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Executive Agreements in Japan and the United States: Their Differences and Similarities

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EXECUTIVE AGREEMENTS IN JAPAN AND THE UNITED STATES: THEIR DIFFERENCES AND SIMILARITIES

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Abstract: The national constitutions of Japan and the United States describe which domestic branches conclude "treaties" and how they do it. In both countries, the legislative branch plays a critical role in the treaty-making process, checking and controlling the executive branch. However, both nations enter international agreements without following the procedures explicitly provided in their national constitutions. Such agreements are called "executive agreements." In both Japan and the United States, the practice of entering executive agreements has been recognized since the adoption of the current constitutions, and the number of such agreements—in lieu of treaties—is rising. Despite contrasting government and legal systems, the two countries share similarities with regard to executive agreements and the domestic legal force of international agreements. This Article compares the practices of entering executive agreements and shows some differences and similarities by analyzing the drafting history of the constitutions, the history of executive agreements, their types, and their domestic legal force.

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I. INTRODUCTION

The national constitutions of Japan and the United States provide which domestic branches conclude, and how those branches enter into, treaties. Both constitutions require legislative or senatorial approval as a form of checking and controlling the treaty-making power of the executive branches. However, international agreements are sometimes entered into without following the procedures explicitly stipulated in the national constitutions.

Domestically, in both Japan and the United States, international agreements that are made in accordance with the explicit provisions of the national constitutions are referred to as "treaties," and international agreements that are entered into without following constitutional provisions are "executive agreements."

Notably, the number of executive agreements, in lieu of treaties, is rising.[1] In short, international agreements outside the treaty-making procedures stipulated in the constitution—procedures which check the power of the executive branch—are increasing. This trend is seen in both Japan and the United States.

However, those two countries are totally different and adopt quite contrasting governmental and legal systems. Japan is a unitary state with forty-seven prefectures and adopts the parliamentary cabinet system. In Japan, the Cabinet, which is the Japanese executive department, has the power to conclude and ratify treaties.[2] Article 73, Item 3 of the Japanese constitution requires treaty approval by the Diet,[3] the Japanese legislative department.[4] But the existence of executive agreements[5] has been recognized since the adoption of the Constitution of Japan[6] and the Diet is not involved in executive agreements.[7]

While some Japanese scholars find that executive agreements in Japan are increasing, they do not often discuss how they are made but debate

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[1] Yasuo Nakauchi, *The Extent of "Treaties" Requiring the Diet Approval: A Consideration on the Current System and Cases Debated in the Diet*, 429 LEGIS. & RSCH. (House of Councillors) 17, 19 (2020) (Japan); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1210 (2018).

[2] NIHONKOKU KENPŌ [KENPŌ][Constitution], art. 73 (Japan), https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

[3] *Id*. art. 73, item 3.

[4] *Id*. art. 41 ("The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.").

[5] Executive agreements are called *gyousei kyoutei* or *gyousei torikime* in Japanese.

[6] *See infra* Part I.B. One study even points out that the Japanese practice derived from the American practice. *See* Hisakazu Fujita, *Government and Congress in Foreign Policy Making: Japan-U.S. Comparison of Executive Agreement*, in PUBLIC POLICY IN CONTEMPORARY JAPAN (Economic & Political Studies Series No. 66) 422, 423 (Public Policy Study Group ed., 1988) (Japan).

[7] YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 19 (1998) [hereinafter YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW].

more on the subject matter such agreement. Whether an international agreement concluded by the Japanese government is a treaty or executive agreement depends on the grant of approval by the Diet.[8] Since the Constitution does not deal with executive agreements, the Japanese government made a statement on the distinction of treaties and executive agreements, the "Ohira Three Principles."[9] There are roughly two kinds of executive agreements in Japan: (1) executive agreements based on delegation or authorization of treaties concluded by the Cabinet according to Article 73, Item 3 of the Constitution and (2) ones based on other authority of the Cabinet granted according to Article 73, Item 2. Since the Ohira Three Principles categorized agreements according to the subject matter of the international agreement, Japanese scholars are more interested in the scope of executive agreements than their kinds. In other words, while Japanese scholars write extensively about what kinds of subject matters executive agreements may cover in Japan and sometimes discuss their proliferation,[10] they rarely focus on an agreement's status as an executive agreement, as opposed to a treaty.

The United States is a federal state with fifty states and adopts the presidential system. In the United States, the Constitution requires treaties concluded by the President to be approved by the Senate. These international agreements are "Article II treaties" and require two-thirds concurrence of the Senate.[11] However, other international agreements made by the President do not require two-thirds approval of the senators; they are called "executive agreements."[12]

There are three primary types of executive agreements in the United States: executive agreements that derive from Article II treaties (executive agreements pursuant to Article II treaty); congressional-executive agreements made with the approval of Congress; and sole executive agreements issued by the President on his or her own authority.[13] Since the Obama Administration, the number of executive agreements has risen, and Article II treaties are rare.[14] The practice of making executive agreements began right after the ratification of the Constitution.[15] Further, the variety of executive agreements has increased, and researchers

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8 Tadaatsu Mori, *The Current Practice of Making and Applying International Agreements in Japan, in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 191, 195 (Curtis A. Bradley ed., 2019).

9 *See infra* Part I.B.2.

10 *See infra* Part I.B.

11 U.S. CONST. art. II, § 2, cl. 2.

12 CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 79 (3d ed. 2020).

13 Bradley & Goldsmith, *supra* note 1, at 1208.

14 *Id*. at 1210–11.

15 *See infra* Part III.B.

have discussed the authority to create even more types of executive agreements.[16]

Thus, Japan and the United States are different in terms of their legal and government systems. These differences manifest in the way each country's political departments exercise power. However, there are some similarities regarding the practices of executive agreements in both countries. They approach executive agreements in similar ways, specifically with regard to the development of the practice and domestic legal force of international agreements.[17]

This Article describes differences and similarities in executive agreements in Japan and the United States by considering the history, types, and domestic legal force of executive agreements and comparing Japanese and American practices. The Article proceeds as follows. Part II covers executive agreements in Japan. Section A reveals the history of the adoption of the current Japanese constitution and also shows the extent to which treaties need the approval of the Diet. Sections B provides a discussion of what kinds of international agreements require the approval of the Diet. Soon after the adoption of the Constitution, international agreements made by the Cabinet without the approval of the Diet were debated in the Diet and the Cabinet has explained the scope of treaties and executive agreements according to the Ohira Three Principles. Moreover, Section C analyzes the domestic legal force of executive agreements in Japan. It makes clear how they acquire such force and how they are related with other domestic legal norms.

Part III considers the American approach to executive agreements. Section A analyzes the drafting process of Article II of the U.S. Constitution and provides insight as to why the power to make treaties is given to the President and the Senate. Section B clarifies how executive agreements have been used since the adoption of the U.S. Constitution, and Section C discusses the traditional, and emerging, forms executive agreements take. Finally, Section D analyzes the domestic legal force and self-execution of each type of executive agreement.

Part IV compares executive agreements in both legal systems. There are some differences in terms of legislative branch involvements in the making of executive agreements and judicial concerns about such agreements because of the differences in their government systems, the structure of the nations, and their legal systems. However, Part IV also identifies interesting similarities, such as the pervasiveness of their use and the constitutional mechanisms which give international agreements domestic legal force.

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16 *See infra* Part III.C.

17 *See infra* Part IV.

II. JAPAN

The Constitution of Japan is a compilation of treaties in four articles. The Cabinet has the power to make treaties and conduct foreign relations.[18] Treaties must be approved by the Diet[19] and then promulgated by the Emperor.[20] Moreover, treaties may have domestic legal force by promulgation without special legislation. This is based on Article 98, Paragraph 2, which provides that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed."[21] This provision is understood to permit treaties to acquire domestic legal force without implementing legislation.[22]

Article 73 provides as follows: "The Cabinet, in addition to other general administrative functions, shall perform the following functions: . . . [m]anage foreign affairs [and] . . . [c]onclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet."[23] This provision gives the nation's treaty-making power to the Cabinet. But its literal interpretation also requires that the Diet approve all international agreements.[24] However, soon after the adoption of the Constitution, politicians began to discuss the possibility of international agreements entered into without the approval. Thus, such agreements were recognized even at the time of the drafting. This part first analyzes the history of the Constitution, which reveals the history of the making of the Constitution and the rise of executive agreements in Japan.

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18 KENPŌ art.73 (Japan).

19 *Id*. arts. 73, 61. Article 61 provides as follows: "The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties." And Article 60, Paragraph 2 reads "Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

20 *Id*. art. 7.

21 *Id*. art. 98, para. 2.

22 YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW, *supra* note 7, at 29; Shin Hae Bong, *Japan*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION 360, 365 (Dinah Shelton ed., 2011).

23 KENPŌ art. 73, items 2 and 3 (Japan).

24 YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW, *supra* note 7, at 19 (pointing out that not all international commitments require the Diet approval notwithstanding "the clear mandate of Article 73 (3)" [sic]).

A. The Drafting History of the Constitution of Japan

1. The Meiji Constitution

The current constitution of Japan was promulgated on November 3, 1946, and came into effect on May 3, 1947. This constitution was procedurally the result of the revision of the Constitution of the Empire of Japan (the Meiji Constitution), which was the immutable law promulgated in 1889.[25] According to that constitution, the Emperor "reigned over and governed" the Empire of Japan,[26] and he was "sacred and inviolable."[27] In contrast, the current constitution adopts a system where "sovereign power resides with the people"[28] and the Emperor is "the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."[29]

Under the Meiji Constitution, which facially adopted a constitutional monarchy, the treaty-making power vested in the Emperor by Article 13.[30] According to a handbook written by the U.S. government:

> [t]he Legislative power regarding treaties normally is one for a parliamentary body. In Japan, under Article XIII [of the 1889 Constitution of Japan] . . . the Ministry of Foreign Affairs negotiates [treaties] and the Privy Council deliberates and advises the Emperor who concludes them. The Diet was not meant to have a part in the foreign relations. Yet the Diet through its own means . . . attempts to exercise some control.[31]

In addition, according to Hirobumi Ito, the most important framer of the Meiji Constitution and the first Prime Minister of Japan, "the Emperor shall

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25 The imperial edict by the Showa Emperor attached to the Constitution of Japan read "I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said Constitution." Article 73 of the Constitution of the Empire of Japan provided for amendments of the Constitution.

26 DAI-NIPPON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 1 (Japan), https://www.ndl.go.jp/constitution/e/etc/c02.html.

27 *Id*. art. 3. There was also a provision in the Meiji Constitution, which provided that "[t]he Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution." *Id*. art. 4.

28 *Id*. pmbl.

29 *Id*. art. 1.

30 *Id*. art 13 ("The Emperor declares war, makes peace, and concludes treaties.").

31 OFF. OF THE PROVOST MARSHALL GEN., U.S. ARMY SERVICE FORCES, M354-2, CIVIL AFFAIRS HANDBOOK JAPAN SECTION 2: GOVERNMENT AND ADMINISTRATION 33 (1945).

dispose of all matters relating to foreign intercourse, with the advice of His Ministers, but allowing no interference by the Diet therein."[32]

However, when it came to treaty ratification, Article 56 provided that "the Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State when they have been consulted by the Emperor."[33] Acting under this Article, the Privy Councillors considered treaties. The Privy Council, which does not exist under the current Japanese constitution, was an advisory council to the Emperor consisting of a chairman, a vice chairman, and councilors. "The Privy Councillors [were] to give their opinions on important matters of State in response to the Emperor's Call Thereof,"[34] and the Privy Council was "to hold deliberations only when its opinion had been asked for by the Emperor."[35] The Privy Council was both "an organ of the state and an organ of the imperial house,"[36] was not responsible to the Diet,[37] and "exert[ed] considerable influence on legislation."[38] The provisions for the organization of the Privy Council of 1888 referred to in Article 56 of the Meiji Constitution provided that "the Privy Council shall hold deliberations, and present its opinions to the Emperor" on "treaties with foreign countries."[39] However, since 1888, it had been understood that not all treaties should have been deliberated by the Privy Council. And even if treaties were deliberated, the Emperor did not have to follow its opinions.[40] In reality, almost all treaties were submitted to the Privy Council, and the Emperor respected its opinions.[41] According to the Meiji Constitution, the Emperor provided "sanction to laws, and order[ed]

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[32] COUNT HIROBUMI ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 28 (Miyoji Ito trans., 1889). The Constitution required the consent of the Imperial Diet on laws and the expenditure and revenue of the state (Articles 37 and 64) but not on treaty-making, so the Diet was not substantially involved in that process. *See* Yasuo Nakauchi, *Discussion in the National Diet on the System and Operation of the Approval of Treaty*, 330 LEGIS. & RSCH. (House of Councillors) 3, 3 n.2 (2012) (Japan). For more details on the treaty-making process under the Meiji Constitution, *see* Kenneth W. Colegrove, *The Treaty-Making Power in Japan*, 25 AM. J. INT'L L. 270, 275 (1931).

[33] MEIJI KENPŌ art. 56 (Japan).

[34] HIROBUMI ITO, *supra* note 32, at 84.

[35] *Id*. at 99.

[36] Kenneth Colegrove, *The Japanese Privy Council*, 25 AM. POL. SCI. REV. 589, 594 (1931).

[37] *Id*. at 595.

[38] *Id*. at 609. Moreover, the Privy Council sometimes came into conflict with the Cabinet. Kenneth Colegrove, *The Japanese Privy Council*, 25 AM. POL. SCI. REV. 881, 881 (1931).

[39] The Privy Council Created, 1888 (Japanese Government Documents), 42 TRANSACTIONS OF THE ASIATIC SOCIETY OF JAPAN 127–28 (W.W. McLaren ed., 1914).

[40] Tomonori Mizushima, *A Note on 'Executive Agreements' in Japanese Law: A Modest Contribution of an International Law Scholar to Public Law Studies*, 277 NAGOYA UNIV. J. L. & POL. 3, 8–9 (2018) (Japan).

[41] Colegrove, *supra* note 32, at 276–82. For further reading on the domestic legal force of treaties under the Meiji Constitution, *see id*. at 282–86.

[treaties] to be promulgated and executed,"[42] and by promulgation, treaties were given domestic legal force.[43]

2. The Constitution of Japan

After the Japanese defeat in World War II, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP) and GHQ, arrived in Japan to democratize Japan by revising and abolishing domestic laws.[44] The Japanese government established the Constitution Investigation Committee—also called the Matsumoto Committee—which was chaired by Jōji Matsumoto, Minister without Portfolio.[45] Matsumoto worked on the revision of the Constitution based on the "Matsumoto Four Principles," one of which was that the Emperor should have power to exercise his prerogatives.[46] An early draft leaked by *Mainichi Shinbun*, one of the most famous newspapers in Japan, on February 1, 1946,[47] was very conservative, which astonished General MacArthur. In response, MacArthur developed his "Three Principles."[48] Following the principle, the Government Section of GHQ/SCAP drafted his version of a constitution, the MacArthur Constitution.

The Japanese government submitted Mastumoto's Gist of the Revision of the Constitution (*Kenpō Kaisei Yōkō*) to the GHQ on February 8. According to it, Article 13 of the Meiji Constitution would be amended to state the following: "The Emperor declares war, makes peace, or concludes treaties concerning subject matters which are needed to be stipulated by

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42 MEIJI KENPŌ art. 6 (Japan).

43 MAKOTO OISHI, CONSTITUTIONAL FRAMEWORK ON SYSTEM OF GOVERNMENT 181 (2016) (Japan).

44 Proclamation Defining Terms for Japanese Surrender para. 7, July 26, 1945, 3 Bevans 1204 (showing Japan accepted as the terms of surrender, provided for the occupation of Japan as follows: "Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.").

45 4 SHIN SHIMIZU, THE MINUTES OF THE DELIBERATION OF THE DRAFT CONSTITUTION OF JAPAN 75 (1963) (Japan).

46 KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 56 (Ray A. Moore trans., 1997).

47 Toshiyoshi Miyazawa (professor at Tokyo Imperial University, now, the University of Tokyo) made an outline based on Matsumoto's Draft of Tentative Revision of the Constitution Draft, being created by reference to debates at the Matsumoto Committee. It was later referred to as the Tentative Revision of the Constitution (A) and it would be submitted to the GHQ with the addition by Matsumoto, which was the Gist of the Revision of the Constitution. On the draft prepared by Japan, *see* MASAAKI SAITŌ, CONSTITUTION AND TREATIES IN DOMESTIC LAW 28–30 (2002) (Japan).

48 One of the three principles was that the "Emperor is at the head of state. . . . His duties and powers will be exercised in accordance with the Constitution and responsive to the basis will of the people as provided therein." 1 THE MAKING OF THE CONSTITUTION OF JAPAN 98–99 (Kenzō Takayanagi, Ichirō Ohtomo & Hideo Tanaka eds., 1972) [hereinafter 1 THE MAKING OF THE CONSTITUTION] (Japan).

laws or impose serious obligations on the Empire of Japan, with the consent of the Imperial Diet."[49]

Although this suggested article did not require the Diet's consent for all treaties, it did require the consent for certain kinds of treaties. However, the GHQ rejected this draft and instead handed over the GHQ Draft (the so-called "MacArthur Draft") to the Japanese government on February 13.

Articles on the Executive were worked on by the Executive Committee in the Government Section of GHQ, whose members were Cyrus H. Peake, Jacob I. Miller, and Milton J. Esman.[50] But provisions on treaties were handled by the Committee on the Emperor, Treaties, and Enabling Provisions (the Committee on the Emperor and Miscellaneous Affairs) whose members were George A. Nelson, Jr. and Richard A. Poole.[51] Although a provision on the treaty-making power was drafted by that Committee,[52] the Steering Committee, which oversaw seven committees and managed the organization, decided that "the Article on Treaty Making Powers be incorporated in the Chapter on the Executive."[53]

But no agreement was reached as to whether all kinds of international agreements would require the Diet's approval.[54] For example, a memorandum from the Chief of the Government Section's office expressed that "[t]he Cabinet shall be empowered to conclude treaties and agreements and to enter into international conventions, provided that such treaties, agreements and conventions shall be effective only if the consent of the Diet be granted by prior authorization or subsequent ratification."[55] Moreover, a report submitted by the Committee on the Executive said the Cabinet would "[c]onclude such treaties, international conventions and agreements with the consent of the Diet by prior authorization or subsequent ratification as it deems in the public interest."[56] And the Steering Committee offered yet another opinion—that the treaty-making power be granted to the Executive with the approval of the legislative department,[57] which meant it considered the treaty-making power to be shared by the political departments and controlled by the legislative department. Based on these opinions, the GHQ submitted the following draft Articles to the Japanese government:

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49 Jōji Matsumoto, Gist of the Revision of the Constitution (Feb. 8, 1946) (available in the National Diet Library repository), https://www.ndl.go.jp/constitution/e/shiryo/03/074a_e/074a_etx.html

50 1 THE MAKING OF THE CONSTITUTION, *supra* note 48, at 110–11.

51 *Id.* at 110–12. For more details of the drafting by Government Section of GHQ, *see* 2 THE MAKING OF THE CONSTITUTION OF JAPAN, 41–54 (Kenzō Takayanagi, Ichirō Ohtomo & Hideo Tanaka eds., 1972) [hereinafter 2 THE MAKING OF THE CONSTITUTION] (Japan).

52 *See* 2 THE MAKING OF THE CONSTITUTION, *supra* note 50, at 226–28.

53 1 THE MAKING OF THE CONSTITUTION, *supra* note 50, at 136.

54 *Id.*

55 *Id.* at 136–39, 146–48.

56 *Id*. at 180–81.

57 *Id.* at 136–39.

> Article VI. Acting only on the advice and with the consent of the Cabinet, the Emperor, on behalf of the people, shall perform the following state functions; Affix his official seal to and proclaim all laws enacted by the Diet, all Cabinet orders, all amendments to this Constitution, and all treaties and international conventions; . . .
>
> Article LXV. In addition to other executive responsibilities, the Cabinet shall: . . . Conduct foreign relations; Conclude such treaties, international conventions and agreements with the Consent of the Diet by prior authorization or subsequent ratification as it deems in the public interest; . . .
>
> Article XC. This Constitution and the laws and treaties made in pursuance hereof shall be the supreme law of the nation, and no public law or ordinance and no imperial rescript or other governmental act, or part thereof, contrary to the provisions hereof shall have legal force or validity.[58]

The GHQ explained that the objectives of the revision were to "[c]entralize all executive power in the Cabinet and eliminate the Privy Council and all other extraconstitutional executive bodies that formerly struggled for power."[59] However, the GHQ also sought to diffuse power to the legislative branch. It did so by requiring the Cabinet to inform the Diet about the status of foreign affairs.[60] Thus, the GHQ considered the Diet to involve all international agreements.

In February, 1946, the Japanese government negotiated the terms of its constitution with the Government Section of the GHQ.[61] The MacArthur Draft was then translated into Japanese, and the Japanese government made a draft following the MacArthur Draft (the March 2 Draft); the Outline of a Draft for a Revised Constitution (*Kenpō Kaisei Sōan Yōkō* (the March 6 Outline)) was then made public.[62] In this draft, the articles regarding the treaty-making power were further clarified with the following language:

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58 *Id*. at 270, 290, 302.
59 *Id.* at 304–06.
60 *Id.* at 312.
61 *See* 2 THE MAKING OF THE CONSTITUTION, *supra* note 50, at 77–101.
62 *Id.* at 101–04.

