

International Agreements (Part I): Overview and Agreement-Making Process

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This Legal Sidebar is the first in a three-part series on international agreements and their relationship with the U.S. legal system. The Constitution vests the power to make treaties with the President acting “[by and with the advice and consent of the Senate](#),” but the United States does not make most international commitments through this constitutionally defined process. The President [regularly](#) concludes [executive agreements](#) and [non-binding instruments](#), which are not mentioned in the Constitution and are not submitted to the Senate for advice and consent. This Sidebar introduces the primary forms of international instruments and depicts the processes to enter into them. [Part II](#) examines options for Congress to influence international instruments, and [Part III](#) addresses legislative measures that provide transparency into the United States’ international obligations. For additional information on these topics, see [International Law and Agreements: Their Effect upon U.S. Law](#).

Forms of International Instruments

In U.S. law and practice, international instruments can take the form of [treaties](#), [executive agreements](#), or [non-binding instruments](#). In this series of Legal Sidebars, the term *international agreement* refers to legally binding commitments, and the term *international instrument* collectively refers to all international commitments, regardless of their form or whether they are legally binding.

Treaties

In U.S. practice, a treaty is an international agreement negotiated and signed by a member of the executive branch that enters into force if approved in the Senate by a two-thirds vote and ratified by the President. (In international law, the term [treaty](#) has broader meaning and refers to any binding agreement between states or international organizations.) Treaties were the most common form of international agreement in the early decades of U.S. history, but scholars have noted they have accounted for [less than 7 percent](#) of international agreements since the World War II era. **Figure 1** outlines the steps for making a treaty in the United States. More background on Senate procedure for approving treaties is available in this [CRS Report](#).

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Executive Agreements

The executive branch enters into international agreements, known as executive agreements, without submitting such agreements to the Senate for advice and consent. The Constitution does not discuss executive agreements, but the United States has used them since the [Second Congress](#), and the Supreme Court has [recognized](#) that they may be a valid form of international agreement. **Figure 2** depicts the steps to make an executive agreement.

Executive agreements are traditionally grouped into three categories based on the President's authority to conclude them.

1. **Congressional-executive agreements** are authorized through legislation enacted through the bicameral process.
2. **Executive agreements made pursuant to a treaty** are based on authority derived from treaties previously approved by the Senate.
3. **Sole executive agreements** are based on the President's constitutional powers.

In its process for coordinating and approving international agreements known as the [Circular 175 Procedure](#), the State Department lists [eight factors](#) that it considers when determining whether an agreement should be a treaty or executive agreement. Congressional preference is one factor, but the criteria's collective breadth leave substantial discretion to the State Department, [according to observers](#). According to scholarly [research](#), most executive agreements are congressional-executive agreements that Congress pre-authorizes by enacting statutes permitting the executive branch to conclude agreements within certain parameters. [Observers](#) have debated [whether](#) congressional-executive agreements are interchangeable with treaties or whether the Constitution requires certain types of agreements to be submitted to the Senate for its advice and consent. Judicial opinions thus far have not resolved this issue, in part because courts have [dismissed](#) constitutional challenges to executive agreements as non-justiciable [political questions](#) or for [lack of standing](#).

The executive branch has, at times, [defended](#) its power to enter into executive agreements [based](#) partly on its authority to implement the agreements under existing statutes. These claims were made notwithstanding the fact that the statutes cited did not explicitly authorize the executive branch to enter into new agreements. Debate over the constitutionality of this practice is discussed in [another CRS Report](#).

Non-Binding Instruments

Along with treaties and executive agreements, the United States concludes agreements with its foreign counterparts using non-binding instruments, which are sometimes called [political commitments](#) or [soft law](#) pacts. Academic [researchers](#) have noted that the rise in non-binding instruments corresponds with a decline in binding agreements. Although non-binding instruments do not modify existing legal requirements, they may establish [moral and political](#) incentives to comply. Non-binding instruments can also [influence](#) binding obligations, serving as precursor documents that lay out the expected terms of later agreements or as supplementary material that implements or refines existing agreements.

The President claims authority to make non-binding commitments for the United States without congressional authorization, but the scope of this authority has been the [subject of debate](#) between the executive branch and Congress. The source of the executive branch's authority to make non-binding instruments is not stated in the Constitution, and the Supreme Court has never addressed the issue. Legislative options, discussed in [Part II](#) of this Sidebar, may facilitate obtaining [greater](#) congressional [control](#) over non-binding instruments should Congress seek greater influence in this area. In the [Iran Nuclear Agreement Review Act](#), for example, Congress [required](#) the President to submit an agreement related to Iran's nuclear program for congressional review [regardless of whether it is binding](#).

Figure 1. Steps in Making a Treaty

Sources: CONG. RSCH. SERV., 106TH CONG., REP. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 8–9 (Comm. Print 2001), available at <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>; James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5947, 136 Stat. 2395 (2022) (FY2023 NDAA)

*Requirement took effect on September 19, 2023, under Section 5947 of the FY2023 NDAA.

Figure 2. Steps in Making an Executive Agreement

Sources: CONG. RSCH. SERV., 106TH CONG., REP. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 8–9 (Comm. Print 2001), available at <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>; FY2023 NDAA, § 5947

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