UNITED STATES FOREIGN RELATIONS LAW: Documents and Sources

VOLUME I
EXECUTIVE AGREEMENTS

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PREFACE

The materials contained in these volumes deal with the foreign relations power of the federal government. For the most part they consist of documents presenting the views of the executive and legislative branches--or components thereof-- concerning the scope of their authority. Compared with most "casebooks," relatively few judicial decisions are included; the courts, for a variety of reasons, venture infrequently into the realm of foreign relations, and the contours of the law are best revealed by the arguments and justifications offered by those vying for power. The absence of authoritative resolution causes those arguments to recur. The ultimate court is that of public opinion, and much of the rhetoric in statutes and in legislative materials is directed at creating a "record" for that "tribunal."

We have included those materials which we believe students and practitioners will find useful in adjudication and in the less formal exchanges which characterize our system of government.

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A. WHAT CONSTITUTES AN INTERNATIONAL AGREEMENT?

1. Introductory Note

The threshold question at which these materials are directed--what constitutes an international agreement?--has been the subject of great confusion in recent years. What is commonly referred to as the "Helsinki Agreement," (73 U.S. Dept. of State Bulletin 323 (1975)) for example, is not an agreement at all but, as the March 9, 1976 memorandum of the Department of State Legal Adviser (see below) indicates, merely a document "intended to have political or moral weight." Similarly, upon the expiration, in October, 1977, of the SALT I Interim Agreement (23 U.S.T. 3462, T.I.A.S. 7504), the Administration maintained--although challenged by certain members of the Senate--that the agreement was not as a matter of law being extended, but that as a matter of policy its provisions would simply continue to be observed by the United States; the legal difference, it was suggested, derived from the non-obligatory character of the President's action (see below).

The confusion can doubtless be traced to the complete silence of both statutory and case law on the topic. The only relevant statute--the so-called "Case Act," which requires the transmittal of international agreements to the Congress--sets forth no definition of what it is that must be transmitted (a matter for which the American Bar Association has proposed a remedy; see the Congressional Research Service memorandum). And so far as can be determined, no court, with the exception of the International Court of Justice, has yet addressed the question. That exception occurred in 1974, when, presented with the statements of certain French officials regarding the intention of France not to detonate nuclear devices in the South Pacific, the Court held them to be legally binding. (Nuclear Test Cases, Australia v. France and New Zealand v. France, Judgment of 29 Dec. 1974, I.C.J. Reports 1974, pp. 253 and 457.)

In the absence of more authoritative criteria, United States practice has been guided for the most part by criteria prescribed by the executive branch. Two items are of particular relevance. First is the "Rush Letter," a communication of the Acting Secretary of State to other Department heads

which in its final paragraphs sets forth criteria for compliance with the Case Act and "Circular 175" procedure (see part II below). The second is a communication of the Department of State Legal Adviser to all U.S. diplomatic posts which describes criteria employed by the State Department for deciding what constitutes an international agreement.

However satisfactory such criteria may have proven with respect to internal administrative procedures of the executive branch, they have not resolved problems perceived by certain members of the legislative branch, as is illustrated by the Report and Supplemental Views of the Committee on Foreign Relations on Senate Concurrent Resolution 56, which concerned the continued observance of the SALT I Interim Agreement (see below).

2. "Definition of the Phrase 'International Agreement,'" Memorandum, American Law Division, Congressional Research Service, Library of Congress, March 17, 1978

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WASHINGTON, D.C. 20540

DEFINITION OF PHRASE "INTERNATIONAL AGREEMENT"

This report examines various legal treatises and other sources for a definition of the phrase "international agreement."

The phrase "international agreement" is rarely defined in the legal literature. In general, it would appear that the term "treaty" is the usual object of definitional focus. See, for example, 14 M. Whitman, Digest of International Law 1-3 (1970); 5 G. Hackworth, Digest of International Law 1-2 (1943); M. Gamboa, A Dictionary of International Law and Diplomacy 257 (1 ed. 1973); Research in International Law of the Harvard Law School - Law of Treaties: Draft Convention With Comment (1935), in 29 Am.J. Int'l L. 686 (1935); McNair, The Law of Treaties 3-4 (1961). This is also true under Article 2(1)(a) of the 1970 Vienna Convention on the Law of Treaties, S. Exec. L., 92nd Cong., 1st Sess. (1971).

Exceptionally, however, the phrase is defined, by the American Law Institute's Restatement (Second) Foreign Relations Law of the United States 361(1965):

> §115(a) "international agreement" means an agreement between states or international organizations by which there is manifested an intention to create, change or define relationships under international law.