> Article VII. The Emperor, with the advice and approval of the Cabinet, shall perform the following functions of state on behalf of the people: Promulgation of amendments of the constitution, laws, cabinet orders and *treaties*. . . .
>
> Article LVI. The second paragraph of the preceding article applies also to the Diet Approval required for the conclusion of *treaties, and international conventions and agreements*. . . .
>
> Article LXIX. The Cabinet, in addition to other general administrative functions, shall: . . . conduct affairs of State; Manage foreign affairs; [and] Conclude *treaties, international conventions and agreements*. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet. . . .
>
> Article XCIII. This Constitution and the laws and *treaties* made in pursuance hereof shall be the supreme law of the state and no public law of ordinance and no imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.[63]

But this draft was totally different from the draft prepared by the Constitutional Problem Investigation Committee of Japan and did not consider what kinds of treaties would require the consent of the Diet in the process of making them.

The Bureau of Legislation and Kades (BLK) immediately set about to codify the March 6 Outline.[64] But because there were some issues in the draft, such as terminology and interpretation, the BLK tried to codify while still meeting with the Government Section of the GHQ.[65] Moreover, the BLK solicited feedback from concerned government ministries[66] and held a meeting with Jōji Matsumoto to discuss problematic portions of the Outline.[67] The BLK argued that adding "international conventions . . . "

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[63] Draft Constitution of Japan Accepted by the Cabinet on 6 March 1946 (available at the National Diet Library Repository), https://www.ndl.go.jp/constitution/e/shiryo/03/093a_e/093a_etx.html (last visited Nov. 4, 2023) [hereinafter 1946 Draft Constitution] (emphasis added).

[64] 3 TATSUO SATŌ, HISTORY OF THE FORMULATION OF THE CONSTITUTION OF JAPAN 227–35 (Isao Satō ed., 1994) (Japan).

[65] *Id*. at 286–325.

[66] MAKOTO OISHI, *supra* note 43, at 183.

[67] 3 TATSUO SATŌ, *supra* note 64, at 235.

only to Article 69 was not uniform compared to some articles relating to treaties.[68] It further pointed out that the use of "approval" in the context of subsequent Diet approval was inappropriate.[69]

In contrast, the Treaties Bureau of the Ministry of Foreign Affairs (MOFA) had more specific and detailed opinions. In a detailed paper, "Concerning the Treaty-Making System under the Revised Draft of the Constitution,"[70] MOFA challenged the "Approval of the Diet related to Treaty-Making."[71] It opined that because the approval procedure in treaty making was new to the Japanese legal system, it was appropriate to refer to precedential practices in some other countries and to consider what kinds of treaties would need the approval of the Diet .[72] Moreover, MOFA made the following conclusion, which shows how the framers considered the Diet approval to treaties and whether they acknowledged the existence of executive agreements:

> It may not be clear on the extent of treaties that requires the Diet approval only from the article of the Draft, and, therefore, this compels the government to wait for the compilation of the legislations and the practice. Consequently, the Bureau suggests having clear legislative measures to prevent problems or doubts. This was in consideration of the conflicts between the government and the Privy Council about what kinds of treaties should have been submitted to the latter and in view of a possibility that certain problems would happen under the system adopting the Diet approval of treaties.
>
> As a matter of law, the extent of the Diet's approval of treaties needs to be considered in terms of both (i) the significance of approval by the Diet, which consists of the representatives of the people and (ii) the convenience of the government, which is in charge of diplomacy. In these respects, the government should obtain the approval of the Diet when entering into the following three kinds of treaties with reference to examples of democratic countries:

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68 *Id*. at 253.
69 *Id*.
70 *Id*. at 239.
71 *Id*. at 253.
72 MAKOTO OISHI, *supra* note 43, at 184.

> 1. Treaties concerning the rights and duties of the people (treaties involved in legislative matters)
>
> 2. Treaties that place a financial burden on the state or the people
>
> 3. Treaties that impose important duties on the state, such as peace treaties, treaties involving territorial changes, and amity, commerce, and navigation treaties.
>
> It is appropriate that the Cabinet is allowed to enter into treaties other than the above treaties based on the exclusive power of the Cabinet, just as the President of the United States of America can enter into executive agreements on his or her own power.[73]

The Treaties Bureau of MOFA envisioned three kinds of treaties which required the Diet's approval. Because those treaties could have an impact on Japanese nationals, the Bureau thought that the Diet's approval should be required, as will be discussed in the next section. Interestingly, the above opinion referred to the American practice of executive agreements.

On April 9, two delegates from MOFA met with some members of the Government Section of GHQ.[74] They suggested to the GHQ that the extent of treaties requiring the Diet approval be narrowed. They did so while referring to the American practice of executive agreements.[75] In response, the GHQ told the MOFA delegates that it did not understand the treaty provision to require approval, even for executive agreements, and that MOFA was allowed to delete "agreements" in the case of a terminological problem.[76] However, the delegates from MOFA told them to leave in the term "agreements" since it was possible to interpret it that way.[77]

After the meeting, texts of the provisions were made in a colloquial style with several changes and revisions.[78] In the text of Article 69, the term "treaties, international conventions, and agreements" was changed to just "treaties" (*Kenpō Kaisei Sōan*).[79] The Privy Council deliberated the draft,

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[73] *See* 3 TATSUO SATŌ, *supra* note 64, at 253–54. *See also* MAKOTO OISHI, *supra* note 43, at 184–85.

[74] 3 TATSUO SATŌ, *supra* note 64, at 309.

[75] Yoshiyasu Ebihara, *Reconsideration on the Prehistory of Drafting Process of Article 73 Item (3) of the Constitution of Japan*, 117 MEMOIRS INST. HUMANS., HUM. & SOC. SCIS., RITSUMEIKAN UNIV. 219, 236 (2019) (Japan).

[76] 3 TATSUO SATŌ, *supra* note 64, at 312.

[77] MAKOTO OISHI, *supra* note 43, at 185; 3 TATSUO SATŌ, *supra* note 64, at 311–12.

[78] 3 TATSUO SATŌ, *supra* note 64, at 326.

[79] *Id*. at 344.

and the majority of members voted to adopt it.[80] And pursuant to the Meiji Constitution, the Revised Draft of the Constitution of the Empire of Japan (*Teikoku Kenpō Kaiseian*) was submitted with imperial rescript to the House of Representatives of the 90th Imperial Congress for the review and amendment of the draft. The articles on the treaty-making power were not amended there.[81]

At that time, most of the Japanese framers strongly suggested to amend the new Constitution's Supremacy Clause. That article was a near replica of the Supremacy Clause of the U.S. Constitution.[82] As such, it provided for the supremacy of the federal constitution, federal law, and treaties over state laws. But it was inappropriate to incorporate this American clause into the new constitution of Japan, which was a unitary, not a federal, state.[83]

The revised draft included an amended Supremacy Clause. It was suggested to amend Article 93 (later, Article 94) to provide that only the constitution was the supreme law of the state due to criticism of the federal–state style provision.[84] But MOFA felt that it was unfavorable that Japan would not have a constitutional provision that indicated respect for treaties and international law.[85] Accordingly, the Director of the Treaties Bureau presented Tokujirō Kanamori, the Minister of States for Constitution Revision, with a draft revision, adding as a second paragraph of Article 94 that "[t]reaties concluded or entered into by Japan, decisions of international organizations which Japan participates in, and established law of nations shall be respected together with this Constitution."[86]

Ultimately, the House of the Representatives—the Imperial Diet's lower house—agreed to delete "laws and treaties" from Article 94 and to add the second paragraph suggested by the Treaties Bureau. According to Hitoshi Ashida, the chairman of the Committee on Bill for Revision of the Imperial Constitution and Prime Minister in 1948, some believed that granting supremacy to laws and treaties was unreasonable even though the status of the constitution as the supreme law of the land was generally

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80 *Id*. at 349.

81 However, the BLK prepared materials for answers to supposed questions and MOFA was also prepared. *See* Yoshiyasu Ebihara, *supra* note 75, at 238–40; 3 TATSUO SATŌ, *supra* note 64, at 447–48.

82 U.S. CONST. art. VI, cl. 2. ("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.")

83 MASAAKI SAITŌ, *supra* note 47, at 30.

84 *Id*. at 31.

85 4 TATSUO SATŌ, HISTORY OF THE FORMULATION OF THE CONSTITUTION OF JAPAN 746–47 n. 3 (Isao Satō ed., 1994) (Japan).

86 *Id*.

acceptable.[87] The draft was amended as follows in the House and was submitted to the House of Peers[88]—the upper house of the Imperial Diet:

> This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.
>
> The treaties concluded by Japan and established laws of nations shall be faithfully observed.[89]

The second paragraph received considerable attention, in light of Japan's not-so-distant past. During the Plenary Session of the House of Peers on August 29, 1946, Minister Kanamori, in response to an opinion that those two paragraphs were meaningless and should be deleted,[90] made the following statement:

> It is domestically very necessary to make clear the import of the provision that Japan would never disrespect treaties. The current status of Japan in international society is doubtful since it disrespected treaties in the past, so I really believe that it is highly reasonable to insert such a provision.[91]

Furthermore, Minister Kanamori also said in the Special Committee of the House of Peers that "it was substantially meaningful to establish a provision of respect for treaties and the law of nations in terms of criticism on actions by Japan from the past and distrust of foreign countries on Japanese domestic law."[92]

Finally, the draft, with its suggested amendments, passed the Plenary Session of the House of Peers on October 6, 1946. It was submitted to the House of Representatives and passed the Plenary Session of the House, which completed all of the procedural requirements of the Constitution of the Empire of Japan.[93] After that vote, a plenary session of the Privy

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87 4 SHIN SHIMIZU, *supra* note 45, at 477.

88 The House of Peers did not exist under the current Constitution of Japan. The National Diet now consists of the House of Representatives and the House of Councillors. In contrast to the present system, members of the House of Peers were not elected by the national election but were "composed of the members of the Imperial Family, of the orders of nobility, and of those persons, who have been nominated thereto by the Emperor." MEIJI KENPŌ art. 34 (Japan).

89 4 SHIN SHIMIZU, *supra* note 45, at 466.

90 PROCEEDINGS OF THE REVISION OF THE IMPERIAL CONSTITUTION OF JAPAN: RENUNCIATION OF WAR 303 (Secretariat of the House of Councillors ed., 1951) (Japan).

91 *Id.* at 307.

92 *Id*. at 472.

93 4 SHIN SHIMIZU, *supra* note 45, at 142.

Council met and approved the draft, and it was officially ratified by the Emperor. "The Constitution of Japan" was promulgated on November 3, 1946, and put into effect on May 5, 1947.

As mentioned above, procedurally, the current Constitution of Japan was passed as a revision of the Constitution of the Empire of Japan, and it grants the treaty-making power to the Cabinet with the Diet approval.[94] Moreover, it specifies that treaties ratified by Japan are to be "fully observed."[95]

Two points stand out regarding the new Constitution's adoption. First, the words "treaties, international conventions, and agreements" in a provision of the Cabinet powers was changed to just "treaties," as discussed above.[96] This revision was not questioned by the Imperial Diet, and no groups of politicians submitted a revision of its content. Rather, MOFA—part of the Cabinet—was responsible for changing a provision related to the Cabinet power. MOFA felt that it was not appropriate to stipulate the treaties that the Cabinet had the power to make without limits, and MOFA opined that it was proper to enumerate treaties requiring the Diet's approval and that making international agreements without the involvement of the Diet should be permitted.[97] Because the GHQ thought that it was possible to include these agreements by interpretation without changing the terms of the provision, the provision did not enumerate the treaties that should be approved by the Diet.[98] It is apparent from the process of making the Constitution that the framers had actually considered the possibility of executive agreements.

Second, the framers agreed that the American Supremacy Clause was not fit for the Japanese legal system. The Supremacy Clause in the U.S. Constitution provided for the supremacy of the federal constitution, federal law, and treaties over state laws, so it was not proper for a unitary state like Japan.[99] As analyzed above, the framers deleted treaty supremacy from the draft.[100] However, after reflecting on Japanese treaty violations of the past, a new provision was added in order to make clear Japan's attitude

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94 KENPŌ art. 73, item 3 (Japan).

95 *Id*. art. 98, para. 2.

96 *Compare* 1 THE MAKING OF THE CONSTITUTION, *supra* note 48, at 290 (discussing Article LXV of the GHQ draft), *and* 1946 Draft Constitution, *supra* note 63, at art. LXIX, *with* 3 TATSUO SATŌ, *supra* note 64, at 344 (discussing the Kenpō Kaisei Sōan).

97 *See supra* notes 70–73 and accompanying texts.

98 *See supra* notes 74–77 and accompanying texts.

99 *See* Hajime Nishioka, *Histories of the Formulation of Article 98, Paragraph 2 of the Constitution of Japan (The "Established Laws of Nations" Clause) and Article 25 of the Bonn Basic Law (The "General Rules of International law" Clause) (Part 2)*, 18 FUKUOKA UNIV. REV. LAW 1, 10 (1974) (Japan).

100 *See supra* notes 83–89 and accompanying texts. There was also suggestion by the Japanese government that the deletion of the worde "the laws and treaties made in pursuance hereof" from Article 93 (later Article 94) of the Draft was allowed by members of the GHQ. 4 TATSUO SATŌ, *supra* note 85, at 682, 688, 695.

regarding its respect for treaties. Although some members of the House of Peers found this addition to be unnecessary, it ultimately agreed that it was important for the new constitution to have a provision for treaty respect. Therefore, this fact reveals that the political meaning of Article 98, Paragraph 2 was a form of "national repentance"—a reflection on the county's historical disrespect toward and violations of treaties and the law of nations; a commitment to restoring trust in joining the ranks of the international community; and a way to pronounce the resurgence of Japanese people for them to be loved by all the nations of the world.[101]

B. The History and Scope of Executive Agreements

Problems arose for the first time since enacting the new Constitution during discussions of the 1952 Japan–U.S. Administrative Agreement.[102] That agreement was concluded according to Article 3 of the Japan–U.S. Security Treaty, signed in 1951,[103] but the Japanese government never submitted the Administrative Agreement for approval or let the Diet deliberate. After this Agreement was debated, in 1974, then-Foreign Minister Masayoshi Ohira released a statement describing the scope of treaties and Diet approval, known as the "Ohira Three Principles."[104] However, due to MOFA's concerns during the constitution's drafting, the issue on the scope of treaties for which the Diet approval was not required had already been discussed.[105] And even before 1951 such agreements had already existed in Japan.

1. Debates before the Ohira Three Principles

This subsection analyzes debates on executive agreements before the publication of the Ohira Three Principles, which are the most authoritative statements on executive agreements. And this subsection first describes the views of MOFA during the making of the constitution. As will be seen, Seiichi Nakahara, a public law scholar in Japan, pointed out that the practice of executive agreements had already existed under the Meiji Constitution and that there had been international agreements that did not require the Privy Council's deliberation.[106] However, such international

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101 Hajime Nishioka, *supra* note 99, at 14.

102 Administrative Agreement Under Article III of the Security Treaty Between the United States and Japan, Japan-U.S., Jan. 22, 1952, 3 U.S.T. 3341.

103 Japan Security Treaty, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3329.

104 *See, e.g.*, *H of Representatives*, *Comm. on Land, Infrastructure, Transport and Tourism No. 11*, 208th Diet 14 (Apr. 22, 2022) (Tomohiro Mikanagi, Deputy Director-General, International Legal Affairs Bureau, MOFA) (Japan), https://kokkai.ndl.go.jp/#/detail?minId=120804319X01120220422&spkNum=105&current=1.

105 *See supra* notes 70–78 and accompanying texts.

106 SEIICHI NAKAHARA, ISSUES ON INTERNATIONAL TREATY AND CONSTITUTION 125 (1969) (Japan).

agreements were based on other treaties or the delegation of domestic laws. Their purposes were either (1) to implement treaties themselves; (2) to provide for the details of existing treaties;[107] or (3) to see to purely administrative matters based on experience or legal interpretations.[108] Thus, during the era of the Constitution of the Empire of Japan, executive agreements were allowed.[109] Moreover, consensus formed around MOFA's position, which was reflected by the Treaties Bureau,[110] concerning the scope of international agreements for which consent was requested.[111]

In addition to the Treaties Bureau opinion discussed in the previous section, MOFA expressed its opinions on the scope of treaties and Diet approval in two materials created in November 1945: "Overview on International Treaty"[112] and "Concerning an Issue of the Revision of Art. 13 of the Constitution (Diplomatic Powers of the Emperor)."[113] The former explained the necessity of the revision of the article and suggested requesting the approval of the Diet on three kinds of treaties: (1) treaties dealing with legislative matters (including the rights and duties of the subjects of Japan and legislative changes); (2) treaties imposing financial duties on Japan; and (3) commerce treaties.[114] In contrast, the MOFA's opinion "Concerning an Issue of the Revision of Art. 13 of the Constitution" expressed by the First Division of Treaties Bureau, argued against the revision. The First Division believed it was more appropriate to revise Article 13 step by step, in light of Japanese people's immature

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107 *Id*. at 125–26.

108 *Id*. at 126. There were also international agreements that needed no deliberation of the Privy Council, such as an agreement on unrestricted medical practice between Japan and Mexico (1917) and Japan-China detailed agreements on the unsettled problem of Shantung (1922). *Id*. *See also* 1 ISAO SATŌ, SOME ISSUES ON THE CONSTITUTIONAL INTERPRETATION, 217, 221–22 (1953) (referring to *H. of Councillors, Comm. on Foreign Affs*. *No. 11*, 13th Diet 6 (Mar. 12, 1952) (statement of Hisao Yanai, former Director-General of the Treaties Bureau), https://kokkai.ndl.go.jp/#/detail?minId=101313968X01119520312&current=1 (Japan)).

109 The article on international agreements that was to be deliberated by the Privy of Council in the provisions for the organization of the Privy Council of 1888 was revised in 1890; the term "treaties" was changed to "treaties and agreements." Tomonori Mizushima, *supra* note 40 at 8. After that, the term was revised into "international treaties" in 1938 due to secrecy about the title and the formality of international agreements, which required deliberation. *Id*. However, the revision shows that international agreements without deliberation did exist. *Id*. at 8–9.

110 *See supra* notes 70–73 and accompanying texts.

111 According to Yoshiyasu Ebihara, the view on the scope of treaties which required the consent of the Imperial Diet had been established already on November, 14, 1945. Yoshiyasu Ebihara, *supra* note 75, at 228–30.

112 "An Overview on International Treaty," MOFA Record B.0.0.0.1-1, 1945, in Sundries of Treaties Matters, Concerning Japan, Vol. 2 (Japan) in possession of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. It is not clear which division of MOFA made this and when. Yoshiyasu Ebihara, *supra* note 75, at 244–45.

113 The First Division of the Treaties Bureau "Concerning an Issue of the Revision of Art. 13 of the Constitution (Diplomatic Powers of the Emperor)," November 11, 1945, reprinted in 1 COMPLETE COLLECTION OF MATERIALS OF THE MAKING THE CONSTITUTION OF JAPAN 253–57 (Nobuyoshi Ashibe et al. eds., 1997) [hereinafter 1 MATERIALS OF THE MAKING OF THE CONSTITUTION] (Japan).

114 An Overview on International Treaty, *supra* note 112.

understanding of international politics.[115] It suggested to adopt "a system admitting consent only to treaties involving legislative matters and financial impositions on the country."[116] It is not clear why MOFA submitted two different opinions on the scope of treaties. However, what is clear is that MOFA had already recognized the existence and scope of executive agreements before both the GHQ draft and the Outline of a Draft for a Revised Constitution was made.[117]

Moreover, a note used by the BKL in a meeting with MOFA showed that it would be troublesome for all treaties to be submitted to the Diet for approval.[118] Instead, it favored executive agreements not related to the Diet to be reported ex post and for there to be room for secret treaties.[119] The BKL clearly had the intention of excluding executive agreements from those international agreements that required the approval of the Diet.[120]

But as this Article exposed in the previous section, the new constitution did not state the scope of the treaties requiring the Diet approval. After the constitution was made, Japan concluded a security treaty with the United States at the same time as the signing of the San Francisco Peace Treaty.[121] Article 3 of the Security Treaty provided for the following: "The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."[122] Japan and the United States also made an administrative agreement to implement the Security Treaty.[123] However, the Japanese government concluded the agreement without submitting it to the Diet. This was the first time the Cabinet's request for the approval of a treaty under the new constitution could be discussed.[124]

The Japanese government offered a solution in 1951 to the perceived unconstitutionality of the Japan–U.S. Administrative Agreement. Article 3 of the Security Treaty provided for agreements that implemented the

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115 1 MATERIALS OF THE MAKING OF THE CONSTITUTION, *supra* note 113, at 257.

116 *Id*. at 257.

