# Chapter 7 - The Domestic Effect of International Law

## While the Court has never strongly endorsed the domestic effect of International law, there is now a majority of judges on the Court who strongly reject any judicially enforceable domestic effect of international law that has not been codified by Congress. We are looking for big picture in these case, not a detailed analysis.

## Traditional treaties

### What are the four factors that determine whether an agreement is a treaty under international law?

#### (1) the states intend the agreement to be legally binding under international law;

#### (2) the agreement deals with significant matters;

#### (3) it clearly describes the obligations of the parties; and

#### (4) it takes a form consistent with the intent that it be legally binding.

### What is the international law significance of a treaty, i.e., is there an international enforcement system for most treaties?

### Why do countries follow them?

#### GATT/WTO has an enforcement system through other trading partners using tariffs to punish bad behavior. Nations comply because of the trading benefits of being in the agreement. The enforcement panel is now without a quorum because the US is blocking the appointment of new members.

#### The current trade war tariffs violate GATT/WTO

### The US does not accept jurisdiction for the International Court of Justice, as we see in a later case.

### What mechanisms can be used, short of war, for multilateral treaties such as the those deal with atomic energy?

### What is going on with Iran in this regard?

### What is the Senate approval process?

### What is the legal effect of approval by the senate?

#### Does this make a treaty into a statute?

### What does advice and consent mean?

#### Was the senate meant to participate in drafting treaties?

#### What is the downside to senate participation?

#### How do you negotiate with 100 voices?

#### What about secrecy?

### What if the senate will not ratify without changes?

### Does this undermine the president's constitutional right to negotiate treaties?

### Fast track - the Senate promises to not mess with the treaty, only to vote it up or down.

## Relevance of Senate Ratification History to Treaty Interpretation (April 9, 1987) – n3 180

### What is Biden addressing in this report?

### If these deliberations were intended to be a binding part of the treaty, what could the Senate do to make them binding?

### Whose representations should count in construing a treaty?

### What are the president's dual roles in treaties?

### Why is president's role more important in international law?

### What type of legal document does this report say a treaty is?

### What is the primary responsibility of the executive or the courts in construing the treaty?

### What is the best evidence of the meaning of the treaty?

### What can the senators do if they believe that a provision in the treaty is ambiguous?

### What does this report say should happen if the president wants to use secret side deals to change the meaning of the treaty?

## N5. 181 – Deference

### Does the Court interpret a treaty itself?

### Does it defer to departments involve in their enforcement?

### Think about why a presidential decision that a treaty does not apply in specific circumstance is not reviewable.

## Abrogating Treaties - Goldwater v. Carter, 617 F.2d 697 (1979)

### Only dicta, vacated by United States Supreme Court as non-justiciable

### Does the Constitution provide for abrogating treaties?

### Symmetry - if the senate has to approve a treaty, does this mean they have to approve its abrogation?

### The senate has to approve the appointment of Principle officers and . ambassadors. Do it have to approve firing them?

### What are the time limits on treaties - what happens if conditions change, say an ally goes communist?

### Who evaluates these changes?

### What would be the problem if he had to go the senate to get the treaty modified?

### Who has final authority to send in troops when there is a mutual defense treaty?

### When do modifications amount to abrogating the treaty?

### What about the termination clause in this treaty?

### Who gets to make that decision?

### The Paris Climate Agreement says that you have to give one year notice to withdraw. Does this affect that the US does during the year after Trump announced he was withdrawing from the agreement?

### What is the dissent's argument that once a treaty becomes the law of the land, it can only be changed like other laws?

#### Does this mean that congress has to pass a law that the president signs to abrogate or change a treaty?

## What is a self-executing treaty?

## What are limits on self-executing treaties, i.e., how are they like executive orders?

## Treaties that require congressional action

### Many treaties are really agreements that congress pass laws to accomplish a certain goal.

### If Congress passes the laws, does abrogating the treaty repeal those laws?

### What do you have to do to abrogate the effect of these statutes?

## Executive and Other Agreements

### Until I started looking at this, I assumed, as do most people, that treaties are the only binding agreements with foreign governments.

### Turns out that we sign very few treaties, preferring to do everything with executive agreements

### Types of Executive agreements

#### Congressional-executive agreements

##### Congress either approves them or delegates approval to the president

#### Agreements made pursuant to treaty

##### Probably implicitly authorized by the treaty

#### Pure executive agreements, such as the Iran hostage settlement

##### These were rare, but the court has not banned them

### Are Executive agreements explicitly mentioned in the Constitution?

#### No

### They are constrained in that they cannot change appropriations or violate statute. Their power is in the international realm where the president has broad powers to make agreements and then enforce them with other foreign policy tools under his control, including military force