Another definition of the phrase "international agreement" is reflected in a recent proposal by the American Bar Association to amend the Case Act of 1972, 1 U.S.C. 112b. The ABA amendment would add, inter alia, the following language to the Act:

> As used herein the phrase "international agreement," means any arrangement or understanding, written or oral, that purports to commit the United States to an obligation to follow a course of action requiring subsequent Congressional authorization or approval of the expenditure of funds not yet authorized or appropriated or that purports to create, change or define substantive contractual obligations under international law." "Congressional Review of International Agreements," Hearings before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations of the House of Representatives, 94th Cong., 2d Sess. 83 (1976).

Other definitions of the phrase "international agreement" may be suggested by reference to the various definitions of the phrase "executive agreement" which were embodied in executive agreement reform legislation during the 94th Congress. The most comprehensive definition would appear to be that afforded by Sec. 2 of S. 1251, 94th Cong., 1st Sess (1975)(Mr. Glenn):

> For the purposes of this Act, the term "executive agreement" means any bilateral or multilateral international agreement or understanding, formal or informal, written or verbal, other than a treaty, which involves, or the intent is to leave the impression of, a commitment of manpower, funds, information, or other resources of the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

It is difficult to conceive what agreements, if any, would be excluded if the foregoing language were used to define the phrase "international agreement." It will be noted, for example, that even informal oral understandings made by executive branch personnel would be covered under this text. Whether such coverage should be effected is, of course, a policy issue beyond the scope of this report.

David M. Sale
Legislative Attorney
American Law Division
March 17, 1978

3. State Department Letter to Heads of U.S. Government Agencies on Compliance with the Case Act and Provisions of Circular 175

DEPARTMENT OF STATE.
Washington, September 6, 1973.

DEAR ——— ———. I want to invite your personal attention to the problem of ensuring that all international agreements to which the United States becomes a party are cleared, prior to conclusion, with the Department of State and are submitted, after conclusion, by the Department of State to the Congress, as required by the Case Act (Public Law 92–403; 1 USC 112b). Although cooperation by the various executive departments and agencies has, in general, been most gratifying, there remain difficulties, particularly in achieving mutual understanding of the types of agreements covered by the applicable law and in assuring sufficient awareness by officers and employees of the implications for the operations of their department or agency. It may well be that a combination of new regulations and broad educational efforts within each affected department and agency will suffice to eliminate these difficulties ,and I hope you will ensure that the necessary action is taken within your jurisdiction.

A recent Report by the Comptroller General, "U.S. Agreements with and Assistance to Free World Forces in Southeast Asia Show Need for Improved Reporting," B–159451, April 24, 1973, has recommended that the Congress consider legislation requiring that the Secretary of State submit annually to the Congress a list of all such subordinate and implementing agreements made involving substantial amounts of U.S. funds or other tangible assistance, together with estimates of the amounts of such funds or other assistance. I believe that such legislation should be unnecessary. Certainly it is preferable to bring about full cooperation through our own efforts.

On August 15, 1973 the Department of State published in the Federal Register a Public Notice inviting comment on a proposed revision of its Circular 175 Procedure, and related procedures, regarding the authorization, negotiation and conclusion of treaties and other international agreements (38 Fed. Reg. 22084). We would appreciate the opportunity to discuss with you any particular questions or problems that you may have regarding the application of that procedure, which we hope will provide a satisfactory basis for instructions within each of the departments and agencies concerned.

In this connection, I would also note that neither the form in which an agreement is expressed nor the fact that an agreement is of a subordinate or implementing character in itself removes the agreement from the requirements of the Case Act or of the law regarding the publication of international agreements (1 U.S.C. 112a). The determination whether an instrument or a series of instruments constitutes an international agreement that is required to be transmitted to the Congress and to be published is based upon the substance of that agreement, not upon its form or its character as a principal agreement or as a subordinate or implementing agreement.

As the subject matter of our international agreements is, in general, as broad as the scope of our foreign relations, it is not practicable to enumerate every type of agreement which the Department of State should receive from the other executive departments and agencies. However, it seems clear that texts should be transmitted to the Department of State of the agreements referred to in the recommendations of the Comptroller General and of any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment. In general, the instruments transmitted to the Congress pursuant to the Case Act, and those published (other than those classified under E. O. 11652), should reflect the full extent of obligations undertaken by the United States and of rights to which it is entitled pursuant to instruments executed on its behalf.

The fact that an agency reports fully on its activities to a given Committee or Committees of Congress, including a discussion of agreements it has entered into, does not exempt the agreements concluded by such agency from transmission to the Congress by the Department of State under the Case Act.

In the event of a question whether any particular document or series of documents constitutes an international agreement, inquiry may be made of the Assistant Legal Adviser for Treaty Affairs in the Department of State, telephone 632–1074. We look forward to your continued cooperation in ensuring compliance with these requirements.

Sincerely,

KENNETH RUSH, *Acting Secretary.*