117 *See supra* notes 73, 75 and accompanying texts. For more details, *see* Yoshiyasu Ebihara, *supra* note 75, at 222–26. The scope of treaties with the Diet approval was shown in drafts of the Constitution Investigation Committee. *See supra* note 49 and accompanying text; MASAAKI SAITŌ, *supra* note 47, at 28–31.

118 "Meetings with Governmental Ministries and Agencies," in Materials related to Tatsuo Satō 50 (Collection of the National Diet Library).

119 *Id*.

120 Yoshiyasu Ebihara, *supra* note 75, at 234.

121 Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169.

122 Japan Security Treaty, *supra* note 103, at 3332.

123 Administrative Agreement, *supra* note 102, at 3341.

124 Before that, the government referred to executive agreements in the U.S. in answering a question about treaty ratification in Japan and other countries. *H. of Councillors, Comm. on Foreign Affs. No. 14*, 10th Diet 3 (June 1, 1951) (Kumao Nishimura, Director-General of the Treaties Bureau), https://kokkai.ndl.go.jp/#/detail?minId=101013968X01419510601&current=1 (Japan).

details of the treaty.[125] Thus, the approval of the Security Treaty by the Diet beforehand indicated legislative approval of the Administrative Agreement between the executive branches of the two nations. Therefore, the Administrative Agreement did not need to be approved by the Diet, except in the case that money or legislation was needed to implement the agreement.[126]

The Japanese government also offered another explanation for why the Cabinet did not request for Diet approval to the Administrative Agreement. It analogized to the distinction in the United States between "treaties" and "executive agreements" and claimed that an "Administrative Agreement" had the same nature as an executive agreement—which did not require legislative approval in the U.S.[127]

Under this reasoning, the Cabinet had authority, in the case of treaty delegations, to enact international agreements without the Diet's approval. Although one member of the government claimed that Article 3 of the Security Treaty granted the Cabinet the power to enter into some agreements,[128] the Diet's approval was still required for treaties concerning the rights and duties of Japanese citizens.[129] And in cases where the treaties were concerned with legislative matters, they would be entered into the proceedings of the Diet.[130]

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[125] Japan Security Treaty, *supra* note 103, at 3332.

[126] *H. of Councillors, Plenary Sess. No. 4*, 12th Diet 6 (Oct. 15 1951) (statement of Takeo Ohashi, Minster of Justice), https://kokkai.ndl.go.jp/#/detail?minId=101215254X00419511015&current=1 (Japan). *See also H. of Representatives, Spec. Comm. on the Peace Treaty and the Japan-U.S. Security Treaty No. 3*, 12th Diet 4 (Oct. 18, 1951) (statement of Takeo Ohashi, Minister of Justice), https://kokkai.ndl.go.jp/#/detail?minId=101205185X00319511018&current=6 (Japan).

[127] *H. of Representatives, Spec. Comm. on the Peace Treaty and the Japan-U.S. Security Treaty No. 7*, 12th Diet 28 (Oct. 23, 1951) (a response of Ryuen Kusaba, Parliamentary Vice-Minister for Foreign Affairs to a member of House of Representatives), https://kokkai.ndl.go.jp/#/detail?minId=101205185X00719511023&current=6 (Japan).

[128] *H. of Representatives, Comm. on Rules and Admin. No. 12*, 13th Diet 1 (Feb. 5, 1952) (statement of Katsuo Okazaki, Minister of States), https://kokkai.ndl.go.jp/#/detail?minId=101304024X01219520205&current=5 (Japan). *See also H. of Councillors, Comm. on Foreign Affs. No. 2*, 13th Diet 3 (Feb. 12, 1952) (statement of Katsuo Okazaki, Minister of States), https://kokkai.ndl.go.jp/#/detail?minId=101313968X00219520212&current=10 (Japan).

[129] *H. of Representatives, Comm. on Foreign Affs. No. 3*, 13th Diet 7 (Feb. 6, 1952) (statement of Katsuo Okazaki, Minister of States), https://kokkai.ndl.go.jp/#/detail?minId=101303968X00319520206&current=3 (Japan)

[130] *H. of Representatives, Spec. Comm. on the Peace Treaty and the Jap.-U.S. Security Treaty No. 8*, 12th Diet 11 (Oct. 24, 1951) (statement of Shigeru Yoshida, Prime Minister), https://kokkai.ndl.go.jp/#/detail?minId=101205185X00819511024&current=1 (Japan). *See also H. of Representatives*, *Spec. Comm. on the Peace Treaty and the Jap.-U.S. Security Treaty No. 9*, 12th Diet 3 (Oct. 25, 1951) (statement of Shigeru Yoshida, Prime Minister), https://kokkai.ndl.go.jp/#/detail?minId=101205185X00919511025&current=1 (Japan); *H. of Councillors, Spec. Comm. On Peace Treaty and Jap.-U.S. Security Treaty No. 6*, 12th Diet 14 (Oct. 30, 1951) (statement of Shigeru Yoshida, Prime Minister), https://kokkai.ndl.go.jp/#/detail?minId=101215185X00619511030&current=1 (Japan); *H. of Councillors, Spec. Comm. on the Peace Treaty and the Jap.-U.S. Security Treaty No. 18*, 12th Diet 3 (Nov. 14, 1951) (statement of Shigeru Yoshida, Prime Minister), https://kokkai.ndl.go.jp/#/detail?minId=101215185X01819511114&current=1 (Japan).

After these discussions in the Diet, the Supreme Court of Japan in 1959 noted that the Administrative Agreement was constitutional in obiter dictum.[131] It said that although the Administrative Agreements was not ratified by the Diet, it was constitutional based on a delegation of Article 3 of the Security Treaty.[132] Therefore, "the stationing of the Security Forces based upon the Security Treaty and the Administrative Agreement must also be admitted as being constitutional."[133] Even though this opinion was expressed in obiter dictum, the Supreme Court of Japan had in mind that the Administrative Agreement which was made without the Diet approval was constitutional.

After the Diet debated the Japan–U.S. Administrative Agreement, the Japanese government released a statement—the Ohira Three Principles, an important development for Japanese executive agreements. The Ohira Principles are the most famous and authoritative statements on executive agreements in Japan. The Principles describe the distinction between treaties and executive agreements, but, as discussed above, MOFA, not the Ohira Principles, was the first to describe executive agreements.[134]

Since the debate on the Administrative Agreement, a protocol amending the Japan–U.S. Agreement for Cooperation Concerning Civil Uses of Atomic Energy[135] was on the proceedings of the Diet. A debate ensued because the Diet and the Cabinet disagreed about the interpretation of Article 9.A of the agreement,[136] based on which an exchange of diplomatic notes[137] was made and never submitted and reported on to the Diet.[138] As a result, the government made a promise to pronounce a

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131 The *Sunagawa* Case, SAIKŌ-SAIBANSHO [Sup. Ct.] Dec. 16, 1959, Shō 34 (A) 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225, 3236, https://www.courts.go.jp/app/hanrei_en/detail?id=13 (Japan).

132 *Id*.

133 *Id*.

134 *See supra* notes 112–20 and accompanying texts. Until the pronouncement of the Ohira Principles, the Japanese government confirmed which treaties should be approved by the Diet. According to the government's view, executive agreements could only be made between the executive branches, which meant there was no involvement by the legislative branch. *H. of Councillors*, *Subcomm. on Budget of Fiscal Year Shōwa 27 and the Constitution No. 2*, 13th Diet 9 (Mar. 24, 1952) (statement of Katsuo Okazaki, Minister of States), https://kokkai.ndl.go.jp/#/detail?minId=101315264X00219520324&current=1 [hereinafter *Subcomm. on Budget of Fiscal Year Shōwa 27 and the Constitution No. 2*] (Japan).

135 Protocol Amending the Agreement for Cooperation Between the Government of the United States of America and the Government of Japan Concerning Civil Uses of Atomic Energy, Mar. 28, 1973, 24 U.S.T. 2323.

136 Agreement for Cooperation between the Government of the United States of America and the Government of Japan Concerning Civil Uses of Atomic Energy, February, 26, 1968, 19 U.S.T. 5214.

137 Agreement amending the agreement of February 26, 1968, February, 24, 1972, 23 U.S.T. 275.

138 For some discussions on the Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, *see* Isao Satō, *The Treaty Approval by the Diet and Exchange of Notes*, 19 SOPHIA L. REV. 135 (1976).

unified view on executive agreements,[139] which led to the famous statement: the Ohira Three Principles.

From the Japanese perspective, whether an agreement requires the Diet approval is primarily determined by the content of the agreement, not the title (although executive agreements of Japan are made in the form of an exchange of notes). For example, an agreement between the Minister of Posts and Telecommunications and the Postmaster General does not need to be approved by the Diet because a postal treaty provides for such an agreement, and its content is not so significant as to have an impact on Japanese nationals.[140]

Masato Fujisaki, the then Director-General of the Treaties Bureau of MOFA and later a justice of the Supreme Court, explained the need for agreements to always be approved in the case that they are related to legislative matters, financial matters, or politically important matters although neither legislative nor financial.[141]

Fujisaki also advocated for using the following criteria with regard to the scope of treaties submitted to the Diet for approval.[142] First, treaties involving legislative matters, such as commerce and navigation treaties and tax treaties, needed to be approved by the Diet. Second, treaties concerning financial imposition on the nation in excess of the budget also required approval. For example, reparation treaties and treaties imposing a duty of payment on financial contributions fell under this category. Third, politically "important" treaties unrelated to legislative or financial matters—such as friendship treaties and cultural agreements—also needed to be approved by the Diet.

In the case of the Administrative Agreement, since Article 3 did not fall under any of the three categories, the Cabinet entered into it without the Diet's approval because of the delegation of the Security Treaty. However, in a new security treaty with the United States[143] and the Japan–U.S. Status of Forces Agreement in 1960 under Article VI of the new

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[139] *H. of Representatives, Comm. on Foreign Affs. No. 37*, 71st Diet 2 (Sep. 25, 1973) (Kiyoshi Mizuno, Parliamentary Vice-Minister for Foreign Affairs), https://kokkai.ndl.go.jp/#/detail?minId=101013968X01419510601&current=1 (Japan).

[140] *Subcomm. on Budget of Fiscal Year Shōwa 27 and the Constitution No. 2*, *supra* note 134, at 9.

[141] *H. of Councillors, Spec. Comm. on the Jap.-Korea Treaty No. 3*, 50th Diet 26 (Nov. 24, 1965) (statement of Masato Fujisaki, Director-General of the Treaties Bureau), https://kokkai.ndl.go.jp/#/detail?minId=105014958X00319651124&current=1 (Japan).

[142] *H. of Representatives, Comm. on Foreign Affs. No. 11*, 46th Diet 5 (Mar. 18, 1964) (statement of Masato Fujisaki, Deputy Director-General, MOFA), https://kokkai.ndl.go.jp/#/detail?minId=104603968X01119640318&current=1 [hereinafter *Comm. on Foreign Affs. No. 11*] (Japan).

[143] Treaty of Mutual Cooperation and Security between the United States and Japan, Japan-U.S., June 23, 1960, 11 U.S.T. 1632.

security treaty,[144] the government submitted the latter to the Diet for approval. This was because its content was significant to the nation and there was no delegation or authorization by the new security treaty, so the government had to, and did, acquire the approval.[145] Unlike in the case of the Administrative Agreement, the Japanese government considered it necessary for the Japan–U.S. Status of Forces Agreement to be approved by the Diet because it was not based on the delegation of the 1960 new Japan–U.S. Security Treaty.

2. The Ohira Three Principles

It was after these discussions and explanations that the Japanese government provided the criteria for treaties to be approved by the Diet. Masayoshi Ohira, the then Foreign Minister, outlined in 1974 the Ohira Three Principles, which remain authoritative to this day. Under Article 73, Item 3 of the Constitution, which provides for the conclusion of treaties, the government specified which international agreements were treaties that should be presented to the Diet.[146]

The first category of treaties is international commitments that involve legislative matters. Article 41 of the Constitution provides for the Diet to be the only legislative body in Japan,[147] so when international commitments involve contents related to the legislative power of the Diet under Article 41, they must be approved.[148] More specifically, in concluding such international commitments, legislative measures are necessary to maintain existing domestic laws, and the Diet should deliberate and approve them.[149] For example, international commitments on the transfer of territory or administrative rights have a direct impact on the nation's sovereignty, including legislative power.[150]

On the first category, international agreements involving legislative matters should require the approval by the Diet, so the Cabinet does not have authority to conclude such agreements without the Diet approval.

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144 Agreement under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Japan-U.S., June 23, 1960, 11 U.S.T. 1652.

145 *Comm. on Foreign Affs. No. 11*, *supra* note 142, at 5 (Mar. 18, 1964) (statement of Masato Fujisaki, MOFA Officer). For a similar explanation, *see H. of Representatives, Comm. On Foreign Affs. No. 9*, 63d Diet 3 (Apr. 17, 1970) (statement of Toshio Yamasaki, Deputy Director-General, Treaties Bureau), https://kokkai.ndl.go.jp/#/detail?minId=106303968X00919700417&current=1 (Japan).

146 *H. of Representatives, Comm. on Foreign Affs. No. 5*, 72d Diet 2 (Feb. 20, 1974) (statement of Masayoshi Ohira, Foreign Minister), https://kokkai.ndl.go.jp/#/detail?minId=107203968X00519740220&current=1 [hereinafter *Comm. on Foreign Affs. No. 5*] (Japan).

147 KENPŌ art. 41 ("The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.") (Japan).

148 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

149 *Id.*

150 *Id.*

When the Cabinet enters into international agreements that require new legislation or revision of existing laws to implement the agreement, it must acquire the approval of the Diet. Thus, treaties sometimes involve positive legislative matters, which require enactment of new laws or revision of existing laws.[151] For example, in entering into the U.N. Convention on the Law of the Sea, which was one of the treaties that required the approval of the Diet, it was necessary to revise domestic laws concerning territorial sea, exclusive economic zones, and the continental shelf.[152]

However, some treaties impose an obligation to keep existing laws and orders while not requiring new legislative measures to carry them into effect.[153] They include negative legislative matters in which there is an obligation to keep laws and orders as they are.[154] For example, in 1969 "the Act on Special Provisions of the Income Tax Act, the Corporation Tax Act, and the Local Tax Act Incidental to Enforcement of Tax Treaties" (Act on Special Provisions) was passed. Usually, concluding bilateral tax treaties does not require new legislative measures, but Japan had an obligation to maintain the Act on Special Provisions as it was, so such bilateral treaties required the approval of the Diet.[155] Investment agreements and social security agreements similarly required approval.[156]

In this regard, the Ohira Three Principles mentioned treaties transferring territories and administrative rights as examples of treaties having a direct impact on Japan, including the legislative power.[157] In addition to these examples, there are the Treaty of Peace with Japan of 1951, which had provisions for the alternation of territories and administrative rights, and the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands of 1971, which was an agreement between Japan and the United States concerning transfer of administrative rights to Okinawa.[158]

The second category of treaties that require approval is international agreements that include financial matters. Article 85 of the Constitution provides for the following: "No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet."[159] Because of this

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151 Yasuo Nakauchi, *supra* note 1, at 21.

152 *Id*. at 21–22.

153 *Id*. at 22.

154 Makoto Matsuda, *Treaty-Making Process in Practice*, 10 HOKKAIDO J. NEW GLOB. L. & POL'Y 301, 306 (2011) (Japan).

155 Yasuo Nakauchi, *supra* note 1, at 22 n. 28. *See also* Yoshihiro Masui, *The Diet Involvement in the Making of Tax Treaties* 217, *in* A COMPREHENSIVE STUDY OF THE PRINCIPLE OF STATUTE-BASED TAXATION IN JAPAN (Minoru Nakazato & Takeshi Fujitani eds., 2021) (Japan).

156 Yasuo Nakauchi, *supra* note 1, at 22.

157 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

158 Yasuo Nakauchi, *supra* note 1, at 23.

159 KENPŌ art. 85 (Japan).

provision, when entering into international commitments imposing duties on the nation that are beyond the extent of expenditure and laws already passed, the Diet's approval must be sought.[160]

Some examples are reparation agreements with some countries as part of a post-war process, including the Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation of 1965. Another example is the Agreement between Japan and the United States of America concerning New Special Measures relating to Article XXIV of the Japan–U.S. Status of Forces Agreement of 1960, in which the Japanese government agrees to pay the costs of electricity, water, and wages for workers in American facilities in Japan.[161] However, as Ohira mentioned, international commitments that involve spending within expenditures already passed by the Diet do not require approval.[162] As an example of such agreements, almost all exchanges of diplomatic notes concerning Official Development Assistance (ODA) implementation are executive agreements.[163]

The third category of treaties that require approval is politically important international commitments. These treaties are "important" in that they legally provide for the general relationship between Japan and foreign countries. Ratification is required for these treaties to come into effect.[164]

Examples of such agreements are a joint declaration signed by Japan and the Soviet Union in 1956 for the restoration of diplomatic relations after WWII; the Treaty on Basic Relations Between Japan and the Republic of Korea of 1965, which was concluded by the two countries to establish normal diplomatic relations between them; and the Treaty of Peace and Friendship between Japan and the People's Republic of China of 1978, which created a basic diplomatic relationship between them.[165]

Recently, however, most treaties submitted to the Diet for approval were the first two kinds of treaties which involved legislative and financial matters. The third category of treaties, politically important treaties, is rare.[166]

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160 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

161 Yasuo Nakauchi, *supra* note 1, at 23.

162 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

163 Yasuo Nakauchi, *supra* note 1, at 23.

164 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

165 Yasuo Nakauchi, *supra* note 1, at 23–24; YUJI IWASAWA, INTERNATIONAL LAW 92 (2d ed. 2023) [hereinafter YUJI IWASAWA, INTERNATIONAL LAW] (Japan).

166 Yasuo Nakauchi, *supra* note 1, at 24.

Furthermore, Ohira not only referred to treaties made by the authority of Article 73, Item 3 of the Japanese Constitution, but also he explained that certain "other international commitments" required the Cabinet to report them to the Diet, which were executive agreements.[167]

Among international agreements made by the Japanese government, some international agreements are executive agreements—such as those implemented within treaties already approved by the Diet or pursuant to domestic laws or expenditure passed by the Diet. They are entered into by the executive branch under provision of treaties and/or domestic laws to "[m]anage foreign affairs"[168] under Article 73, Item 2.[169] In fact, most executive agreements are a form of exchange of diplomatic notes, and it is the content of international agreements, not the form, that makes them executive agreements.[170]

As seen above, the Ohira statement not only mentioned treaties but also the scope of executive agreements. Almost all issues debated since the making of the Constitution of Japan were related to executive agreements made according to treaties approved by the Diet. According to Ohira, those kinds of agreements were in the case of international commitments that could be implemented within treaties approved by the Diet, meaning that the commitments required the arrangement of details or delegation by treaties.[171] This was the case for the Administrative Agreement that was based on the older Security Treaty.

However, the Ohira statement named two other categories of executive agreements: international commitments that can be implemented within the existing domestic laws and ones that can be implemented within the expenditure passed by the Diet.[172]

Furthermore, as pointed out through debates in the Diet, there are executive agreements concluded by the Cabinet on its own authority, just as the U.S. President can make.[173] This authority derives from Article 73, Item 2 of the Constitution (managing foreign affairs). Some scholars had doubts about the constitutionality of such executive agreements. For example, Isao Satō, one of the leading constitutional scholars in Japan,

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167 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

168 KENPŌ art. 73, item 2 (Japan).

169 *Comm. on Foreign Affs. No. 5*, *supra* note 146, at 2 (statement of Masayoshi Ohira, Foreign Minister).

170 *Id*.

171 *Id*.

172 *Id*. Exchanges of diplomatic notes about ODA is an example of the latter, and the Exchange of Notes concerning the transfer of military technologies to the United States of America between Japan and the U.S. is an example of the former. Yasuo Nakauchi, *supra* note 1, at 34.

173 Tomonori Mizushima, *supra* note 40, at 15. Furthermore, on the making of international agreements to amend a part of international agreements, *see* Yukiko Uehara, *National Implementation of Treaties in Japan, the U.S. and the U.K.: The Role of Parliament and Treaties in the National Legal Order*, 840 THE REFERENCE 79, 84 n.27 (2021) (Japan).

asserted that Japan cannot adopt the U.S. practice without any adjustments because Japan is not a federal state.[174] Article 73 did not grant broad authority to the Cabinet to make executive agreements, and the Cabinet needed authorization from the Diet to do so.[175] However, executive agreements concluded by the Emperor without any involvement from the Privy Council have been recognized since the era of the Meiji Constitution.[176] Technically, Article 73, Item 2 is understood to enable the Cabinet to make such agreements. In addition, the scope of executive agreements had been debated in the Diet and formed as a practice, and the Ohira Three Principles established the practice and are the most famous statements of treaties and executive agreements in Japan.

In sum, executive agreements are also international agreements in international law. They establish the legal relationship between Japan and other countries, but as a matter of domestic law, it matters whether the approval of the Diet is required or not in entering into international agreements.[177] The Japanese government has focused closely on and explained the scope of treaties that needed the approval of the Diet.[178] The Cabinet has authority to conclude all other international agreements and executive agreements. The Ohira Three Principles are the most authoritative statements in Japan used to distinguish between treaties and executive agreements, and they are relied on to determine which agreements require the Diet's approval.

