conducted. Americans have, in a sense, an advantage because so many foreign officials know and speak English and are willing to use it. But lack of knowledge of the foreign tongue causes one to miss some of the signals that the foreign tongue conveys. Beyond language differences, there are cultural differences, as comparative studies demonstrate. An American is apt to operate with a different set of priorities than a citizen of a Muslim state in Southeast Asia. This may cause opportunities to be missed. One side may not understand what proposals will be acceptable to the other side. But there can also be opportunity—one country may put a higher value on prestige, for example, and be willing to make concessions that have a financial cost. Cultures differ in their degree of risk aversion and their concerns may have to be accommodated.<sup>41</sup> While power and interest drive these negotiations, there is a space within which diplomatic skill (tact) can make progress and where blunter tactics would cause the parties to pick up their papers and go home.

There is also a body of literature that tries to determine what the result of negotiations will be—the equilibrium position. It proceeds from an assumption that states act as rational decision-makers, taking into account their material interests. This literature sometimes undervalues the influence that other considerations, psychological, cultural, and institutional, play in these calculations. There is a strong influence and desire not to be regarded in international circles as an “outsider” who does not cooperate with the community. This runs in parallel with the thought that being a negative force with regard to the development of international law damages a nation's standing. More narrowly viewed, country A's stubbornness regarding a treaty that country B wants to execute can come back to haunt A when it is A's turn to ask for something from B. Of course, these negative forces are less damaging than those unleashed when a country commits itself to a treaty and then breaches it.

When relations between the two states are particularly strained, it may be wise to consider calling upon an intermediary to help. In some cases, an intermediary is already in place because an “interest section” in some third

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SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* 1 (1984); *INTERNATIONAL NEGOTIATION* 5 (Victor Kremenyuk ed., 1991).

41. MICHAEL MORRIS & MICHELE GELFAND, *Cultural Differences and Cognitive Dynamics*, in *HANDBOOK OF NEGOTIATION AND CULTURE* 46–47 (Michele Gelfand & Jeanne M. Brett eds., 2004).

country's embassy has been replaced in lieu of the quarreling states' embassies. Since 1962, Cuba has been the most prominent example in American practice,<sup>42</sup> but the same situation has prevailed in regard to other countries, such as Libya. A classic example is the involvement of Algeria in settling the differences between the United States and Iran. These differences included the seizure of the U.S. embassy in Tehran, responses by the United States, including the freezing of Iranian assets within the United States, and the authorizing of lawsuits against Iran because of the attachment of those assets. The so-called Algiers Accords resulted from these parties' interactions; one observes that the final arrangement took the form of declarations by the United States and Iran without the two nations' signatures appearing on a common document.<sup>43</sup>

### *B. Multilateral Negotiation*

International negotiations can involve an extraordinarily large number of parties. Some of them implicate all 192-member states of the United Nations. It is rare that a private negotiation will involve all 192 members—in some instances we find hundreds of potential lenders involved in the same deal, but their interests run in parallel and they can fairly be represented by a single agent. Charles Brower identified several other causes of increasing difficulty in concluding multilateral agreements. He pointed to the growing number of states with democratic governments, the sharp inter-state conflicts that followed the end of the Cold War, the regulation of more and more issues, and the rise of non-governmental organizations.<sup>44</sup> Various mechanisms have been invented to disentangle the multinational problem. They start out with the idea that the end result cannot be by majority vote, but requires a consensus. There is no legislative power involved; a treaty is an agreement and not a statute. All of the solutions begin with the idea that the task of producing a working text to serve as the basis for detailed “horse-trading” must be delegated. The process followed by the International Law Commission (ILC) is to refer the original drafting task to an expert in the field. The draft is then examined and debated within the Commission, all of whom are lawyers. The paper that is hammered-out within the Commission then goes to a

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42 The agreement on interest sections was negotiated in 1977. United States Treaty with Cuba, Establishment of Interests Section, May 30, 1977, 30.2 U.S.T. 2101, T.I.A.S. No. 9313.