### Made in USA Foundation v. US, 242 F3d 1300 (2000) - 172

#### This is a fight over what can be the subject of a treaty versus an executive agreement

#### Does the constitution give any guidance?

#### Was the court able to find any bright line?

### 6 -185 - Case-Zablocki Act: Congressional limits on agreements

#### What does the Case-Zablocki Act require?

#### What if the president does not comply?

#### Does that make the agreements void?

#### Has congress successfully limited the president's ability to make secret deals?

## Do Treaties supersede the Constitution? - Reid v. Covert, 354 US 1 (1957)

### What are the facts?

### Where did the crimes take place?

### Why are they being tried by military courts?

### Is the defendant active duty military?

### What constitutional provision does the defendants say was violated?

### What does the treaty provide?

### May treaties override the constitution?

### What did the court say about a subsequent statute overriding a treaty?

### Must the statute obey the constitution?

### What did the court decide about trying these women in military courts?

### Why can soldiers be tried in military courts?

## Can private litigants sue in US courts to enforce treaty rights? - Committee of US Citizens living in Nicaragua v. Reagan, 859 F2d 929 (1988)

### What did the International Court of Justice find?

### What did the US do to avoid this judgment?

### What are the plaintiffs seeking?

### The first issue is whether Congress may override a treaty by statute

### What does this tell us about Congress' ability to control executive agreements?

### Why is it hard to do?

### Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972)

#### Background – The US is permanent member of the Security Council, along with England, France, Russia, and China. Any permanent member can veto a security council resolution.

#### The UN Security Council required an economic boycott of Rhodesia

##### What does that tell us about the US president's position at the time on the resolution?

#### Senator Byrd amended a statute to block the boycott

#### Why an amendment, not a separate law?

#### Did the court find that this abrogated our treaty obligations?

#### Are we still part of the UN?

#### Since this is a subsequent statute, it overrides - what about its violation of international law?

### What do the Head Money Cases, 112 U.S. 580 (1884), tell us about the role of the courts in enforcing foreign treaty obligations?

### What do treaties depend on for enforcement?

### How do we tell if a treaty is self-executing, i.e., if individuals can enforce it without additional statutes?

### Who can be a party in the International court of Justice?

### Does this create individual standing?

## Notes

### 1 – Supremacy Clause

#### While the clause puts a treaty on the same plane as the constitution, why is that impossible under the modern reading of the constitution?

### 2 – Charming Betsy and avoiding conflicts with international law

#### Murray v. The Schooner Charming Betsy – what does this theory require courts to do?

#### We will see later that this is likely a dead doctrine, at least when it means that the court should change the interpretation it would use without the doctrine

### 3 - The Presumption Against Extraterritoriality

#### What is The Presumption Against Extraterritoriality

## Al-Bihani v. Obama, 619 F.3d 1 (DCC 2010)

### Judge Kavanaugh

#### Judge Kavanaugh makes a long argument for why the US courts do not need to incorporate CIL, which is a different argument than Scalia’s claims that it would be wrong to do it whether we need it or not.

#### With the Foreign Soverign Immunities Act of 1976 as an example, what does Justice Kavanaugh see as the way to make CIL binding in the US?

#### How does the larger context in which the AUMF was passed make it unnecessary to incorporate CIL to interpret it?

##### We know what it was for.

#### What is the hard view of *Erie* that he expounds as applied to CIL?

#### In a broader sense, how does Judge Kavanaugh’s position act as a counterpoint to the push for the incorporation of Customary International Law?

### Judge Williams

#### What is Judge Williams’s weaker use for CIL?

#### What is his example of why need to CIL to define military force in the AUMF?

#### What is Judge Williams view of the impact of *Erie?*

### Notes

#### What are Ramsey’s four critieria for using CIL?

## Committee of U.S. Citizens Living in Nicaragua v. Reagan – round II, p. 200

### Notes

#### Thinking about Customary International Law (CIL)

##### How does CIL develop?

##### Are you bound by CIL if you refuse to be?

##### How does jus cogens differ from CIL?

##### What are examples of banned practices under jus cogens?

##### Can you opt out of jus cogens?

##### If you do, what is the enforcement mechanism?

##### Are jus cogens offences illegal under domestic law though statutes?

##### How does Koh, former chief legal advisor to the State Department, argue that the courts are using less discretion when adopting CIL than when recognizing state common law?

##### Can you think of areas where CIL evolved to conflict with basic US constitutional law?

#### How do we fit these ideas together as a picture of the role of CIL and jus cogens in US law?

#### How has the role of CIL changed over the years?

#### Is CIL always a broader set of rights than US law?

## F The continuing Incorporation Debate

### Al-Bihani v. Obama – Round II

#### This is all dicta. Much of this is over the reach of the 2001 AUMF:

##### Second, the 2001 AUMF does not expressly or impliedly incorporate judicially enforceable international-law limits on the President’s direction of the war against al Qaeda and the Taliban. In authorizing the President to employ force, the AUMF authorizes the President to command the U.S. military to kill, capture, and detain the enemy, as Commanders in Chief traditionally have done in waging wars throughout American history. Congress enacted the AUMF with knowledge that the U.S. Constitution and other federal statutes would limit the President’s conduct of the war. But neither the AUMF’s text nor contemporaneous statements by Members of Congress suggest that Congress intended to impose judicially enforceable international- law limits on the President’s authority under the AUMF.

#### Notes

##### We are not going to parse this case because it is a philosophical discussion of CIL that is not necessary to our purposes in this course. You can study this in International Law.