3. The Domestic Legal Force of Executive Agreements

The constitutional provision concerning domestic legal force of international law in Japan is Paragraph 2 of Article 98, which stipulates that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed."[179] This article enables international agreements ratified by Japan to have domestic legal force in Japanese legal system without special laws.[180]

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174 1 ISAO SATŌ, *supra* note 108, at 247.

175 *Id*. *See also* Takeo Matsuda, *Democratic Control over the Conclusion of Treaties*, 38 SHIZUOKA UNIV. J. L. & ECON. 169, 176–77, 184 (1989) (denying executive agreements without any involvement of the Diet) (Japan).

176 Tomonori Mizushima, *supra* note 40, at 15–17.

177 Yasuo Nakauchi, *supra* note 1, at 19.

178 Takeo Matsuda, *supra* note 175, at 175. Takeo Matsuda also insists that the government specify the specific reasons why treaties required the approval of the Diet. *Id*.

179 KENPŌ art. 98, para. 2 (Japan).

180 YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 524; Hiromichi Matsuda, *International Law in Japanese Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 8, at 537, 537–38. However, some scholars criticize the theoretical result derived from Article 98. MASAAKI SAITŌ, *supra* note 47, at 243–48; HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS: THE COMPETENCE TO IMPLEMENT

The term "[t]he treaties concluded by Japan" in Article 98 refers to international commitments between Japan and foreign countries made through a series of necessary processes, and it is understood that the term "treaties" in Article 98 should be interpreted more broadly than "treaties" in Article 73.[181] Hence, the term "[t]he treaties" in Article 98 covers international agreements between Japan and foreign countries, not just treaties requiring the Diet's approval, as required by Article 73.

Treaties that require the approval of the Diet are promulgated in the Official Gazette (*Kanpō*). While executive agreements are made public there, they appear in the *Gaimushō Kokuji* ("Public Notice of the Ministry of Foreign Affairs") section. But treaties appear in the *Jōyaku no Kōfu* ("Promulgation of Treaties") section.[182] Although the Japanese government has explained that executive agreements are considered the same as treaties approved by the Diet in determining whether legislation is needed,[183] the government has never clarified the domestic legal force of executive agreements or their relationship with other domestic laws.[184]

It should be understood as follows. As mentioned above, executive agreements are not promulgated differently than treaties although both are published in the Official Gazette. As with treaties, executive agreements are international agreements between sovereign states, so Japan must comply with executive agreements. Since executive agreements are to implement treaties already approved by the Diet or to manage foreign affairs, it follows that executive agreements acquire domestic legal force.[185] They obtain such force by public notice.[186] Technically, executive agreements are "treaties" under Paragraph 2 of Article 98, so they can be interpreted to have domestic legal force similar to treaties approved by the Diet.[187]

INTERNATIONAL NORMS 163–68 (2020) [hereinafter HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS] (Japan). *See also* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW, *supra* note 7, at 28–33.

181 2 YŌICHI HIGUCHI ET AL., THE ANNOTATED CONSTITUTION OF JAPAN 1493 (1988) (Japan); 5 DIGEST OF JAPANESE PRACTICE IN INTERNATIONAL LAW: LAW OF TREATIES 10–11 (Study Group of Japanese International Law Practice ed., 2000) [hereinafter DIGEST OF JAPANESE PRACTICE] (Japan); YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 524; ICHIRŌ KOMATSU, INTERNATIONAL LAW IN PRACTICE 278–79 (3d ed. 2022) (Japan).

182 DIGEST OF JAPANESE PRACTICE, *supra* note 181, at 44–46.

183 *H. of Councillors, Comm. on Rules and Admin. No. 25*, 13th Diet 4, 6 (Mar. 12, 1952) (statements of Katsuo Okazaki, Minister of States), https://kokkai.ndl.go.jp/#/detail?minId=101314024X02519520312&current=1 (Japan); *H. of Councillors*, *Comm. on Budget No. 7*, 64th Diet 18 (Nov. 9, 1971) (statement of Masami Takatsuji, Director-General of the Cabinet Legislation Bureau), https://kokkai.ndl.go.jp/#/detail?minId=106715261X00719711109&current=1 (Japan).

184 Shōtarō Taniuchi, *Domestic Implementation of International Legal Norms, in* INTERNATIONAL LAW AND DOMESTIC LAW: DEVELOPMENT OF INTERNATIONAL PUBLIC INTERESTS 109, 113 (Kazuya Hirobe & Tadashi Tanaka eds., 1991) (Japan); Yukiko Uehara, *supra* note 173, at 87.

185 Shōtarō Taniuchi, *supra* note 184, at 113.

186 Tomonori Mizushima, *supra* note 40, at 18.

187 *See, e.g.*, YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 524.

But a problem with executive agreements is the relationship with other domestic laws, especially with statutes. While Shōtarō Taniuchi opines that executive agreements naturally rank as inferior to treaties and statutes,[188] it has been understood in Japan that Article 98 makes treaties *superior* to statutes.[189] According to Yuji Iwasawa, a leading international legal scholar and a judge of the International Court of Justice, executive agreements can be interpreted as follows:

> Most scholars consider that it is natural that executive agreements also have the same rank as *treaties approved by the Diet*, which means they are superior to domestic laws. It is acceptable to think that executive agreements according to authorization of treaties that require the approval of the Diet have domestic legal force and are superior to domestic laws as treaties that provide the basis for executive agreements. However, executive agreements made by the government *within current laws and orders* or made by the government *within expenditure* should be understood to have the same rank as orders issued by the government.[190]

While scholars have discussed the domestic legal force of executive agreements, there has not been much discussion on their rank in domestic law, i.e. the relationship of executive agreements with other domestic legal norms. As Iwasawa explains, executive agreements that do not require the Diet approval have the status of treaties approved by the Diet, but their rank should be considered in terms of types of executive agreements.[191]

Iwasawa discusses two types of executive agreements: executive agreements according to treaties with the Diet approval and executive agreements concluded within domestic laws and/or orders and expenditure. The former is for implementing treaties which authorize or delegate the making of executive agreements. It can be followed that such executive agreements acquire the same legal force as treaties which are the basis for the making of executive agreements. Moreover, executive agreements entered into within domestic laws and/or orders and expenditure does not have the same legal force as treaties in the Japanese legal order. It is because the bases of the conclusion of executive agreements are laws

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188 Shōtarō Taniuchi, *supra* note 184, at 113.

189 *See* HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS, *supra* note 178, at 163.

190 LECTURES ON INTERNATIONAL LAW 125 (Akira Kotera et al. eds., 2d ed. 2010) (Japan). *See also* YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 524, 529.

191 *See, e.g.,* TERUYA ABE, CONSTITUTIONAL LAW 279 (Rev. ed. 1991) (Japan).

and/or orders and expenditure, not treaties approved by the Diet. But there are two options for the rank of such executive agreements: they are superior or inferior to domestic laws. If they are superior to domestic laws, then they can displace domestic laws and that allows the Cabinet to have the legislative power through executive agreements.[192] Therefore, executive agreements made within domestic laws or orders and expenditure are to have the rank of orders, not of domestic laws.

In summary, executive agreements have domestic legal force in Japan. They are international agreements which are concluded by the Japanese government and "treaties" stipulated in Article 98, which "shall be faithfully observed."[193] Japan needs to comply with them. And it is necessary to consider their rank depending on how they are made. Executive agreements based on treaties approved by the Diet have the same effect as the underlying treaties, which means they are superior to domestic statutes. And executive agreements made within the current laws and expenditure have the rank of domestic orders which are issued by the administrative agencies, not by the Diet having the legislative power.

As mentioned in Section D of the next part, self-execution of executive agreements has been discussed in the United States, but both Japanese courts and scholars have rarely discussed it. Self-execution of treaties matters in the Japanese legal system. Even if treaties have domestic legal force, it does not follow that they are enforceable in Japanese domestic courts.[194] Non-self-executing treaties need implementing legislation and/or administrative measures in order for courts or the executive branch to enforce treaties.[195] Theoretically, self-execution of executive agreements could matter in Japan. But executive agreements are not such international agreements as involving legislative or financial matters and having impacts on rights and duties of individuals. Self-execution is often discussed in courts when individuals invoke international agreements and claim violation of their rights or noncompliance of duties of the government.[196] Executive agreements do not cover rights and duties of Japanese citizens. Of course, executive agreements are international agreements which are concluded by the Japanese government and it shall comply with those agreements as stipulated in Article 98 of the

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192 *See, e.g.,* Hajime Nishioka, *Domestic Execution of International Treaties, Administrative Agreements and International Organization Decisions in the Bonn Basic Law*, 47 FUKUOKA UNIV. REV. LAW 67, 100 (2002) (Japan).

193 KENPŌ art. 98, para. 2 (Japan).

194 YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 525. Iwasawa uses the term "direct applicability" instead of "self-execution." YUJI IWASAWA, DOMESTIC APPLICATION OF INTERNATIONAL LAW: FOCUSING ON DIRECT APPLICABILITY 8 (2023).

195 YUJI IWASAWA, INTERNATIONAL LAW, *supra* note 165, at 510.

196 *See* HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS, *supra* note 180, at 215–17.

Constitution, but self-execution of executive agreements may not be an issue in the Japanese legal system.

III. THE UNITED STATES

There also exists a distinction between treaties and executive agreements in the United States. The former, an Article II treaty, is an international agreement made through a defined Constitutional process. The second paragraph of Article II, Section 2 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." [197] Constitutionally, "treaties" refer to those made following the procedures of Article II. However, the President may also make international agreements without following this procedure. These agreements are called "executive agreements."[198]

This part analyzes the history, types, and domestic legal force of executive agreement in the United States. First, Section A describes the drafting history of Article II of the U.S. Constitution and analyzes why the President and the Senate were granted the power to make treaties. Section B makes clear how executive agreements have been used since the constitution's adoption. Section C outlines the types of executive agreements. Traditionally, scholars have discussed three types of executive agreements: executive agreements according to Article II treaty; congressional-executive agreements, which are approved by the whole of Congress; and sole executive agreements made by the President based solely on the position's foreign affairs power. However, more recently, it has been pointed out that some international agreements may not be explained by any of these three types. Section D discusses the domestic legal force of executive agreements in the United States.

A. The Drafting History of Article II, Section 2 of the U.S. Constitution

The United States Declaration of Independence was adopted on July 4, 1776, and the United States, consisting of thirteen states, was born. The thirteen states formed a confederation. Each had the perfect sovereignty, and carrying out treaties was left to their legislatures. [199] Under the Articles of Confederation and Perpetual Union, the Congress of the

197 U.S. CONST. art. II, § 2, cl. 2.
198 BRADLEY, *supra* note 12, at 79.
199 SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 153 (2d ed. 1916).

Confederation, which was executive in nature,[200] had the power to make treaties but did not have substantial authority to legislate.[201]

The Articles of Confederation did not provide a framework for dealing with treaty violations by states or for the domestic status of treaties. For example, certain provisions in the Treaty of Paris of 1783 with Great Britain were in conflict with existing legislation in some states,[202] which triggered serious problems such as withdrawal of British armies from the United States.[203] The Congress only encouraged states to follow treaties through recommendations.[204] At the Constitutional Convention in Philadelphia, it was agreed that the power of the national government should be strengthened and the power to execute treaties should be granted to the national government.[205] Although the Framers agreed that the federal government, not state governments, should have the power to make treaties,[206] they disputed which branch of government should have that power. According to Arthur Bestor, a distinguished scholar of constitutional history, there was no suggestion that decisions on diplomatic policy be left exclusively to the executive until just before the Constitutional Convention.[207] Previously, conducting diplomatic relations was considered a shared power of the legislative and the executive branches.[208] However, there was no specific discussion on which branch had the power to make treaties.

It was only when drafts prepared in the Committee of Detail were being discussed that the location of this power was debated for the first time, although the delegates debated some drafts including the Virginia and New Jersey Resolutions.[209] The Committee of Detail consisted of five

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200 John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2009 (1999).

201 DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 15, 17 (2016).

202 CRANDALL, *supra* note 199, at 36–37; FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 5-11 (1986).

203 Yoo, *supra* note 200, at 1980, 2005; CHRISTOPHER R. DRAHOZAL, THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 8 (2004); SLOSS, *supra* note 201, at 17–19.

204 James Madison, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 348–58 (William T. Hutchinson et al. eds., 1975); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 18, 19 (Max Farrand ed., 1911) (statement of Edmund Randolph on defects of the Confederation).

205 SLOSS, *supra* note 201, at 23.

206 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22, 28, 135 (Max Farrand ed., 1911).

207 Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution of the Historically Examined*, 55 WASH. L. REV. 1, 73 (1979).

208 *Id*. at 72–73.

209 A resolution suggested by Charles Pinckney on May 29 granted the treaty-making power to the Senate. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 595, 599 (Max Farrand ed., 1911). *See also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 204, at 292 (the amendments suggested by Alexander Hamilton to the Virginia Plan on June 18, which granted to the executive branch the power to make treaties with the Senate).

members: John Rutledge (the chairman), James Wilson, Edmund Randolph, Oliver Ellsworth, and Nathaniel Gorham.[210] The Convention started in May 1787 and was adjourned for ten days from July 27 in order for the Committee to prepare for the drafts of the constitution.[211]

The first draft was written by Randolph, with notes made by Rutledge.[212] It granted the power to make commerce, peace, and alliance treaties only to the Senate.[213] Among the powers of the executive branch, the only one related to foreign affairs was the power to receive and send ambassadors.[214] Randolph inserted the new idea to grant the power of important foreign affairs to the Senate.[215] The reason why this power was not granted to the executive branch was that many thought the Senate would be to function as the executive, like it did under the Articles of Confederation.[216]

On August 6, 1787, a draft of the article was reported by the Committee of Detail to the Constitutional Convention and included the following language[217]: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[218] The delegates had "a tacit assumption" that the power to make treaties would be granted to the Senate.[219] Granting that power exclusively to the Senate meant that the delegates considered the Senate to have continuity and enough experience with diplomacy from the long-standing and national perspective.[220]

The draft was debated in the Convention for one and a half months.[221] In the early stages, it was preferred for the Senate to have the power to make treaties, but during a debate over the power of both legislative houses to determine expenditures, an opinion was expressed that the executive branch should have the treaty-making power.[222]

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210 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 97.

211 *Id*. at 85–87, 128; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 204, at xxii.

212 William Ewald, *The Committee of Detail*, 28 CONST. COMMENT 197, 220 (2012).

213 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 144–145.

214 *Id.* at 145–46.

215 Ewald, *supra* note 212, at 228. As mentioned in *supra* note 209, the draft made by Charles Pinckney on May 29 already offered this idea but there was no discussion on it. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 209, at 595.

216 Ewald, *supra* note 212, at 233–34.

217 Other drafts which seemed to be debated in the Committee of Detail also granted the treaty-making power to the Senate. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 155, 169. Additionally, the last draft included an article like the Supremacy Clause. *Id*. at 169.

218 *Id*. at 183.

219 Bestor, *supra* note 207, at 93.

220 *Id*. at 93–94 (citing and quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 204, at 426 (statement of James Wilson)).

221 *See* 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 121–22 (Jonathan Elliot ed., 2d ed. 1891).

222 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 297 (statement of John Francis Mercer). It should be noted, however, that this opinion wasn't adopted. George Mason

On August 23 the delegates debated directly on the treaty-making power.[223] According to Randolph, "almost every Speaker had made objections to the clause as it stood."[224] Gouverneur Morris suggested adding terms that "no Treaty shall be binding on the U.S. which is not ratified by a law."[225] James Wilson was concerned that only the Senate had the treaty-making power and upheld Morris's suggestion.[226] But in the end, the amendment suggested by Morris was not passed.[227] James Madison pointed out that the Senate was representative only of each state, and the President—who represented all the states—should have the treaty-making power.[228] After rejecting Morris's suggestion, Madison suggested that the treaty-making power should be changed to specify the kinds of treaties that the House of Representatives should be involved in to give the consent of the entire Congress.[229]

The issue was not resolved that day, and the draft was supposed to be discussed again at the Committee of Detail.[230] But it was actually submitted to the Committee of Eleven, which considered issues set aside or not worked on.[231] The Committee of Eleven submitted a second draft to the Constitutional Convention on September 4 that provided: "[t]he President by and with the advice and consent of the Senate, shall have power to make treaties: . . . But no Treaty ⟨except Treaties of Peace⟩ shall be made without the consent of two thirds of the Members present."[232]

The difference between this draft and the earlier draft was that the President had the treaty-making power, but required "advice and consent" of the Senate. The second draft made clear that the Senate's consent

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upheld the treaty-making power exclusively granted to the Senate, considering a balance with the power of the House of Representatives to determine money bills. Bestor, *supra* note 207, at 103 (citing and quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 297–98 (statement of George Mason)).

223 Bestor, *supra* note 207, at 101–02, 107.

224 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 393.

225 *Id.* at 392.

226 *Id.* at 393.

227 *Id.* at 393–94.

228 *Id.* at 392.

229 *Id*. at 394. This debate was on whether the House should have been involved in the treaty-making process, not on whether treaties needed legislations to have domestic legal force in the U.S. Many scholars agree that there was no disagreement with the idea that treaties have legal force in the U.S. without implementing legislation. *See* John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L. J. 1209, 1226 n.89 (2009); Martin S. Flaherty, *Historical Right?: Historical Scholarship, Original Understanding, and Treaties as 'Supreme Law of the Land'*, 99 COLUM. L. REV. 2095, 2123–24 (1999); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1533–34 (2006).

230 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 394.

231 *Id.* at 473. This committee consisted of members delegated from each state and is called "the Committee on Postponed Parts," "the Committee on Postponed Matters," or "the Committee on Remaining Matters." RAY RAPHAEL, MR. PRESIDENT: HOW AND WHY THE FOUNDERS CREATED A CHIEF EXECUTIVE 294 n.5 (2012).

232 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 495; *see also id.* at 498–99.

meant two-thirds of the Senators present. That said, the second draft did not add any language regarding the role of the House of Representatives in the treaty-making process.[233]

The Committee of Eleven's draft was debated on September 7.[234] With regard to the provision that gave the President and the Senate power to make treaties, Wilson suggested requiring the consent of the House.[235] He explained that since treaties "[were] to have the operation of laws, they ought to have the sanction of laws also."[236] But that suggestion was rejected.[237] According to Roger Sherman, who was concerned about the confidentiality of treaty-making, the consent of the Senate was sufficient.[238]

Moreover, Wilson argued against the provision requiring two-thirds of the Senators to be present, pointing out that a minority of the Senate would be able to control the intent of the majority.[239] Rufus King supported Wilson, stating that it would give rise to a checks and balances system which had not existed in the Confederated Congress.[240] However, because there was no official challenge regarding that point, it was never voted on.[241]

Afterward, on September 8, the suggestion of an exception to peace treaties was rejected at the Constitutional Convention,[242] and a draft was suggested on the number of votes (two-thirds or the majority) but neither of them was passed.[243]

Eventually, the Committee of Style was created to revise the style of articles and arrange them.[244] An article on the treaty-making power submitted to the Committee by the Constitutional Convention was the same as the one prepared by the Committee of Eleven.[245] However, the article submitted on September 12 by the Committee of Style, which consisted of Alexander Hamilton, William Johnson, King, Madison, and Morris, was the same as the current constitution[246] and became final on September 17 after signing.[247]

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233 Bestor, *supra* note 207, at 114.
234 *Id*. at 113.
235 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 538.
236 *Id*.
237 *Id*.
238 *Id*.
239 *Id*. at 540.
240 *Id*.
241 *Id*.
242 *Id*. at 544; *see also id.* at 540–41, 547–49.
243 *Id*. at 544–50.
244 *Id*. at 553.
245 *Id*. at 565, 574.
246 *Id*. at 590, 599.
247 *Id*. at 648–49.

Thus, the provision of the Constitution for the treaty-making power was made. As Bestor, who closely studied the treaty-making power clause, pointed out, none of the delegates challenged the idea that the President had that power, and there was not any opposition to the advice and consent of the Senate.[248] All of the arguments focused instead on the two-thirds rule and the involvement of the House of Representatives.

One reason why the House was excluded from the treaty-making process was due to the confidentiality of treaty-making.[249] Moreover, some in the ratification debates of the state conventions insisted on the equality in the Senate.[250] According to Oona A. Hathaway, a renowned international law scholar, there were two reasons why the power to make treaties was granted to the President and the Senate. First, the Senate was supposed to function as a "council of advisors" to the President by participating directly in negotiating treaties.[251] Second, Senate participation was to designed to prevent the federal government from abandoning the local interest of the states.[252]

In addition to functions of the Senate, another reason why the Framers involved the Senate in the treaty-making process was that the legislative branch should be involved in that process since the treaty-making power had the legislative character rather than the executive character and treaties had force as law.[253] According to the Framers, "[i]t must indeed be clear, to a demonstration, that the joint possession of the [treaty-making power], by the president and senate, would afford a greater prospect of security, than the separate possession of it by either of them."[254] And the House was "very little fit for the proper discharge of the trust."[255]

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248 Bestor, *supra* note 207, at 124.