43. The official documents are collected in 75 AM. J. INT'L L. 418–32 (1981) and 20 I.L.M. 223–40 (1981).

44. CHARLES BROWER, THE MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS 75–77 (Vera Gowlland Debbas ed., 2000).

diplomatic conference for further debate and amendment. One notices that one is dealing with a codification of international law, which is supposedly a more objective operation; however, these so-called codifications do contain controversial provisions that directly affect the interests of states and require bargaining. The ILC was able to produce a set of law of the sea (LOS) conventions at Geneva in the 1950s, although it had to leave some issues—such as the width of the territorial sea—unsettled. It was clear that the ILC would not be able to handle the next LOS round of negotiations twenty years later. The last large scale multinational national agreement is the one which created the International Criminal Court, signed in 2000. It was produced by a diplomatic conference that held numerous sessions in Rome.<sup>45</sup>

Some groups of countries work together and develop bargaining stances through a process of caucusing and coalition-forming. This can be complex, involving decisions as to the selection of partners and the degree to which national independence should be sacrificed for the sake of collective power. The Group of 77, a loose coalition of developing countries, frequently represents less developed countries at conferences. A new set of procedures was developed for the LOS. In that case, topics were referred to various committees, so that these committees could create texts that would be assembled for the final product. The selection of personnel is a sensitive and complex issue. For consensus to develop, the committees must not be seen as representing the interests of the rich, developed countries. The chair, in particular, should be somebody who enjoys a widespread reputation for competence and even-handedness. Ambassador Tommy Koh from Singapore was impressive in his function as the chair because he developed principles for competence and even-handedness. Votes should not be required in the committee's work; therefore, this may mean bracketing controversial parts of the text for discussion in the broader assembly.

In some multilateral negotiations, a significant role is played by non-governmental organizations, multinational corporations, and other non-state actors. Some NGOs have a degree of official recognition, in that they have received consultative status under Article 71 of the U.N. Charter, giving them limited rights to be present, to suggest texts, and to make their views known as the multilateral negotiations progress.<sup>46</sup> At times, they have played a disruptive role, as when they organized demonstrations against

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45. LEILA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 32–45 (2002); Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3–4 (1999).

46. For an introduction to NGOs see Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 348 (2006).

negotiating sessions of the World Trade Organization, at both Seattle and Cancun.

Special negotiating techniques have been developed within the General Agreement on Tariffs and Trade (GATT) through the successive rounds that began in the 1950s. They necessarily differ from practices within the traditional bilateral tariff negotiations; particularly because any concession made by country X is extended through the most favored nation clause to all of the other contracting parties. Normally a major importer of a product will make a tentative offer to diminish trade barriers on product A, relying on receiving concessions from various countries for its exports of product B. The simultaneous presence of all the GATT parties makes it easier to coordinate those concessions.

At the end of the negotiations, there is typically a vote to adopt the text which, according to the Vienna Convention Article 9 Section 2, would ordinarily be by a two-thirds vote.<sup>47</sup> The states, then, would likely sign the document. In many cases the text is presented in several languages, often accompanied by a provision that each of them is equally authentic. It is common to adopt a Final Act, which may include, besides the text, the names of the countries and their delegates.<sup>48</sup> Remember that a state may, after going through this entire process, decline to sign or to ratify. It may pay a certain political price for this. The United States was sharply criticized for failing to adhere to the agreements on the LOS, global warming, and land mines. However, the strength of the United States' international position enabled it to endure the resulting storms.

Multilateral negotiations tend to produce a substantial body of materials that would be known as legislative history on the domestic front. They are termed *travaux préparatoires* in international parlance. Article 32 of the Vienna Convention authorizes resort to such materials when clarity does not emerge from the text.<sup>49</sup> While such use is very much in the American tradition, courts of other countries—conspicuously Great Britain—have not permitted reference to their own legislative history and have been slow to tolerate reference to *travaux préparatoires*.<sup>50</sup> Note that sometimes a state becomes committed to a multilateral treaty without having participated in the negotiations that led to it, a process known as

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47. Vienna Convention 1969, *supra* note 6, art. 2, § 9.