249 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 206, at 538 (statement of Roger Sherman); THE FEDERALIST, No. 64 (John Jay). However, according to Oona A. Hathaway, this view was not shared by all Framers. Gouverneur Morris, James Wilson, and James Madison were in favor of the involvement of the House of Representatives in the treaty-making process. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law Making in the United States*, 117 YALE L.J. 1236, 1278 (2008) [hereinafter Hathaway, *Treaties' End*]. For further background on the role of the House of Representatives in treaties, such as its influence and implementation, *see* ELBERT M. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES: THEIR SEPARATE ROLES AND LIMITATIONS 30–35 (1960).

250 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES (PENNSYLVANIA) 563 (Merrill Jensen ed., 1976) (statement of James Wilson); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES (VIRGINIA, No. 3) 1241 (John P. Kaminski et al. eds., 1993) (statement of James Madison); 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 119–20 (Jonathan Elliot ed., 2d ed. 1891) (statement of William R. Davie).

251 Hathaway, *Treaties' End*, *supra* note 249, at 1278.

252 *Id*. John Jay pointed out consideration of state interests. THE FEDERALIST, No. 64 (John Jay).

253 THE FEDERALIST, No. 75 (Alexander Hamilton).

254 *Id*. *See also id.* ("we shall not hesitate to infer, that the people of America would have greater security against an improper use of the power of making treaties, under the new constitution, than they now enjoy under the confederation.").

255 *Id*.

Finally, 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.[256]

To ensure compliance with treaties by the constituent states, there were some suggestions at the Constitutional Convention, including abrogation of conflicting state law by the Congress.[257] But those suggestions were not passed,[258] and Ruther Martin submitted a draft that was very similar to the Supremacy Clause.[259] In the end, the Supremacy Clause was adopted through the Committee of Details[260] and the Committee of Style.[261] At the Constitutional Convention, there were no delegations who disagreed about the status of treaties as the supreme law of the land.[262] The Supremacy Clause was made to deal with treaty violations by states by giving the status of "the supreme Law of the Land" to treaties made by the President and the Senate.[263]

Thus, the U.S. Constitution adopted at the Constitutional Convention and ratified by states granted the power to make treaties to the federal government and ensured treaty supremacy over state law—especially, for those treaties approved by the President and the Senate. The Senate was considered to be appropriate for its functions, confidentiality of the treaty-making process, and checks over the President. However, almost immediately after the adoption of the Constitution, the practice of entering international agreements without following the constitution's process began to emerge.

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256 U.S. CONST. art. VI, cl. 2.

257 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 204, at 54. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 206, at 27–28 (July 17, 1787) (statement of James Madison). *See also* DRAHOZAL, *supra* note 203, at 12–16, 19.

258 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 206, at 28.

259 *Id.* at 21–22, 28–29.

260 *Id.* at 176, 183, 389. For an early draft of the Supremacy Clause, *see id.* at 144; DRAHOZAL, *supra* note 203, at 21–23.

261 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 206, at 48–49. For more detailed discussion on the making of the Supremacy Clause, *see* SLOSS, *supra* note 201, at 23–46; Parry, *supra* note 229, at 1222–73.

262 *See* Parry, *supra* note 229, at 1227. *See also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 264 (1996) (pointing out that the Framers had in mind that the clause would give treaties the force of law).

263 *See* SLOSS, *supra* note 201, at 23–25; Parry, *supra* note 229, at 1227. *See also* Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1160 (1992) (underscoring the importance of the courts in treaty interpretation and enforcement).

B. The History of Executive Agreements

Although Article II requires the President and the Senate to make treaties, executive agreements made without following Article II's procedure were concluded right after the adoption of the Constitution. Research from the Congressional Research Service makes clear that sixty treaties and twenty-seven executive agreements were made from 1789 to 1839.[264] Over the next fifty years, executive agreements exceeded Article II treaties.[265] Since the 1940s, over ninety percent of international agreements in the United States have been executive agreements.[266]

Glen S. Krutz and Jeffrey S. Peake argue that there were two ideas on treaty-making during the making of the Constitution. One was that treaty negotiation was an exclusive area of the executive branch, and the Senate merely approved the already negotiated and signed treaties.[267] The second idea was that the Senate was already involved in treaties at the stage of negotiation.[268]

However, George Washington, the first President of the United States, did not consider the treaty-making process to be the exclusive field of the executive branch; he treated the Senate as "an executive council."[269] Nonetheless, by the end of the second term of his administration, he had not consulted with the Senate before the negotiation of *any* treaties.[270] President Washington's approach would find a home in present practice, where the "advice and consent"[271] of the Senate means consent alone.

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264 CONG. RSCH. SERV., S. REP. NO. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (2001) [hereinafter CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS].

265 *Id*.

266 Bradley & Goldsmith, *supra* note 1, at 1210.

267 GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 27 (2011).

268 *Id*. According to Louis Fisher, the Framers' intent was that the Senate be directly involved in treaty-making. Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1512–14 (1989).

269 Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 546 (1945). *See also* Evan Todd Bloom, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155, 170 n.79 (1985); Fisher, *supra* note 268, at 1512–13; Hathaway, *Treaties' End*, *supra* note 249, at 1280; KRUTZ & PEAKE, *supra* note 267, at 31–32.

270 Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 207 (1945); Hathaway, *Treaties' End*, *supra* note 249, at 1280, 1308; Michael D. Ramsey, *The Treaty and Its Rivals: Making International Agreements in U.S. Law and Practice*, *in* SUPREME LAW OF THE LAND? DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE UNITED STATES LEGAL SYSTEM 282, 291 (Gregory H. Fox et al. eds., 2017) [hereinafter Ramsey, *The Treaty and Its Rivals*].

271 U.S. CONST. art. II, § 2, cl. 2.

Scholars also point out that executive agreements were used early on, immediately after the Constitution's adoption.[272] One of the important practices President Washington established was negotiating and enacting executive agreements.[273] For example, the first executive agreement under the Washington Administration was one according to a statute of 1792.[274] And another congressional-executive agreement was between the United States and Mexico under the administration of John Tyler: the annexation of Texas. That was passed on a joint resolution on March 1, 1845.[275] Furthermore, Hawaii was annexed by a joint resolution in 1898.[276]

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[272] *See, e.g.*, Peter John Lesser, *Superseding Statutory Law By Sole Executive Agreement: An Analysis of the American Law Institute's Shift in Position*, 23 VA. J. INT'L L. 671, 672–73 (1983); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 173 (2d ed. 1996).

[273] Bruce Stein, *Note, Presidential Foreign Policy Powers: The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 463 (1982). On the Framers' assumption of executive agreements, *see* Wienczyslaw J. Wagner, *Treaties and Executive Agreements: Historical Development and Constitutional Interpretation*, 4 CATH. U. L. REV. 95, 100 (1954); Arthur W. Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 409–11 (1977); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 133, 133 (1998) [hereinafter Ramsey, *Executive Agreements*]; Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–1607 (2007).

[274] Based on Section 26 of An Act to Establish the Post-Office and Post Roads within the United States of 1792 (Postal Service Act of 1792, ch. 7 § 26, 1 Stat. 232, 239), Timothy Pickering, then Postmaster, made an agreement with Canada, which was the first congressional-executive agreement made by the U.S. WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 38 (1941); McDougal & Lans, *supra* note 270, at 239–40; BYRD, *supra* note 249, at 150; Deborah Godich Hardwick, *Comments: The Iranian Hostage Agreement Cases: The Evolving Presidential Claims Settlement Power*, 35 SW. L.J. 1055, 1060 (1982); Bloom, *supra* note 269, at 173; Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 21 n.154 (2003). However, there is a view which considers the Texas annexation as the first congressional-executive agreement. Vasan Kesavan & Michael Stokes Paulsen, *Let's Mess With Texas*, 82 TEX. L. REV. 1587, 1593 (2004).

Scholars disagree about the first executive agreement in the U.S., and it depends on how they are classified. KRUTZ & PEAKE, *supra* note 267, at 207 n.19. Before 1792, making international agreements was not explicitly authorized, but section 2 of 1790 authorized the president to borrow money from foreign countries on behalf of the nation. An Act making provision for the [payment of the] Debt of the United States, 1 Stat. 138, 139 (1790). *See also* BYRD, *supra* note 249, at 150, 53 n.146; Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805, 805 n.5 (1983); S. DOC. NO. 112-9, at 549 (2017).

[275] 4 Miller 689 (Hunter Miller ed., 1934). One scholar understood the Louisiana Purchase of 1803 under the Jefferson Administration to be an executive agreement. *See* LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 6–7 (1986). However, it was in fact an Article II treaty. RUFUS BLANCHARD, DOCUMENTARY HISTORY OF THE CESSION OF LOUISIANA TO THE UNITED STATES TILL IT BECAME AN AMERICAN PROVINCE WITH AN APPENDIX 30 (1903); John C. Yoo, *Laws as Treaties: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 766 (2000).

[276] For a critique of the annexations of Texas and Hawaii as congressional-executive agreements, *see* Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 650 n.135 (1945). In addition to such agreements, Hathaway enumerates the agreements with island nations surrounding the U.S. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 172 (2009) [hereinafter Hathaway, *Presidential Power over International Law*].

As mentioned earlier in this section, Article II treaties were the primary U.S. international agreements for 100 years after independence.[277] Nevertheless, after that, executive agreements were made more often. That was triggered by the McKinley Act of 1890, a customs law.[278] Section 3 of the Act authorized the President to suspend the free trade of sugar, coffee, and other goods if he or she determined customs imposed by countries importing merchandise to the United States to be "reciprocally unequal and unreasonable."[279] This allowed the President to negotiate agreements with foreign countries on customs for establishing mutual trade. Based on that legislation, President Benjamin Harrison entered into commerce agreements with over ten countries including the United Kingdom and Germany.[280]

Additionally, in 1934, the U.S. Congress passed the Reciprocal Tariff Act, which expanded the use of executive agreements to decrease customs on more merchandise than was covered under the McKinley Act.[281] The Supreme Court upheld the authorization to the President in the McKinley Act, and later decisions upheld similar acts, which led to the establishment of the practice of congressional-executive agreements.[282] Although the McKinley Act did not delegate the legislative power to the President, the Supreme Court acknowledged that the McKinley Act empowered the President to carry out congressional policy by entering into reciprocal agreements.[283] In other words, the Supreme Court found congressional-executive agreements to be constitutional,[284] which led to the proliferation of those types of agreements.

The first executive agreement based on the President's own power alone—a sole executive agreement—was an international agreement in 1799.[285] President John Quincy Adams entered into an agreement with the Netherlands for the settlement of U.S. citizen claims for lost cargo in the American schooner *Wilmington Packet*,[286] which was seized by a Dutch privateer. This agreement was the first executive agreement on

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277 CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 264, at 39.

278 Hathaway, *Presidential Power Over International Law*, *supra* note 276, at 173.

279 Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (1890).

280 *See* 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 303–05 (1906); John Bassett Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 394 (1905).

281 Reciprocal Trade Agreements Act, ch. 474, 48 Stat. 943 (1934).

282 Hathaway, *Treaties' End*, *supra* note 249, at 1297–98, nn.167–68; Field v. Clark, 143 U.S. 649, 651, 692–94 (1892).

283 Field v. Clark, 143 U.S. at 692–93.

284 QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 106 (1922); Hathaway, *Treaties' End*, *supra* note 249, at 1295–97.

285 MCCLURE, *supra* note 274, at 43–44; Wuerth, *supra* note 274, at 21; Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 968–69 n.327 (2019).

286 Settlement of the Case of the Schooner "Wilmington Packet," Neth.-U.S., Dec. 12, 1799, *reprinted* in 5 Miller 1075–80.

settlement of claims,[287] and it is established now that such agreements are made on the President's power alone.[288] Another major sole executive agreement was the Rush-Bagot Agreement of 1817 with Great Britain[289] under the Monroe Administration (although President Monroe sought Senate approval afterward).[290]

Moreover, sole executive agreements in the nineteenth century were also made to fulfill provisional or temporary international obligations.[291] For example, the Cartel for the Exchange of Prisoners of War with Great Britain was signed in 1813.[292] But this agreement was superseded by the Treaty of Ghent of 1814,[293] so the Cartel was classified as a provisional, sole executive agreement.

These early sole executive agreements generally fell within the domain of the executive branch and were limited in their use. As a result, they

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[287] American Insurance Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Roman Pipko & Jonathan S. Sack, *Rediscovering Executive Authority: Claims Settlement and Foreign Sovereign Immunity*, 10 YALE J. INT'L L. 295, 320 (1985); Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 903 (2016). *See also* Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981).

[288] Executive agreements made on claims settlements were for cases in which the U.S. or one of its citizens was the recipient of foreign funds. Hathaway, *Presidential Power over International Law*, *supra* note 276, at 171 n.90; Hathaway, *Treaties' End*, *supra* note 249, at 1290.

While many scholars understand the international agreement on the *Wilmington Packet* to be the first sole executive agreement, Robert J. Reinstein points out that two secret sole executive agreements between the U.S. and Great Britain on St. Domingue took place under the Adams Administration. Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141, 165 (2013). The first one provided for the framework for a tripartite convention between the two countries and Toussaint Louverture, and the second one had to do with commerce, diplomacy, and the military. Reinstein, *id*. at 165–72.

[289] Rush-Bagot Agreement, Gr. Brit.-U.S., Apr. 28, 1818, 8 Stat. 231.

[290] The Rush-Bagot Agreement was signed between Acting Secretary of State Richard Rush and Charles Bagot, who was British Ambassador to the U.S. It limited the naval forces on the Great Lakes after the War of 1812. The Rush-Bagot Agreement was a sole executive agreement since it was made through an exchange of notes to limit the naval forces on the Great Lakes and the President did not acquire the congressional and senatorial approval for that. On the interaction of Congress and the President on the Rush-Bagot Agreement, *see* Hathaway, *Presidential Power Over International Law*, *supra* note 276, at 170–71.

Kevin C. Kennedy considers the Rush-Bagot Agreement to be the first sole executive agreement, while Louis Henkin considered it a congressional-executive agreement. Kevin C. Kennedy, *Congressional-Executive Tensions in Managing the Arms Control Agenda—Who's in Charge?*, 16 N.C. J. INT'L L. & COM. REG. 15, 23, n.47 (1991). Cf. HENKIN, *supra* note 272, at 219, 498 n.166.

Some understand the Rush-Bagot Agreement to be an Article II treaty. Michael D. Ramsey insists that this agreement and the annexation of Texas should be understood to confirm the superiority of Article II treaties and the role of the Senate. Ramsey, *The Treaty and Its Rivals*, *supra* note 270, at 294–95. *See also* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 817 n.57 (1995) (arguing that how the form of the agreement should be evaluated is "the subject of countless debates"); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 738–39 (1998) (explaining the reasons for the debate about the Rush-Bagot Agreement); Clark, *supra* note 273, at 1583–84 (enumerating the Rush-Bagot Agreement as an example of limited use of earlier executive agreements).

[291] Hathaway, *Presidential Power Over International Law*, *supra* note 276, at 171 n.90.

[292] Cartel for the Exchange of Prisoners of War between Great Britain and the United States of America, Gr. Brit.-U.S., May 12, 1813, in 2 Miller 557.

[293] Treaty of Ghent, Gr. Brit.-U.S., Dec. 24, 1814, 2 Miller 574.

rarely provoked constitutional controversy.[294] They are based on the presidential powers, such as the Chief Executive[295] and the Commander-in-Chief of the army and navy.[296] Furthermore, there were a few executive agreements concluded under Article II treaties.[297]

Until the nineteenth century, international agreements were rarely approved by Congress after their negotiation. However, in the New Deal era, President Franklin D. Roosevelt made a habit of negotiating agreements by himself and only then seeking the approval of Congress.[298] There were some difficulties in making Article II treaties. For example, the Senate rejected the Treaty of Versailles in 1919.[299] This was a trigger for the development of ex post congressional-executive agreements. During the interwar period, this type of executive agreement came to be made in lieu of Article II treaties. One example was an agreement for the United States to join the International Labour Organization.[300]

In the late twentieth century, the North American Free Trade Agreement and the Agreement Establishing the World Trade Organization were entered into as executive agreements. These were based on the Trade Act of 1974[301] and the Omnibus Trade and Competitiveness Act of 1988,[302] which granted trade promotion authority—or fast-track negotiation authority—to the President.[303] Since Congress had the constitutional power to regulate commerce, it granted the President the authority to

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294 Clark, *supra* note 273, at 1584. For more earlier executive agreements, *see also* Ramsey, *Executive Agreements*, *supra* note 273, at 173–83.

295 U.S. Const. art. II, § 1, cl. 1.

296 *Id*. art. II, § 2, cl. 1.

297 *See* Hathaway, *Presidential Power Over International Law*, *supra* note 276, at 171 n.91; *see also* Hathaway's list of such agreements. *Id*. Examples of the limited amounts of agreements that were made by the early 1900s include the Declaration of the Commissioners on Delimitation of the St. Croix River under Article 5 of the Jay Treaty (Declaration of the Commissioners under Article 5 of the Jay Treaty, Gr. Brit.-U.S., Oct. 25, 1798, 2 Miller 430), the Declaration of the Commissioners under Article 4 of the Treaty of Ghent (Declaration of the Commissioners under Article 4 of the Treaty of Ghent, Gr. Brit.-U.S., Nov. 24, 1817, 2 Miller 655), and the Declaration of Accession to the Stipulations Contained the Convention of 1854 with Russia. Declaration of Accession to the Stipulations Contained the Convention with Russia of July 22, 1854, June 9, 1855, in 7 Miller 139. *See also* CRANDALL, *supra* note 199, at 117–19.

298 Hathaway, *Treaties' End*, *supra* note 249, at 1289–99. *See also* Ackerman & Golove, *supra* note 290, at 813–15, 860–61.

299 Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 664–65 (1944); McDougal & Lans, *supra* note 269, at 558–59; Hathaway, *Treaties' End*, *supra* note 249, at 1301–02.

300 48 Stat. 1182 (1934); 22 U.S.C. § 271 (1934). There was also a debate that the Statute of the Permanent International Court of Justice should be made as an executive agreement. Hathaway, *Treaties' End*, *supra* note 249, at 1299–1300.

301 Section 1103 of the Omnibus Trade and Competitiveness Act of 1988, 102 Stat. 1107, 1128.

302 Section 151 of An Act to promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate fair and free competition between the United States and foreign nations, to foster the economic growth of, and full employment in, the United States, and for other purposes, 88 Stat. 1978, 2001.

303 JANE M. SMITH ET AL., CONG. RSCH. SERV., RL97896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN TREATIES 1 (2013).

negotiate trade agreements for the removal of non-tariff barriers and trade conflicts. At present, trade agreements are made as executive agreements following those expedited procedures (trade promotion authority).[304]

Prior to the twentieth century, authority to make sole executive agreements was related to presidential constitutional powers as seen above.[305] But sole executive agreements were broadened to cover agreements on the settlement of claims which triggered a constitutional question regarding their authority and scope. During the twentieth century, sole executive agreements were used more frequently, and their scope began to broaden. International agreements altering the preexisting legal rights of U.S. citizens, such as claims—which would have previously been made as Article II treaties—came to be made as sole executive agreements.[306] Examples include the Algiers Accords of 1981 with Iran providing for the release of hostages, the transfer of frozen Iranian assets, and the establishment of the Iran–U.S. Claims Tribunal[307] and the Agreement Concerning the Foundation Remembrance, Responsibility and the Future with Germany for resolving some issues during the German Nazi era.[308]

More than 90 percent of international agreements that are made by the United States are now executive agreements.[309] The U.S. Constitution requires both the President and the Senate to be involved in the treaty-making process, but soon after the adoption of the Constitution, many international agreements were made without following the Article II procedure. Already during the Washington Administration, executive agreements were concluded based on federal statutes. After that, other congressional-executive agreements were made, such as the Texas annexation. In the late nineteenth century, some tariff acts triggered the increase of congressional-executive agreements, in particular the

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304 IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 1–3 (2019); Kathleen Claussen & Timothy Meyer, *The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF*, LAWFARE (July 18, 2022, 9:01 AM), https://www.lawfaremedia.org/article/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef; CONG. RSCH. SERV., IF10038, TRADE PROMOTION AUTHORITY (TPA) (2022), https://crsreports.congress.gov/product/pdf/IF/IF10038; 19 U.S.C. § 4202.

305 *See* Clark, *supra* note 273, at 1631–32. Moreover, the distinction between sole executive agreements and treaties on the settlement of claims used to be clear. Ramsey, *Executive Agreements*, *supra* note 273, at 201–02. Bradford R. Clark points out that the scope of sole executive agreements on the settlement of claims was related to the enactment of the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891, which abrogated absolute immunity of foreign states from suit on. In sum, before 1976 there was no other way other than sole executive agreements made by the President for U.S. nationals to receive compensation from foreign countries. Clark, *supra* note 273, at 1576.

306 Clark, *supra* note 273, at 1584.

307 On the relevant agreements which collectively make up the Algiers Accords, see 20 I.L.M. 223–40 (1981); *see also* 1 Iran-U.S. Cl. Trib. Rep. 3–25 (1983).

308 Agreement Concerning the Foundation "Remembrance, Responsibility And the Future," Ger.-U.S., July 17, 2000, 39 I.L.M. 1298 (2000).

309 Bradley & Goldsmith, *supra* note 1, at 1210.

reciprocity agreements. And there were some sole executive agreements made by the President based on his own authorities, including as the Commander-in-Chief. Executive agreements pursuant to Article II treaty were also entered into by the President. In the twentieth century, ex post congressional-executive agreements emerged in the field of international organizations and trade and commerce. Finally, the scope of sole executive agreements widened enough to cover many topics which were not dealt with in sole executive agreements until the twentieth century. While one scholar points out that Article II, Section 2, Clause 2 has never functioned as the Framers expected,[310] the fact remains that executive agreements have been utilized very often, and such agreements are very important to American diplomatic relations.

C. The Various Types of Executive Agreements

As outlined in the previous section, in the United States, executive agreements have been used since the writing of the Constitution. This section analyzes classifications of executive agreements in the United States Traditionally, American executive agreements have been classified into three types of executive agreements. However, some scholars recently claim other types of executive agreements.

1. The Traditional Classification of Executive Agreements

At present, there are three types of executive agreements:[311] executive agreements according to Article II treaties, congressional-executive agreements ex ante or ex post approved by Congress, and sole executive agreements made by the President on his or her own authority. This classification, which is according to the involvement of Congress, is typical and traditional.[312]

First, the President can make executive agreements pursuant to treaty[313] because some treaties explicitly or implicitly authorize or provide for the

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[310] Nigel Purvis, *Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority* 10–11 (Apr. 15, 2008) (Discussion Paper RF DP 08-09, Research for the Future), https://media.rff.org/documents/RFF-DP-08-09.pdf.

[311] On the classification of executive agreements, *see* KRUTZ & PEAKE, *supra* note 267, at 42–43.

[312] Jean Galbraith, *International Agreements and U.S. Foreign Relations Law: Complexity in Action*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 8, at 157, 160 [hereinafter Galbraith, *International Agreements*].

[313] On the terminology for such executive agreements, treaty-executive agreements, treaty-based executive agreements, treaty-authorized executive agreements, treaty-related agreements, and executive agreements under the authority of a treaty provision, *see, e.g.*, Purvis, *supra* note 310 at 14 (treaty-executive agreements); Joseph M. Isanga, *The U.S. Withdraws: Impact on the U.S. and International Rule of Law*, 32 FLA. J. INT'L L. 215, 265 n.244 (2020) (treaty-based executive agreements); Kenneth C.

making of such agreements.[314] For example, the Convention on International Civil Aviation (the Chicago Convention) signed in 1944 is an Article II treaty, but the Interim Agreement that provided for the establishment of a Provisional International Civil Aviation Organization was signed in 1945 as an executive agreement.[315] And the Status of Forces Agreements, including the U.S.–Japan Status of Forces Agreement of 1960, were also made as this type of executive agreement.[316] These treaties authorize the President to make agreements that implement the treaties.

Because this type of executive agreements is established pursuant to explicit or implicit treaty authorization, the President does not have authority to enter into executive agreements beyond the treaty's authorization.[317] Executive agreements pursuant to Article II treaties depend on whether specific treaties actually authorize the President to make executive agreements.[318]

Next, executive agreements approved by Congress are classified into ex ante congressional-executive agreements and ex post congressional-executive agreements.[319] These types are not limited to agreements on trade; there are many kinds of executive agreements that are approved by Congress, and such agreements are made on subject matters other than ones

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Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1092 (1990) (treaty-authorized executive agreements); Hyman, *supra* note 274, at 811 (treaty-related agreements); STEPHEN P. MULLIGAN, CONG. RES. SERV., RL32528 INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 24 (2023) (executive agreements under the authority of a treaty provision).

314 This type of executive agreement derives from the presidential authority to "take [c]are that the [l]aws be faithfully executed." U.S. CONST. art. II, § 3; Keith E. Fryer & J. Michael Levengood, *Recent Developments: Arms Control: SALT II - Executive Agreement or Treaty?*, 9 GA. J. INT'L & COMP. L. 123, 125 (1979); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1300 n.51 (1997). *See also* Wilson v. Girard, 354 U.S. 524 (1957). In *Wilson*, the court upheld executive agreements pursuant to Article II treaty. 354 U.S. at 528–29.

315 Richard Kermit Waldo, *Sequels to the Chicago Aviation Conference*, 11 L. & CONTEMP. PROBS. 609, 614 n.7 (1946); Erwin Seago & Victor E. Furman, *Internal Consequences of International Air Regulations*, 12 U. CHI. L. REV. 333, 342 (1945); Hathaway, *Treaties' End*, *supra* note 249, at 1262 n.57.

316 The NATO Status of Forces Agreement, however, was the only one of these agreements concluded as an Article II treaty. R. CHUCK MASON, CONG. RES. SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 n.6, 18 n.128 (2012). Sean D. Murphy and Edward T. Swaine describe the bilateral status of forces agreements as "treaty-implementing agreements." SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF U.S. FOREIGN RELATIONS 558 (2023). For more on the categorization of security agreements, *see* MICHAEL JOHN GARCIA & R. CHUCK MASON, CONG. RES. SERV., R40614, CONGRESSIONAL OVERSIGHT AND RELATED ISSUES CONCERNING INTERNATIONAL SECURITY AGREEMENTS CONCLUDED BY THE UNITED STATES 9–16 (2012).

It has also been pointed out that executive agreements pursuant to a treaty might be classified as sole executive agreements. Chris Mullen, *Pushing Back: Reasserting A Role for Congress in the Withdrawal from International Agreements*, 51 N.Y.U. J. INT'L L. & POL. 493, 508 (2019).

317 BRADLEY, *supra* note 12, at 82–84.

318 MULLIGAN, *supra* note 313, at 7.

319 Some scholars refer to these as statutory executive agreements. *See* JAMES M. MCCORMICK, AMERICAN FOREIGN POLICY AND PROCESS 263 (5th ed. 2010).

the President has authority to make on his or her own power.[320] For instance, as seen in the previous section, there are executive agreements for annexing Texas and Hawaii[321] and joining the International Labour Organization.[322] There are also international agreements on extradition of suspects to the international criminal tribunals related to Rwanda and Yugoslavia.[323] Thus, congressional-executive agreements are based on either ex ante congressional authorization or ex post congressional approval and may cover many topics, such as American territory, and protection for patents, copyrights, and trademarks.[324]

And finally, the third type of executive agreement is sole executive agreements. As the *Restatement (Third) of U.S. Foreign Relations Law* provides, "the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."[325] The sources of the President's constitutional authority are found in Article II and include the following: "the Executive Power,"[326] the power of "Commander in Chief of the Army and Navy,"[327] the authority to appoint and receive "Ambassadors and other public Ministers,"[328] and the authority to "take Care that the Laws be faithfully executed."[329] Thus, because the President lacks an independent spending power, for example, he cannot conclude sole international agreements obligating the United States to spend money.[330] And although the

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320 Julian Nyarko, *Giving the Treaty Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AM. J. INT'L L. 54, 57 (2019).

321 *See supra* notes 275–76 and accompanying texts.

322 *See supra* note 300 and accompanying text.

323 For more on congressional-executive agreements, *see* Hathaway, *Treaties' End*, *supra* note 249, at 1261–70.

Scholars have discussed the interchangeability of such agreements with Article II treaties. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. e (AM. L. INST. 1986); McDougal & Lans, *supra* note 270, at 187; Hathaway, *Treaties' End*, *supra* note 249, at 1252–71; BRADLEY, *supra* note 12, at 88–91. For further readings on the objections to this interchangeability, *see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1276 (1995); Yoo, *supra* note 275, at 758; Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 993–1009 (2001).

324 CRANDALL, *supra* note 199, at 127–40.

325 RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303(4) (AM. L. INST. 1986).

326 U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

327 *Id*. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

328 *Id*. art. II, § 2, cl. 2 ("[H]e shall receive Ambassadors and other public Ministers.").

329 *Id*. art. II, § 3, cl. 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. g (AM. L. INST. 1986); Wuerth, *supra* note 274, at 12–13; Robert E. Dalton, *National Treaty Law and Practice: United States, in* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH 780 (Duncan B. Hollis et al. eds., 2005).

330 Hathaway, *Presidential Power Over International Law, supra* note 276, at 211–12.

President may enter into executive agreements alone, he must report them to Congress.[331]

Among international agreements entered by the United States, over 80 percent of them are ex ante congressional-executive agreements. [332] Sole executive agreements make up five to ten percent, and executive agreements pursuant to Article II treaty make up one to three percent.[333]

2. The Rising of New Classification of Executive Agreements

In addition to the three types of executive agreements discussed above, a new type of executive agreement has recently emerged: the executive agreement plus (EA+).[334] According to Daniel Bodansky and Peter J. Spiro, the above tripartite classification cannot explain all of executive agreements in terms of both theory and practice. [335] As analyzed earlier, bases for the traditionally classified executive agreements are one of "Senate consent, congressional authorization, and independent presidential power."[336] But those are not the only bases[337] and American executive agreements may also have their bases in legislation or treaties.[338] Such agreements "are consistent with, and complement, related congressional activity."[339] Bodansky and Spiro suggest that some executive agreements which have been considered as sole executive agreements are, in fact, EA+ and are supported by Congress.[340]

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331 1 U.S.C. § 112b(a) (2000). There is a debate over whether a sole executive agreement binds only the President who concluded the agreement. Bodansky & Spiro, *supra* note 287, at 918 n.182; Hathaway, *Presidential Power Over International Law, supra* note 276, at 175 n.107. For a discussion on transparency of executive agreements, *see* Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020).

332 Bradley & Goldsmith, *supra* note 1, at 1214.

333 *Id*.

334 Bodansky & Spiro, *supra* note 287, at 885.

335 *Id*. at 893.

336 *Id*.

337 *Id*. For critiques of the traditional tripartite classification, *see* Harold Hongju Koh, Remarks, *Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725 (2013) [hereinafter Koh, Remarks]; Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338 (2017) [hereinafter Koh, *Triptych's End*]; Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675 (2017) [hereinafter Galbraith, *From Treaties to International Commitments*].

For problems on the discussions of Bodansky & Spiro and Koh, *see* Bradley & Goldsmith, *supra* note 1, at 1257–70.

338 Bodansky & Spiro, *supra* note 287, at 893.

339 *Id*. at 887–88.

340 *Id*. at 915. Ultimately, EA+ are implicit ex ante congressional-executive agreements. *Id.* at 906.

The Obama Administration utilized EA+ consciously for the first time.[341] The Administration did not explain some executive agreements in terms of the presidential constitutional authority or sole executive agreement, and it pointed out that these agreements were consistent with and promoted congressional policies.[342] Bodansky and Spiro discussed three agreements as examples of EA+ under the Obama Administration: the Anti-Counterfeiting Trade Agreement, the Minamata Convention on Mercury, and intergovernmental agreements implementing the Foreign Account Tax Compliance Act of 2010.[343] Among these three, they considered the Minamata Convention[344] to have the strongest precedential value.[345] President Obama did not submit the Convention to either the Senate or the House, and the Department of State did not provide any legal basis for concluding it.[346] The State Department considered the Convention to "complement[]" measures already taken in the United States to reduce mercury pollution.[347]

Furthermore, the Paris Agreement on climate change, which was supported by the U.N. Framework Convention on Climate Change—a Senate-approved Article II treaty—could be considered as EA+ because it is consistent with existing legal and regulatory authorities and complements existing law.[348]

Bodansky and Spiro argue that some executive agreements which scholars categorize as congressional-executive agreements with implicit authorization or sole executive agreements according to the conventional classification, are EA+.[349] They insist that EA+ cannot be classified using the three conventional models. Although the view claimed by Bodansky and Spiro has some unclear boundaries, the scope of EA+ is not unlimited. EA+ has two limitations. First, EA+ should be implemented based on

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341 *Id*. at 887.

342 *Id*. at 907.

343 *Id*. at 907–14

344 Minamata Convention on Mercury, Nov. 6, 2013, TIAS 17–816.

345 Bodansky & Spiro, *supra* note 287, at 910.

346 Duncan B. Hollis, *Doesn't the U.S. Senate Care About Mercury?,* OPINIO JURIS (Nov. 12, 2013), http://opiniojuris.org/2013/11/12/doesnt-u-s-senate-care-mercury/; Ryan Harrington, *Understanding the "Other" International Agreements*, 108 L. LIBR. J. 343, 344, 357 (2016); Galbraith, *From Treaties to International Commitments*, *supra* note 337, at 1704; Bradley & Goldsmith, *supra* note 1, at 1267.

347 Press Release, U.S. Dept. of State, *United States Joins Minamata Convention on Mercury* (Nov. 16, 2013), https://2009-2017.state.gov/r/pa/prs/ps/2013/11/217295.htm

348 Bodansky & Spiro, *supra* note 287, at 917–19. The Paris Agreement is regarded as an executive agreement pursuant to treaty, ex ante congressional-executive agreement, or sole executive agreement. Bradley & Goldsmith, *supra* note 1, at 1249. Jean Galbraith concludes that ex ante congressional-executive agreements and sole executive agreements "can blur together." Galbraith, *International Agreements*, *supra* note 312, at 161. Cf. Jessica Durney, *Defining the Paris Agreement: A Study of Executive Power and Political Commitments*, 2017 CARBON & CLIM. CHANGE L. REV. 234 (2017) (considering the Paris Agreements as a political commitment).

349 *See, e.g.,* Sean Flynn, *ACTA's Constitutional Problem: The Treaty is Not A Treaty*, 26 AM. U. INT'L L. REV. 903, 903 (2011); Harrington, *supra* note 346, at 357.

existing federal law.[350] The President should not make use of such agreements to alter existing federal statutes or extend the domestic authority of the executive branch.[351] Second, EA+ is only appropriate when it complements other existing domestic measures.[352]

Harold Honju Koh holds a similar opinion to Bodansky and Spiro. Koh claims that the "triptych" of executive agreements (three types of executive agreements as classified above) was "dying or dead" by the end of the Obama Administration.[353] Koh also points out that the EA+ theory cannot solve the problem of classifying executive agreements. He suggests eliminating the triptych classification altogether.[354] In its place, executive agreements should be classified depending on their subject matter and framework.[355] Koh insists on three factors of the framework: (1) whether the agreements provide for "new, legally binding obligations"; (2) "the degree of congressional approval" for lawmaking by the executive branch; and (3) "the constitutional allocation of institutional authority over the subject matter at issue."[356]

Koh's view does not offer new categories of classification[357] but instead offers tools to evaluate whether international agreements are constitutional or lawful. Koh offers a conceptual framework for international agreements that may not be explained by the conventional classification in circumstances that are "moving to a whole host of less crystalline, more nuanced forms of international legal engagement and cooperation."[358]

As a result, executive agreements have been traditionally divided into three types (executive agreements pursuant to Article II treaties, congressional-executive agreements, and sole executive agreements). Executive agreements in the United States, according to the conventional classification, derive their bases from one of the senatorial consent, explicit or implicit congressional authorization, and the President's independent authority. More recently, however, some international agreements cannot be explained based on the conventional classification.[359]

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350 Bodansky & Spiro, *supra* note 287, at 915.

351 *Id.*

352 *Id.*

353 Koh, *Triptych's End*, *supra* note 337, at 338. On Koh's classification of the Paris Agreement, *see* Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432, 467, 472 (2018).

354 Koh, *Triptych's End*, *supra* note 337, at 341–42.

355 *Id.* at 345.

356 *Id*.

357 For more details of his argument, *see id*. at 345–49.

358 *Id*. at 338 (quoting Koh, *Remarks*, *supra* note 337, at 726–27).

359 *See* Galbraith, *From Treaties to International Commitments*, *supra* note 337, at 1675. In addition to the U.S. Constitution, certain factors in international law and administrative law also have impacts on forms of international agreements. *Id*.

D. *The* Domestic Legal Force and Self-Execution of Executive Agreements

1. Domestic Legal Force

The Supremacy Clause of the U.S. Constitution, which provides that all treaties are the "supreme Law of the Land," concerns the domestic legal force of Article II treaties."[360] This Clause makes clear that treaties are "part of U.S. domestic law" and ensures "the capacity of treaty obligations to supplant inconsistent State laws, particularly in State courts."[361]

In contrast, there is no explicit provision in the U.S. Constitution dealing with the domestic legal force of executive agreements. U.S. scholars have discussed this force by analyzing four Supreme Court decisions: *United States v. Belmont*,[362] *United States v. Pink*,[363] *Dames & Moore v. Regan*,[364] and *American Insurance Association v. Garamendi*.[365]

In the *Belmont* case, which was decided in 1937, Petrograd Metal Works, a Russian company during the Imperial Russia era, deposited money to a private banker (August Belmont & Co.) in New York.[366] After the revolution of 1918, the Metal Works's property was nationalized by decree of the Soviet government.[367] As a result, the company's deposit in Belmont came to belong to the Soviet government.[368] In 1933, the Soviet government released and assigned claims to the United States by the Litvinov Agreement, which was part of American policy to recognize the Soviet government.[369] New York public policy was to refuse the confiscation decree and the assignment.[370] At issue in the case was whether the United States could claim the money deposited to Belmont. After finding the international agreement at issue (an executive agreement made by President Franklin D. Roosevelt) to be valid,[371] the Court held that the executive agreement was supreme over state law.[372] In the decision, Justice Sutherland stated the following:

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360 U.S. CONST. art. VI, cl. 2.

361 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310 cmt. a (AM. L. INST. 2018).

362 *See generally* United States v. Belmont, 301 U.S. 324 (1937).

363 *See generally* United States v. Pink, 315 U.S. 203 (1942).

364 *See generally* Dames & Moore v. Regan, 453 U.S. 654 (1981).

365 *See generally* American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003).

366 *Belmont*, 301 U.S. at 325–26.

367 *Id*. at 326.

368 *Id*.

369 *Id*.

370 *Id*. at 327.

371 *Id*. at 330.

372 *Id.* at 331–32.

> Mr. Madison, in the Virginia Convention, said that, if a treaty does not supersede existing state laws as far as they contravene its operation, the treaty would be ineffective. . . . "To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war." . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government, and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.[373]

The Supreme Court held executive agreements to have the same force as treaties because of the "complete power" of the federal government over "international affairs" despite the fact that executive agreements were not treaties that were created with the advice and consent of the Senate and there was no "express language" in the Supremacy Clause regarding such agreements.[374]

Moreover, the *Pink* case, decided in 1942, had similar facts to the *Belmont* case. In the *Pink* case, the validity and domestic force of the Litvinov Agreement was upheld as follows:

> The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems, including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. . . .[375]

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373 *Id.* (citations and quotations omitted) (upholding the broad federal authority of foreign affairs including ones not explicitly granted by the Constitution (citing United States v. Curtiss Wright Export Corporation, 299 U.S. 304, 318 (1936)).

374 *See also* Wuerth, *supra* note 274, at 15.

375 United States v. Pink, 315 U.S. 203, 229–30 (1942).

Then, turning to the question of domestic validity and supremacy of the Agreement, the Court relied first on the Federalist Papers, explaining:

> All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . . . " The Federalist, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity. . . . [S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.[376]

The Supreme Court again upheld the validity of executive agreement in terms of the federal government authority over foreign affairs and the domestic legal force and supremacy of the agreement over state law.

Dames & Moore raised the validity of executive orders and Treasury Department regulations implementing the Algiers Accords. The executive orders and regulations required the transfer of assets in Iran to the Federal Reserve Bank of New York and the return of all Iranian assets held in the United States by American banks.[377] The petitioner company, Dames & Moore, had contracted with the Atomic Energy Organization of Iran and claimed for payment for services performed under the contract.[378] The district court found in favor of the petitioner, but the court's enforcement order of the contract interfered with the Algiers Accords (the executive agreements) and executive orders.[379]

The Supreme Court upheld the President's authority to invalidate the attachment of Iranian assets and the validity of the executive agreement that implement the claims settlement.[380] The Court first addressed the President's authority to suspend claims pending in court. The Supreme Court confirmed that although such authority was not clearly granted by relevant statutes, Congress had implicitly recognized the President's authority to settle claims through the use of executive agreements.[381] This

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376 *Id*. at 229–31 (citations omitted). *See also id*. at 232 ("Here we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue.").

377 Dames & Moore v. Regan, 453 U.S. 654, 660, 663, 665–66 (1981).

378 *Id*. at 664.

379 *Id*. at 664–66.

380 *Id*. at 690.

381 *Id*. at 675–88.

included the authority to suspend claims according to state law.[382] So in that sense, this holding could be evaluated to uphold the supremacy of executive agreement over state law.[383]

The Supreme Court emphasized that its decision in *Dames & Moore* applied only to the facts of that case.[384] But in 2003, the Court in *Garamendi* substantially relied on the *Dames & Moore* decision.[385] *Garamendi* addressed whether the California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) interfered with the federal government's conduct of foreign relations.[386] HVIRA required any insurer in California to disclose information about any policies sold in Europe from 1920 to 1945 by the company itself or related companies[387] and the State of California issued "administrative subpoenas . . . against several subsidiaries of European insurance companies participating in [the International Commission on Holocaust Era Insurance Claims (ICHEIC)]."[388] After that incident, the federal government entered into executive agreements with Germany, Austria and France to "encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information,"[389] which was "the only effective means to process quickly and completely unpaid Holocaust era insurance claims."[390]

The Supreme Court pointed out that "valid executive agreements are [generally] fit to preempt state law, just as treaties are."[391] However, the executive agreements at issue in *Garamendi* did not contain express preemption language.[392] As a result, there was a conflict between state law and federal diplomatic policy.[393]

According to the Court, the presidential valid policy clearly trumped conflicting state law.[394] The Court also noted that in negotiations leading up to the executive agreements, presidential policy had consistently

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382 CHRISTOPHER N. MAY ET AL., CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM: EXAMPLES AND EXPLANATIONS 377 (8th ed. 2019).