48. For materials on final acts *see* SATOW, *supra* note 33, ch. 31.

49. Vienna Convention 1969, *supra* note 6, art. 32.

50. MCNAIR, *supra* note 1, at 418. For more recent authority *see* Fothergill v. Monarch Airlines, [1981] A.C. 251, ¶ 70 (H.L. 1980), *available at* <http://www.nadr.co.uk/articles/published/ArbitrationOlderReports/Fothergill%20v%20Monarch%20Airlines%201980.pdf> (last visited Oct. 15, 2010).

accession. The Warsaw Convention,<sup>51</sup> on limiting damages for aircraft accidents on international flights, stands as an example. Accession is rare for the United States, but common among states that have achieved independence in recent years. New states typically begin by acceding to the New York Convention on Arbitration and the Vienna Conventions on Diplomatic and Consular Relations.

#### IV. THE POST-SIGNATURE STAGE

##### *A. Advice, Consent, and other Action by Congress*

When the agreement is signed, that may be the end of the process. That would be the case with an executive agreement that had been previously authorized by Congress or was undertaken under the President's foreign relations power. Indeed, people not accustomed to the international law processes tend to assume that "signing" is final. But the signing is not the last step if the agreement is, in American terms, a treaty. Also, in many multilateral situations, the parties sign *ad referendum*, meaning that they are not bound until more has been accomplished. In the United States, the process involves obtaining advice and consent from the Senate. This process is often erroneously referred to as "ratification." That term is only properly applied to a president's international action which takes place after the Senate procedures are completed.

In U.S. practice, the President refers the proposed treaty to the Senate along with a Message of Transmittal explaining the document and the reasons consent is sought.<sup>52</sup> The transmission is then referred to the appropriate committee. This is typically the Senate Foreign Relations Committee, even if the subject matter is the adjustment of income taxation, a topic which would normally be of interest to other committees, including the House Committee on Appropriations. The committee schedules hearings at which interested members of the public can express their opinions alongside officials of the executive branch. The result would ordinarily be a committee report to the Senate which would then debate the matter and vote—which requires an approval by two-thirds vote of the senators then present. Remember that the history of the treaty process brings forth many examples of treaties that died along the way.<sup>53</sup> One possibility is that the Senate may insist upon reservations being inserted. In

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51. 49 Stat. 3000 (1946); Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, TS No. 876, 137 L.N.T.S. 11 (1934).

52. These documents bear a designation as "Senate Executive Document X."

53. For a compendium see WIKTOR, *supra* note 13, at xi.



the case of a bilateral treaty, this calls for renegotiation with the other party. In the case of a multilateral arrangement, the question then arises whether the reservation is compatible with the object and purpose of the treaty. It is important whether other countries register objections to the reservation.<sup>54</sup>

It is a matter of dispute whether the documents generated during this congressional process can be used in interpreting the agreement. The negative case is that they are internal to the United States and cannot fairly be used in regard to other signatories.<sup>55</sup> Practice indicates that there is a cautious use of such papers. Sometimes the references simply bring the researcher, who made the statements, to the international negotiations.

If the chosen method for the agreement has been a legislative-executive agreement that was not authorized in advance, the negotiated agreement must be submitted to Congress for its approval. This arrangement looks so much like the advice and consent to a treaty (though requiring only a simple majority vote in both houses) that it has been the focus of advocates who believe that such an agreement should not be substituted for a treaty. With respect to trade agreements, there has developed a special process termed “the fast track” or more recently, “Trade Promotion Authority.” Under the various statutes that paved the way for approval of trade agreements, Congress committed itself to the following: there will be no amendment of the agreement since that would compel the executive to renegotiate the deal with all the parties, committees must discharge the bill within forty-five days thus preventing them from bottling it up, and there must be a vote on the floor of each house within a specified number of days.<sup>56</sup>

### B. Ratification

If the Senate has consented, the President is now free to ratify the treaty; it is not, however, his duty to do so and sometimes the process is stopped at this point. The President may, for instance, be unwilling to proceed with ratification if the Senate has imposed reservations. In the case of a bilateral accord, ratification is simply a matter of transmitting to the other party a copy of the document as signed and accompanied by a

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54. On reservations and the effect of objections to them by other states *see* Vienna Convention 1969, *supra* note 6, arts. 19–23. The Senate may also attach “understandings” and “declarations.” On their effect *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 (1987).

55. *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring). For a response *see* Detlev F. Vagts, *Senate Materials and Treaty Interpretation*, 83 AM. J. INT’L L. 546, 546 (1989).

56. JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 90–93 (5th ed. 2008); Hal S. Shapiro, *Fast Track: A Legal, Historical and Political Analysis*, J. INT’L ECON. L. 153, 153–54 (2006).

presidential statement reciting the advice and consent of the Senate along with the President's own concurrence. In former years, the document annexed to the text of the treaty also proclaimed that it is now valid and binding. The case of a multinational agreement is more complicated, at least from a secretarial perspective, since here, it would be a flurry of transmissions if every state had to send a copy to every other state in the circuit. It is part of the boilerplate of multilateral agreements to designate a particular agency as the depositary. Typically it is the Secretary General of the United Nations, although sometimes a specialized agency, such as the International Labor Organization or a member state, performs the function. Commonly, the agreement will state that it becomes legally binding when a specified number of states have deposited their ratifications. The depositary determines when that point has been reached. It is also the function of the depositary to transmit submitted reservations along with ratifications to the other signatories so that they can react accordingly.

Even though a treaty upon ratification is binding on the United States under international law, if it is not self-executing, a further internal step may have to be taken; the enactment of legislation to make it effective as internal law.<sup>57</sup>

### *C. Filing and Publication*

At the very tail end of the proceedings comes the matter of filing. Internally, the Case Act<sup>58</sup> requires the Department of State to file with Congress copies of all agreements within sixty days of their conclusion. It has been assumed that this would be accompanied by prompt publication to make them readily available to the public. However, misconceived notions of economy have prevented the publication from happening, so that finding official hard copies of recent agreements can be a frustrating experience.<sup>59</sup> There are also matters of paper-shuffling at the international level. Article 102 of the U.N. Charter provides for the registration of agreements with the Secretary General, and further states that an agreement not so registered will not be taken into account by the United Nations. Treaties so registered

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57. U.S. CONST. art. VI; *Medellin*, 552 U.S. at 494, 505.

58. 1 U.S.C. § 112b (2000).

59. The official Treaties and other International Acts Series of pamphlets currently runs only to 1997. They are later published in the bound volumes called United States Treaties and Other international Agreements. The Department of State publishes annually a volume called Treaties in Force which indexes treaties and indicates what countries are currently parties to them. There is an unofficial hardcover series, CONSOLIDATED TREATIES & INTERNATIONAL AGREEMENTS 23 (Erwin C. Surrency, ed., vol.1 1990) (1991). For an explanation of treaty databases see Hathaway, *supra* note 15, at 1358-61.

are published in the United Nations Treaty Series, which now runs to more than 2000 volumes.<sup>60</sup>

## V. CONCLUSION

The preceding pages have laid out in chronological order the steps needed to bring an international agreement into effect. They have also indicated where outsiders can bring to bear whatever influence they have on the process. They have not sought to deal with questions about what happens after an agreement enters into force. That might include internal or external disputes involving the United States system about what a treaty really signifies. These disputes might also include denunciation of a treaty or charges that there has been a grave breach of the treaty. Another possibility would be that Congress might enact legislation that varied the terms of an agreement.

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60. The U.N.T.S. cannot be taken as an accurate database for treaties in force as some states neglect to register treaties and treaties no longer in force are not deleted.

## VI. APPENDIX

## Charts Showing Steps in Treaty Process:

*A. An Article II Treaty*

1. Gathering consensus in the U.S. government—  
Circular 175 process
2. Authorization to negotiate, naming of Representatives
3. International negotiation
4. Conclusion of negotiation—final act, signature, etc.
5. Transmission by President to Senate
6. Committee hearings, floor debate, and Senate vote
7. Ratification by exchange with foreign state(s)

*B. Pre-Approved Executive Agreement*

1. Gathering consensus in the U.S. government—  
Circular 175 process
2. Filing of bills in Senate and House
3. Committee hearings and floor votes
4. Transmission of bill to President and signature
5. Designation of negotiators
6. International negotiation
7. Conclusion of negotiation—final act, signature, etc.

*C. Non Pre-approved Executive Agreement*

1. Gathering consensus in the U.S. government—  
Circular 175 process
2. Designation of negotiators
3. International negotiation
4. Conclusion of negotiation—final act, signature, etc.
5. Filing of bills in Senate and House
6. Committee hearings, floor debates, and votes in both  
houses of congress
7. Transmission to President for signature