383 *Id*.

384 *Dames & Moore*, 453 U.S. at 688.

385 American Insurance Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).

386 *Id*. at 412–13.

387 *Id.* at 401.

388 *Id.* at 411.

389 *Id.* at 421.

390 *Id.* at 397.

391 *Id.* at 416.

392 *Id.* at 416–17.

393 In *Garamendi*, the Court examined *Zschernig v. Miller*, 389 U.S. 429 (1968) relied upon by petitioners. In that case, according to the *Garamendi* decision, it was held that "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict," and "the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." *Garamendi*, 539 U.S. at 418, 420.

394 539 U.S. at 421.

preferred encouraging European governments to voluntarily provide settlement funds, over litigation or sanction.[395] Specifically, the President wanted insurance companies in Europe to cooperate with the ICHEIC to develop their own claim procedures.[396] In contrast, California's HVIRA imposed regulatory sanctions designed to compel insurance companies to disclose all of their policy information and payment.[397]

Because the state law clearly conflicted with the policy of the President, the state law was invalid.[398] Notably, the *Garamendi* Court held that state law must yield, not only when it conflicted with an executive agreement itself, but also when it conflicted with the federal *policies* reflected in the executive agreement.[399]

These four Supreme Court decisions are leading cases on the domestic legal force of executive agreements in the United States.[400] However, all four dealt with sole executive agreements. Curtis A. Bradley and Jack L. Goldsmith, who are both eminent scholars on the U.S. foreign relations law, account for this fact by describing the "direct domestic effect" of sole executive agreements.[401] They further posit that the same is "presumably" the case for ex ante congressional-executive agreements and executive agreements pursuant to Article II treaties.[402] This is because those kinds of executive agreements are made based on federal legislative authorization or senatorial consent.

Congressional-executive agreements automatically have the legal force of federal law,[403] which means they supersede conflicting state laws.[404] Since they have the same validity and force as acts of Congress,[405] they acquire domestic legal force and are superior to state laws.[406] Similarly, executive agreements that implement treaties have the same status as the

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395 *Id*.

396 *Id*.

397 *Id*. at 409.

398 *Id.* at 425. The dissenting opinion insisted that foreign policy should not be invoked for preemption of state law and express terms in an executive agreement or formal foreign policy statement should be required. *Id.* at 430, 442 (Ginsburg, J., dissenting, joined by Stevens, Scalia, & Thomas, JJ.).

399 *Id.* at 417. For discussion on some problems of this holding, *see* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829–32 (2004).

400 For additional judicial decisions on this subject, *see* B. Altman & Co. v. United States, 224 U.S. 583 (1912); Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1982). *See also* Medellín v. Texas, 552 U.S. 491, 565 (2008) (discussing the presidential authority to conclude executive agreements to preempt state law) (opinion of court).

401 Bradley & Goldsmith, *supra* note 1, at 1255.

402 *Id.*

403 Hathaway, *Treaties' End*, *supra* note 249, at 1255 n.47.

404 BRADLEY, *supra* note 12, at 87.

405 Jordan J. Paust, *International Law as Law of the United States: Trends and Prospects*, 1 CHIN. J. INT'L L. 615, 625 (2002).

406 HENKIN, *supra* note 272, at 217.

treaties they implement—the "supreme law of the land."[407] Thus, they, too, acquire direct domestic effect. Finally, the Supreme Court has recognized the domestic legal force and supremacy of sole executive agreements.[408]

E. Self-Execution

Even if executive agreements have domestic legal force, that does not mean they are always enforceable in U.S. domestic courts. This is an issue of self-execution. If a treaty provision is not self-executing, it does not "of its own force provide a rule of decision" for U.S. courts[409] and "will not be given effect" by them unless the treaty provision is implemented by Congress.[410] Courts have applied the same approach to executive agreements and Article II treaties, on at least three occasions.[411]

For example, in *Islamic Republic of Iran v. Boeing Co.*, the Ninth Circuit discussed the self-execution of the Algiers Accords, sole executive agreements. The Accords stated that any questions relating to their interpretation or application would be decided by the Iran–United States Claims Tribunal.[412] The court was called upon to determine its own jurisdiction in light of the Accords, but to do so, it first had to determine whether the Accords were self-executing—that is, whether congressional action was necessary to give the Accords effect.[413] The Ninth Circuit determined the Accords were not self-executing after analyzing their language and purpose.[414] In deciding that, the court relied on four factors

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407 BRADLEY, *supra* note 12, at 83; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. f (AM. L. INST. 1986).

408 RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303, cmt. j (AM. L. INST. 1986).

Ramsey argues that sole executive agreements lack legal force in the domestic legal system. Ramsey, *Executive Agreements*, *supra* note 273, at 133. Julian Ku and John Yoo have an opinion that sole executive agreements generally do not have domestic effect without implementing legislation, but such agreements replace state law in limited circumstances where the President unilaterally exercises the executive authority, such as in claims settlements. JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION AND THE NEW WORLD ORDER 12 (2012).

409 Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1640 (2015) [hereinafter Ramsey, *A Textual Approach*].

410 BRADLEY, *supra* note 12, at 43.

411 *See* KU & YOO, *supra* note 408, at 12; Canadian Lumber Trade All. v. United States, 425 F. Supp.2d 1321, 1362–63 (Ct. Int'l Trade 2006). *See also* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995) (referring to Air Canada v. U.S. Dep't of Transp., 843 F.2d 1483, 1486 (D.C. Cir. 1988) (pointing out that executive agreements "are interpreted in the same manner as treaties and reviewed by the same standard.").

412 Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985).

413 *Id*. at 1283–84.

414 *Id*. at 1283–84.

mentioned for finding self-execution in *People of Saipan v. U.S. Dep't. of Interior*.[415]

In 2017, *United States v. Sum of $70,990,605* involved the forfeiture of assets deposited in U.S. banks by Afghan banks.[416] The Bilateral Security Agreement with the Islamic Republic of Afghanistan provided (1) for Afghanistan's right to exercise jurisdiction over U.S. contractors and their employees and (2) for the settlement of disputes by other organizations, such as domestic courts, regarding the interpretation or application of the Agreement.[417] According to the district court, executive agreements were legally binding in the United States regardless of their self-execution.[418] But non-self-executing executive agreements were not a rule for the courts to apply and did not, by themselves, create domestically enforceable federal law.[419] In sum, executive agreements are to be complied with and have domestic legal force irrespective of their self-execution, but in order for the courts to enforce executive agreements they must be self-executing. Moreover, the court recognized a presumption against creating private rights, even if the executive agreement was self-executing.[420]

The court did not find the agreement to be self-executing or judicially enforceable.[421] The court considered the self-execution in terms of the justiciability, concluding that the agreement provided for the settlement of dispute through diplomatic channels.[422]

Moreover, in *Beeler v. Berryhill* in 2019, the District Court for the Southern District of Indiana considered self-execution of a social security agreement with Canada authorized by Section 233 of the Social Security Act.[423] The court considered the agreement to be self-executing, stating that: "Executive agreements (such as totalization agreements . . .) are law—that is, part of our domestic or municipal law—if they are sufficiently analogous to treaties as defined by the Constitution, art. II, § 2, cl. 2, and

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415 *Id*. at 1283. In People of Saipan v. U.S. Dep't of Interior, the Court of Appeals for the Ninth Circuit enumerated four factors for finding "affirmative and judicially enforceable obligations without implementing legislation," stating, "[t]he extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors." The factors are "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution." People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

416 United States v. Sum of $70,990,605, 234 F. Supp. 3d 212, 216 (D.D.C. 2017).

417 *Id.* at 221–22.

418 *Id.* at 233 (quoting HENKIN, *supra* note 272, at 203).

419 *Id*. at 233–34.

420 *Id.* at 234.

421 *Id.*

422 *Id.* at 236–37.

423 Beeler v. Berryhill, 381 F. Supp. 3d 991, 997 (S.D. Ind. 2019).

if they are self-executing—that is, effective without further congressional action."[424]

Thus, the courts have applied the same test for self-execution to Article II treaties and executive agreements. But if the courts consider self-execution without distinction between Article II treaties and executive agreements, there is two issues to be discussed: whether executive agreements may override federal statutes and how the courts decide self-execution.

Self-execution is an issue discussed on the relationship with federal statutes while *supremacy*, analyzed in the previous subsection, is an issue on the relationship between executive agreements and state laws. The domestic legal force of treaties is related to the Supremacy Clause, and the legal force issue has been discussed in the context of the relationship between them and state laws. Treaty self-execution has mainly been discussed in the context of its relationship with federal statutes.[425] And the courts have generally applied four approaches to treaty self-execution: the intent, congressional exclusive power, justiciability, and private right of actions.[426] The rest of this subsection (1) analyzes the relationship between executive agreements and federal statutes and (2) considers those four approaches for executive agreements.

The relationship between executive agreements and federal statutes depends on whether the last-in-time rule applies between those legal norms. With the last-in-time rule, courts solve conflicts between treaties and federal statutes.[427] According to that rule, "when a treaty and federal statute conflict, whichever was enacted last in time controls."[428] In deciding whether to apply a federal statute and self-executing treaty, U.S. courts generally "apply whichever is last in time."[429] Non-self-executing treaty provisions are not enforceable in courts, and thus the last-in-time rule does not apply to such provisions.[430]

First, agreements pursuant to treaties are considered to be self-executing if the underlying treaties are self-executing. This is because those

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[424] *Id*. at 998 (citations omitted). For other decisions about direct application of executive agreements*, see* United States v. Walczak, 783 F.2d 852, 856 (9th Cir. 1986). *See also* Dep't of Def. v. Fed. Lab. Rels. Auth., 685 F.2d 641, 648 (D.C. Cir. 1982).

[425] SLOSS, *supra* note 201, at 85–95, 139–52, 208–18, 231–40; Yuhei Matsuyama, *The Significance of the* Fujii *Case to the Self-Executing Treaty Doctrine in the United States: Treaty Supremacy and Self-Execution*, 50 J. GRADUATE SCH. FUKUOKA UNIV. 49 (2018) [hereinafter Matsuyama, *The Significance of the Fuji Case*] (Japan).

[426] For the four approaches to treaty self-execution, *see* Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) [hereinafter Vázquez, *The Four Doctrines of Self-Executing Treaties*].

[427] *See, e.g.,* Whitney v. Robertson, 124 U.S. 190, 194–95 (1888).

[428] Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 325 (2005).

[429] BRADLEY, *supra* note 12, at 55.

[430] MULLIGAN, *supra* note 313, at 22.

executive agreements are encompassed by, and share the same status as, the underlying treaties. They can be supreme over conflicting treaties or federal statutes which are valid before executive agreements go into effect.[431]

Second, according to Bradley, an internationally renowned scholar of the U.S. foreign relations law, the framework for treaty self-execution applies to sole executive agreements.[432] The *Islamic Republic of Iran* decision mentioned above illustrates this approach.[433] But sole executive agreements, unlike Article II treaties, cannot override earlier federal statutes.[434] Although the courts' views on the relationship between Article II treaties and sole executive agreements are not clear,[435] it has been pointed out that sole executive agreements do not supersede earlier statutes.[436] This also means that it does not matter whether the last-in-time rule applies to them or not, but the relationship of powers between Congress and the President matters.[437]

To elucidate this relationship of powers, Justice Jackson's concurring opinion in the *Youngstown* case is useful even now. The *Youngstown* case is one of the leading cases on the relationship among political departments.[438] It centered on the validity of Executive Order 10340, which "direct[ed] the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[439] That executive order was issued by President Harry S. Truman to prevent a nationwide strike by steel workers during the Korean War.[440] The Supreme Court held that the

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431 BRADLEY, *supra* note 12, at 83. *See also* Bradley & Goldsmith, *supra* note 1, at 1255 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

432 BRADLEY, *supra* note 12, at 100.

433 Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283–84 (9th Cir. 1985).

434 BRADLEY, *supra* note 12, at 100.

435 *See* United States v. Guy W. Capps, Inc., 204 F.2d 655, 659–60 (4th Cir. 1953); Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (holding that executive agreements are not supreme over congressional statutes); Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 724 F.3d 230, 234 (D.C. Cir. 2013) (applying the last-in-time rule as in the case of treaties).

436 Hannah Chang, *International Executive Agreements on Climate Change*, 35 COLUM. J. ENV'T L. 337, 344 (2010) (referring to RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. j (AM. L. INST. 1986); HENKIN, *supra* note 272, at 228; CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 264, at 93–95; Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1244 (2007)).

According to the *Restatement (Third)*, "[l]ike treaties and other international agreements, [sole executive agreements] can be superseded as domestic law by later international agreements or by acts of Congress within its constitutional authority. Their status in relation to earlier Congressional legislation has not been authoritatively determined." RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. j (AM. L. INST. 1986). *See also* HENKIN, *supra* note 272, at 228.

437 Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT'L & COMP. L. 15, 25 n.37 (1996). *See also* Hathaway, *Treaties' End*, *supra* note 249, at 1255 n.47; RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §115 cmt. c, reporters' note 5 (AM. L. INST. 1986).

438 *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 Const. COMMENT. 87 (2002); Bradley & Goldsmith, *supra* note 1, at 1257.

439 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

440 *Id.*

executive order was unconstitutional because issuing such an order was not within the proper presidential power and was related to the lawmaking power of Congress.[441]

Justice Jackson's concurring opinion in *Youngstown* is often cited in Supreme Court decisions.[442] He described a fluctuating Presidential power that ebbed and flowed in strength depending on its alignment with congressional intent.[443] Presidential authority could thus be described in three tiers: First, presidential authority was at its maximum when the President acted within the express or implicit authorization of Congress.[444] In those instances, the President acted not only with his own authority, but also has the authority delegated by Congress.[445] Second, when Congress neither prohibits nor authorizes the President to act, "there is a zone of twilight" where the President's power depends on "the imperatives of events and contemporary imponderables."[446] Third, the President's power is at its weakest when acting in a way "incompatible with the expressed or implied will of Congress."[447] Under those circumstances, the presidential power is his or her own.[448]

The validity of sole executive agreements ultimately relies on the acquiescence of Congress,[449] so, under Justice Jackson's framework, they fall within the second tier,[450] the "zone of twilight." This means that the congressional authority prevails and that federal statutes take the place of sole executive agreements.[451] Those agreements have legal force as long

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441 *Id.* at 587–89 (opinion of court).

442 *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375 (2000); American Insurance Ass'n v. Garamendi, 539 U.S. 396, 414, 417 (2003); Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004); Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006); Medellín v. Texas, 552 U.S. 491, 524–25 (2008) (opinion of court); Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015).

443 *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

444 *Id.*

445 *Id.* at 635–37.

446 *Id*. at 637.

447 *Id.*

448 *Id.* at 637–38. *See* Medellín, 552 U.S. at 524 (the presidential authority ''must stem either from an act of Congress or from the Constitution itself.'') (quoting *Youngstown*, 343 U.S. at 585 and Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (opinion of court)). For detailed analysis of the Justice Jackson's framework, *see* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 8–18 (1990); MURPHY & SWAINE, *supra* note 316, at 33–42.

449 *See* Medellín, 552 U.S. at 530–32.

450 *Id*. at 528. *See also* Clark, *supra* note 273, at 1631–32 (pointing out that sole executive agreements for settling claims fall within the second or third category).

451 Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 53–54 (2013). Reinstein identifies Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) as an example of a federal statute superseding a sole executive agreement. In *Japan Whaling Ass'n*, it was held that the executive "may not act contrary to the will of Congress when exercised within the bounds of the Constitution." Reinstein, *id.* at 54 n.364 (quoting *Japan Whaling Ass'n*, 478 U.S. at 223). *See also Medellín*, 552 U.S. at 532 (holding that the President is not a lawmaker) (opinion of court).

According to Bradley and Goldsmith, a foundational principle of the separation of powers is that the presidential measure must be involved by Congress, and sole executive agreements are "generally considered to be a narrow exception to the usual constitutional requirement of joint collaboration in lawmaking." Bradley & Goldsmith, *supra* note 1, at 1257–59.

as they do not conflict with the express intent of Congress—as demonstrated in federal statutes—because sole executive agreements are made by the President alone.[452] The President cannot act beyond his or her own independent powers without "genuine collaboration" with Congress[453] and the Constitution itself "expressly forecloses unilateral presidential conduct of foreign policy."[454] The presidential powers are limited by explicit or implicit grants of powers to Congress by the Constitution, [455] and thus, the extent and constitutionality of the presidential authority depend on his or her measures and the will of Congress. Moreover, agreements that relate to the "exclusive" authority of the President prevail over federal statutes.[456] The last-in-time rule does not apply to sole executive agreements and federal statutes. Generally, statutes are considered to displace such agreements.[457]

Under the Justice Jackson's framework, the first tier is related to congressional-executive agreements. Some believe that self-execution does not apply to congressional-executive agreements. According to Louis Henkin, an influential foreign relations law scholar, congressional-executive agreements "eliminate[]" self-execution issue, and thus, inconsistency between those agreements and federal statutes.[458] In short, the last-in-time rule does not apply there.

However, self-execution of congressional-executive agreements can be an issue. Executive agreements that are created by laws are, themselves, federal statutes. Statutes that create congressional-executive agreements include not only terms for making such agreements, but also may have necessary terms to implement them, and thus, generally, those agreements are presumed to be self-executing.[459] Congress may "indicate directly" that an agreement is not self-executing. [460] Moreover, even ex ante executive agreements could be not self-executing and require implementing legislation because they involve in subject matters of congressional legislative power under the U.S. Constitution or the obligation in the agreements is not justiciable.[461] In short, congressional-executive agreements may trigger issues of self-execution and application

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452 Hathaway, *Treaties' End*, *supra* note 249, at 1255 n.47.

453 Hathaway, *Presidential Power Over International Law*, *supra* note 276*,* at 211.

454 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4–3, at 639 (3d ed. 2000).

455 HENKIN, *supra* note 272, at 62.

456 BRADLEY, *supra* note 12, at 100. *See also* MURPHY & SWAINE, *supra* note 316, at 578–80. For a study on the exclusive executive power, *see, e.g.,* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 6–13 (4th ed. 1998).

457 In a case where the Algiers Accords were at issue, the court explained "[t]here is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement" without reference to self-execution. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 235 (D.C. Cir. 2003).

458 HENKIN, *supra* note 272, at 217.

459 Hathaway, *Treaties' End*, *supra* note 249, at 1321.

460 MURPHY & SWAINE, *supra* note 316, at 561.

461 *Id*. at 561–62. Cf. Hathaway, *Treaties' End*, *supra* note 249, at 1321.

of the last-in-time rule. Ex ante congressional-executive agreements, which are presumably self-executing, prevail over prior inconsistent federal statutes.[462]

Courts have also considered the self-execution of congressional-executive agreements. As mentioned above, the *Beeler* decision discussed the self-execution of the U.S.–Canada social security agreement authorized by the Social Security Act.[463] There, the Social Security Administration insisted on self-execution of the agreement to prevent the plaintiffs from having their pensions paid twice.[464] The court considered the agreement was domestically enforceable by looking to the terms of the agreement.[465]

Finally, it is important to determine the basis for self-execution. At present, self-execution is found in the context of the relationship between treaties and federal statutes, and the courts use four approaches to discuss self-execution: (1) the intent of treaty parties or U.S. treaty-makers, (2) the exclusive legislative power of Congress, (3) justiciability, and (4) private rights of action.[466]

Non-self-executing treaty provision needs implementing legislation in order for courts to directly enforce the provision.[467] The intent-based approach for self-execution depends on intentions of treaty parties or the U.S. treaty-makers (the President and the Senate).[468] According to the constitutionality approach, when subject matters which treaty provisions deal with are within the exclusive power of Congress, those provisions are not self-executing.[469] And the justiciability approach relies on "constitutional considerations about the appropriate role of the courts"[470] in the U.S. governmental system. Vague or precatory treaty provision does not provide a rule of decision for courts to decide the cases[471] and this approach is similar to the political question doctrine,[472] under which "courts will decline to resolve certain issued deemed to be political in

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462 *See also* Bradley & Goldsmith, *supra* note 1, at 1255.

463 Beeler v. Berryhill, 381 F. Supp. 3d 991, 997 (S.D. Ind. 2019).

464 *Id.*

465 *Id.* at 999. *See also* Defenders of Wildlife v. Hogarth, 330 F.3d 1358, 1367 (Fed. Cir. 2003) ("[T]he Supremacy Clause mandates that a statute is supreme over an executive agreement.").

466 Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 426, at 695; Carlos M. Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, 2015 BYU L. REV. 1747, 1750–51 (2016) [hereinafter Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*]. Additionally, for a view further classifying these four approaches further, *see* SLOSS, *supra* note 201, at 292–93; MURPHY & SWAINE, *supra* note 316, at 524–40.

467 *See, e.g.,* BRADLEY, *supra* note 12, at 43.

468 Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 426, at 700–10.

469 *Id.* at 718–19; BRADLEY, *supra* note 12, at 51–53.

470 Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, *supra* note 466, at 1757.

471 Ramsey, *A Textual Approach*, *supra* note 409, at 1640.

472 Carlos M. Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2180 (1999).

nature."[473] At last, self-execution is determined in light of private right of action. Under this approach, non-self-executing treaty provisions "do not, of their own force, create a private right of action."[474] When an invoked treaty confers a private right of action, it enables private parties to maintain an action in court.[475]

The intent and justiciability approaches for self-execution are mentioned in *Islamic Republic of Iran v. Boeing Co.*[476] and the *Sum of $70,990,605* case.[477] The intent-based approach has been upheld by the courts,[478] and presently, this approach tends to comprehend even the justiciability issue, which is related to the separation of powers.[479] The intent-based approach based on the treaty-makers intentions has been a general criterion for treaty self-execution and is more often invoked, but in the case of executive agreements it is necessary to consider in what circumstances these approaches should be invoked.[480]

Further, the constitutionality approach does not apply to executive agreements. Congressional-executive agreements are likely *inherently* self-executing in terms of the reason why such agreements are within the congressional legislative power. If sole executive agreements were made in relation to subject matters within legislative power, the issue is not self-execution but the constitutionality, of executive agreements.

Next, there are some court decisions that found self-execution based on private rights of action. For example, in *Lakes Pilots Association, Inc. v. U.S. Coast Guard*, an executive agreement made with the authorization of the Great Lakes Pilotage Act was debated. The U.S. District Court

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473 BRADLEY, *supra* note 12, at 5.

474 Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, *supra* note 466, at 1759.

475 Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 426, at 719. However, recently, there are many arguments that self-execution and right of action are distinct issues. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310 cmt. b, reporters' notes 4, 9 (AM. L. INST. 2018); BRADLEY, *supra* note 22, at 51. Cf. Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, *supra* note 466, at 1759–61.

476 Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283–84 (9th Cir. 1985).

477 United States v. Sum of $70,990,605, 234 F. Supp. 3d 212, 233–34 (D.D.C. 2017).

478 *See, e.g.,* Medellín v. Texas, 552 U.S. 491, 506–09, 516, 519–23 (2008); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 149–157, 176–80 (2008). *See also* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310(2) (AM. L. INST. 2018).

479 *See* Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, *supra* note 466, at 1755–59; Yuhei Matsuyama, *The Restatement (Fourth) of U.S. Foreign Relations Law: Self-Executing Treaty Issue*, 51 J. GRADUATE SCH. FUKUOKA UNIV. 45, 51–55 (2019) (Japan).

480 In *Islamic Republic of Iran v. Boeing Co.*, court jurisdiction was an issue and the court considered self-execution of the executive agreement. However, the issue was directed only to the court; it had no impact on the authority of political departments, although there are very few cases of self-execution of executive agreements where self-execution was discussed in terms of the intent and justiciability.

considered self-execution in terms of the granting of a private right of action.[481]

Finally, as mentioned earlier in this section, the courts basically apply the same approach for Article II treaties, such as the four factors approach spelled out in the *People of Saipan* case,[482] to executive agreements. But, since the California Supreme Court's decision in *State of California v. Fujii* in 1952, treaty provisions that are not self-executing do not displace state laws.[483] Thus, applying the same approach to executive agreements may lead some to conclude that non-self-executing executive agreements are not supreme over state law.

On the one hand, it is possible to conclude that non-self-executing executive agreements do not supersede state laws. On the other hand, there is a view that states do not exist in the field of foreign affairs. T he Supreme Court has upheld the supremacy of executive agreements over state laws on the basis of the federal government's authority over foreign affairs.[484] As held in the *Garamendi* case, such agreements are superior to state powers even in the case of conflict between "federal policy"[485] and state laws or state policies. [486] Therefore, even non-self-executing executive agreements may displace inconsistent state laws.

It is likely that the self-execution of executive agreements may still be discussed, but there are currently few judicial cases. On the relationship with federal statutes, while the last-in-time rule applies to the self-execution of Article II treaties, it seems that the rule is not totally applicable to executive agreements. In determining the relationship of executive agreements with federal statutes, the separation of powers consideration also does matter, not just self-execution of executive agreements.

Moreover, in discussing self-execution of executive agreements, it is necessary to further consider the circumstances under which the intent,

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481 Lakes Pilots Ass'n, Inc. v. U.S. Coast Guard, 2013 WL 5435048, at *10–12 (E.D. Mich. 2013) (citing and quoting Renkel v. United States, 456 F.3d 641, 643 (6th Cir. 2006)).

Another district court also considered in 2004 self-execution in terms of right of action and denied self-executing status of an executive agreement at issue. De La Torre v. United States, 2004 WL 3710194, at *8–10 (N.D. Cal. 2004).

482 Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985).

483 SLOSS, *supra* note 201, at 213, 231; Matsuyama, *The Significance of the Fuji Case*, *supra* note 425, at 49.

Sum of $70,990,605 and *Beeler* seem to treat the Supreme Court decisions on the domestic legal force of executive agreements as self-execution of executive agreements. United States v. Sum of $70,990,605, 234 F. Supp. 3d 212, 233 (D.D.C. 2017); Beeler v. Berryhill, 381 F. Supp. 3d 991, 998 (S.D. Ind. 2019).

484 *See, e.g.*, United States v. Belmont, 301 U.S. 324, 331–32 (1937); United States v. Pink, 315 U.S. 203, 230–31 (1942).

485 American Insurance Ass'n v. Garamendi, 539 U.S. 396, 425 (2003).

486 The *Restatement (Third)* states that since executive agreements are federal law, they "supersede[] inconsistent State law or policy whether adopted earlier or later. Even a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy." RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §115 cmt. e (AM. L. INST. 1986).

justiciability, or private rights of action should be invoked. But, as discussed above, self-execution of executive agreements in terms of the exclusive power of Congress may not be an issue because such agreements are usually congressional-executive agreements.

In summary, this section analyzed the domestic legal force and self-execution of executive agreements. Leading cases regarding the domestic legal force of executive agreements—*Belmont, Pink, Dames & Moore*, and *Garamendi*[487]—relate to the domestic legal force of sole executive agreements. Executive agreements implementing treaties have domestic legal force because the underlying treaties that authorize the making of executive agreements are supreme. Congressional-executive agreements also acquire domestic legal force and are supreme over state law. While sole executive agreements have domestic legal force and are superior to state law, the supremacy of sole executive agreements relates to the presidential foreign affairs power which requires state law to yield to sole executive agreements.

For self-execution of executive agreements, the U.S. courts apply the same approach as treaty self-execution. Executive agreements pursuant to Article II treaties are self-executing if the treaties they implement are self-executing. Sole executive agreements may be self-executing, but self-executing sole executive agreements do not displace federal statutes. Thus, the last-in-time rule does not apply to sole executive agreements unless such agreements are made based on the President's exclusive authority. In other words, the validity of sole executive agreements depends on congressional measures and intent. Furthermore, congressional-executive agreements may be self-executing as in the judicial case mentioned above.

This part analyzed American executive agreements in terms of the making history of the Constitution, the practical development of the agreements, classification of the agreements, and domestic legal force and self-execution of the agreements. In contrast to Japanese executive agreements, there are many judicial decisions on executive agreements in the United States. In the next Part, executive agreements in those two legal systems are compared and examined.

IV. COMPARING JAPANESE AND AMERICAN PRACTICES

Previous two Parts analyzed the histories and practices of executive agreements in Japan and the United States. Part I discussed the drafting history of the Constitution of Japan and history of executive agreements in Japan. In the Japanese Constitution, the Cabinet has authority to make

487 *See also supra* notes 362–99 and accompanying texts.

treaties with the approval of the Diet.[488] However, during the debate of the Constitution, the founders recognized that executive agreements would exist, which meant that they anticipated a procedure to make international agreements without following the explicit provisions in the constitutional law.[489]

In Japan, the Administrative Agreement between Japan and the United States provoked a debate under the Constitution of Japan.[490] After the debate, the Japanese government published the Ohira Three Principles, authoritative statements pertaining to executive agreements, which explained the distinction between treaties and other international commitments. According to the Principles, treaties, which concluded with the Diet approval in accordance with Article 73, Item 3 of the Constitution, deal with legislative matters, financial matters or politically important matters. And executive agreements entered into based on Article 73, Item 2 of the Constitution which grants authority to "[m]anage foreign affairs" are made within the scope of already approved treaties, existing domestic laws, or budget already passed by the Diet.[491]

Part I also dealt with the domestic legal force of executive agreements and explained that even international agreements made without the Diet's approval have domestic legal force in Japan. And also some scholars debate the relationship of executive agreements with other domestic legal norms, which is the issue of rank or hierarchy.

Part II discussed the American practice of executive agreements. During constitutional debates, the American Framers agreed that treaty-making authority would be granted to the federal government.[492] Hence, the treaty-making power was bestowed on the President and the Senate,[493] and treaties, as the supreme law of the land, were made superior to state law.[494] However, soon after the adoption of the U.S. Constitution, executive agreements began to emerge.[495] Traditionally, scholars have acknowledged three types of executive agreements.

The Supremacy Clause gives domestic legal force to treaties, while the domestic legal force of executive agreements has been recognized in Supreme Court decisions.[496] Self-execution of executive agreements also is an issue as in the case of Article II treaties.[497] Each type of executive agreements may be self-executing. Especially, some scholars

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488 Kenpō art. 73 (Japan).
489 *See supra* notes 70–77 and accompanying texts.
490 *See supra* notes 121–30 and accompanying texts.
491 *See supra* notes 146–70 and accompanying texts.
492 SLOSS, *supra* note 201, at 23.
493 U.S. CONST. art. II, § 2, cl. 2.
494 *Id*. art. VI, cl. 2.
495 *See supra* Part III.A.
496 *See supra* Part III.D.1.
497 *See supra* Part III.D.2.

congressional-executive agreements do not trigger self-execution but the *Beeler* case considered it. Sole executive agreements can be self-executing but do not supersede federal statutes, which is not an issue of the last-in-time rule but the separation of powers. At last, self-execution of executive agreements are discussed in pursuant to the same approach for treaty self-execution.

Finally, this part analyzes the differences and similarities of executive agreements in the Japanese and the U.S. legal systems. While these systems are quite different, they also have interesting points in common.

First, even though they both adopt the separation of powers system, the two constitutional structures are completely different. Japan is a unitary state with forty-seven administrative prefectures. The current Japanese constitution adopts a parliamentary cabinet system, where the Cabinet functions as the executive department[498] and the Diet, as the legislative department.[499] Additionally, in the exercise of its power, the Cabinet is responsible to the Diet.[500] Under the parliamentary cabinet system, the relationship between the Cabinet and the Diet is very close. The Prime Minister of Japan is "designated from among the members of the Diet by a resolution of the Diet"[501] although members of the Diet are "elected members, representative of all the people."[502]

In contrast, the United States is a federal state with fifty local governments, which are the constituent states. The U.S. Constitution provides for the presidential system, where the President is both the head of the state and the government.[503] He or she is chosen based on the popular vote of electors, who are chosen by the people.[504] The Constitution adopts a strict separation of powers system.[505]

Both countries' legislative branches are involved in the making of some types of executive agreements. In Japan, the Diet approves and implements treaties. In the United States, the Senate gives its advice and consent to treaties. So, there are executive agreements based on treaties

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498 Kenpō art. 65 ("Executive power shall be vested in the Cabinet.") (Japan).

499 *Id*. art. 41 ("The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.").

500 *Id*. art. 66, para. 3 ("The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.").

501 *Id*. art. 67, para. 1. *See also id*. art. 68, para. 1 ("The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet.").

502 *Id*. art. 43, para. 1.

503 *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows").

504 *See* U.S. CONST. amend. XII, amend. VVIII.

505 *See* Springer v. Government of the Philippine Islands, 277 U.S. 189, 201 (1928) (opinion of court); Nixon v. Administrator of General Services, 433 U.S. 425, 442–43 (1977); Immigr. and Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983); Morrison v. Olson, 487 U.S. 654, 694–95 (1988).

in both countries. But in terms of executive agreements concluded by the executive branch alone, some differences emerge.

The U.S. President has greater authority than the Cabinet of Japan.[506] The President's authority encompasses the executive power and the power of Commander in Chief,[507] as well as the power to settle claims[508]and to enter sole executive agreements.[509] However, although the Cabinet in Japan has authority to make executive agreements, it derives this power from its responsibility to "[m]anage foreign affairs."[510] Thus, because that responsibility is more closely circumscribed than the President's authority, the Prime Minister's power is less.[511]

Second, there are differences in how the political branches gets involved in the making of executive agreements. Some types of executive agreements in the United States require the involvement of the political branches, but to be an executive agreement in Japan, there is, by definition, no Diet approval. Traditionally, in the United States, there have been three types of executive agreements: executive agreements pursuant to Article II treaties, congressional-executive agreements, and sole executive agreements. Moreover, each agreement differs in terms of which branch has the ability or power to make the agreement.[512] So, both the subject matters of the executive agreement and the relevant powers do matter. However, in Japan, whether an international agreement is an executive agreement depends on whether the Diet approval is required. And whether the approval is required or not depends on what the agreement covers. Constitutionally, the Cabinet has authority to enter into executive agreements as a part of their foreign affairs function. But some treaties delegate the power to make executive agreements to the Cabinet. Thus, in Japan, the *scope* of executive agreements, rather than the types is more often debated. The scope is related to the Ohira statement. Whether the approval of the Diet is requested is decided according to the subject matters of executive agreements.

Another difference concerns the domestic legal force of executive agreements. While U.S. courts have discussed this issue and established

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506 *See* U.S. CONST. art. II, § 1, cl. 1.

507 *Id*. art. II, § 2, cl. 1.

508 *See supra* notes 285–88 and accompanying texts.

509 *See supra* notes 285–93, 305–06 and accompanying texts.

510 KENPŌ art. 73, item 2 (Japan).

511 Hisakazu Fujita, *supra* note 6, at 447–48. Hisakazu Fujita analyzed differences between practices of executive agreements in Japan and the U.S. in terms of the political systems, the scope of the agreements, notice to the legislatures, and the issue of secret arrangements. *Id*. at 447–50. *See also* 1 ISAO SATŌ , *supra* note 108, at 244–47 (discussing some differences and pointing out the supermajority on treaty-making and the strength of authority); *See* Yukio Tomii, *Executive Agreements and the Treaty Clause of U.S. Constitution (III)*, 129 HOGAKU SHIMPO [CHUO L. REV.] 171, 200 (2022) (pointing out authority of the political branches is ambiguous in the Japanese Constitution because it does not clearly provide for the inherent authority of the Cabinet or the extent of the Diet's legislative power.).

512 *See supra* Part III.C.

precedents, Japanese courts have not dealt with it. The supremacy of executive agreements over state law is established in the United States. In contrast, the Japanese courts have not clearly decided on the domestic legal force of executive agreements and Japanese scholars have discussed it and the relationship of executive agreements with other domestic legal norms.

Furthermore, there are some judicial decisions on self-execution of executive agreements in the United States.[513] One reason why Japanese courts have not dealt with the issue of the domestic legal force of executive agreements might be that these agreements usually do not affect the rights and duties of individuals, which may lead to fewer lawsuits on executive agreements. International agreements that affect individual rights are more likely to be made as treaties requiring the approval of the Diet, as the Ohira Three Principles refer to these types of agreements.[514]

In contrast to what is mentioned above, there are also some similarities between Japanese and American executive agreements. First and foremost, executive agreements have been recognized in both countries for a long time. Each nation's constitutional law stipulates procedures for making international agreements, which are referred to as treaties.[515] Nevertheless, early in each nation's history—and in Japan's case, before its current constitution—international agreements were created according to procedures not explicitly provided for in the constitutional laws. And in both countries, international agreements made outside the constitutional procedure are referred to as executive agreements.

Second, both countries have similar backgrounds regarding the domestic legal force of international agreements or treaties. The Supremacy Clause of the U.S. Constitution was adopted because the Framers were concerned about state violations of international law under the Articles of Confederation, especially violations of the 1783 Treaty of Paris.[516] Therefore, the Clause's main purpose was to assure the supremacy of treaties over state laws to prevent states from violating treaties.[517] Similarly, Article 98 of the Constitution of Japan aims to ensure respect for international law and stipulates the automatic domestic legal force of treaties.[518] Especially during World War II, Japan violated international

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513 *See* Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1985); Lakes Pilots Ass'n, Inc. v. U.S. Coast Guard, 2013 WL 5435048 (E.D. Mich. 2013); United States v. Sum of $70,990,605, 234 F. Supp. 3d 212 (D.D.C. 2017); Beeler v. Berryhill, 381 F. Supp. 3d 991 (S.D. Ind. 2019).

514 However, there are many judicial decisions on the domestic legal effect of treaties. YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW, *supra* note 7, at 30, 44–76; Shin Hae Bong, *supra* note 22, at 365–71; HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS, *supra* note 180, at 539–47.

515 *See* Kenpō art. 73, item 3 (Japan); U.S. CONST. art. II, § 2, cl. 2.

516 *See supra* notes 202–06 and accompanying text.

517 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 310 cmt. a (AM. L. INST. 2018).

518 *See supra* notes 89–92, 101, 180 and accompanying texts.

law, and other countries had an unfavorable impression of Japan.[519] Hence, although the Committee on Bill for Revision of the Imperial Constitution ultimately rejected a provision borrowed from the Supremacy Clause of the American constitution—which was designed for a federal state—members of the Diet, in considering the new constitution, suggested inserting a similar term to show respect of international law.[520] Thus, provisions on the domestic legal force of international agreements in both countries have similarities—they assure other countries of their respect for international law.[521] And executive agreements is also international agreements both countries comply with, and they acquire domestic legal force.

Third, the creation of international agreements through express constitutional procedures has decreased in both countries. In America, almost ninety-five percent of new international agreements are executive agreements, and the ratio of Article II treaty is low.[522] Moreover, the number of new Article II treaties since the Obama Administration has been significantly reduced.[523] New Article II treaties make up only several percent of international agreements in the United States. Some scholars describe this decline as the "death" of the Article II treaty.[524]

In Japan, of the roughly 300 international agreements concluded per year, only 10 to 30 are treaties.[525] Therefore, most international agreements made by Japan are executive agreements. Over 90 percent of executive agreements are related to economic cooperation, such as ODA.[526] According to Yasuo Nakauchi from the Research Office of the Committee on Foreign Affairs and Defense, the choice of whether an international agreement is a treaty or executive agreement is a legal issue related to the interpretation of Article 73, Item 3 of the Japanese Constitution.[527] However, in practice, the choice is also influenced by the policy consideration of MOFA.[528] In other words, it is a legal issue whether an international agreement includes subject matter that requires the approval

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519 4 TATSUO SATŌ, *supra* note 85, at 747.

520 *See supra* Part I.A.

521 However, there are some critiques of the legal effect of Article 98, Paragraph 2 of the Japanese Constitution, which calls for domestic legal force of international agreements in Japan. *See* MASAAKI SAITŌ, *supra* note 47, at 243–48; HIROMICHI MATSUDA, INTERNATIONAL LAW AND CONSTITUTIONAL LEGAL SYSTEMS, *supra* note 180, at 163–68.

522 Bradley & Goldsmith, *supra* note 1, at 1210.

523 *Id*. at 1210–11.

524 Curtis A. Bradley et al., *The Death of Article II Treaties?*, LAWFARE (Dec. 13, 2018), https://www.lawfaremedia.org/article/death-article-ii-treaties

In contrast to this view, for a study on focusing on a meaningful perspective of Article II treaties, *see* Nyarko, *supra* note 320, at 54.

525 Yasuo Nakauchi, *supra* note 1, at 19.

526 *Id.*

527 *Id*. at 34 (quoting Yoshiaki Yamamoto, *Treaty and the Diet*, 66 LEGIS. & RSCH. (House of Councillors) 18, 24 (1975)).

528 Yasuo Nakauchi, *supra* note 1, at 35.

of the Diet, which is determined by the government with the review of the Cabinet Legislation Bureau. But in some cases, treaty makers draft the text so as to make executive agreements in the process of negotiating an agreement.[529]

As mentioned above, while legal systems and the practice of executive agreements differ in both countries, their use and domestic legal force of the agreements have some similarities. Each country adopts different system of the government but the practice of creating executive agreements has long been recognized.

V. CONCLUSION

This Article discusses executive agreements in Japan and the United States. In both countries, these agreements have existed ever since the adoption of their constitutions. Each country adopts a different government and legal system. However, the practice of executive agreements, which are made without following the procedure explicitly provided in the constitution, has been recognized. In both countries, executive agreements have increased in lieu of treaties. Furthermore, constitutional provisions regarding the domestic legal force of international agreements share similar purposes.

[529] ICHIRŌ KOMATSU, *supra* note 181, at 282.