

## REPORT

In the spring of 2008, the American Bar Association Section of International Law and the American Society of International Law decided to establish a joint Task Force on Treaties in U.S. Law to assess the implications of *Medellín v. Texas*,<sup>1</sup> which the Supreme Court decided on March 25, 2008, and to make recommendations with respect to existing and future treaties. The Section and ASIL each appointed half the members of the task force; in addition, two *ex officio* members were appointed. A list of the members of the task force is at Annex C. From the ABA perspective, the task force's recommendations will be reviewed by the Section Council and the House of Delegates; from the ASIL perspective, the task force's recommendations are considered those of the task force, not of ASIL as a whole. The recommendations are not to be attributed to the *ex officio* members or their current or former agencies.

The task force conducted its work between July 2008 and March 2009. At the outset, the Task Force agreed that it should not take any position on how the *Medellín* decision should be read, but should instead (1) identify the reasonable range of meanings, (2) identify the potential consequences in light of that range, and (3) make recommendations covering that range.

### **I. Potential Interpretations of *Medellín* Concerning Treaty Self-Execution**

In *Medellín*, the Supreme Court held that the judgment of the International Court of Justice (ICJ) in the *Avena* case,<sup>2</sup> which required the United States to provide review and reconsideration in certain death penalty cases involving Mexican nationals, did not override Texas' law of procedural default. While acknowledging that the United States was obligated under Article 94 of the United Nations Charter to comply with the *Avena* judgment as a matter of international law,<sup>3</sup> the Court reasoned that the obligation in Article 94 was not self-executing.<sup>4</sup>

*Medellín*'s implications depend on how the Court's analysis of treaty self-execution, which lends itself to a variety of potential interpretations, is understood. This report identifies the most plausible interpretations of the opinion with respect to two questions: first, the circumstances under which treaties will be found to be non-self-executing (as to which three different but plausible readings of the decision are set out), and second, the possible legal consequences of a determination that a treaty provision is non-self-executing. The objective is not to resolve which of these interpretations is likely to prevail, or which is more appealing, but rather to provide clearer terms for assessing the range of potential consequences. This report does not seek to address all the consequences of determining that a treaty provision is self-executing (for

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<sup>1</sup> 128 S.Ct. 1346 (2008); 129 S.Ct. 360 (2008) (stay and habeas corpus denied).

<sup>2</sup> *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. Reports 12 (Judgment of 31 March 2004); *see also* Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, 2009 I.C.J. Reports -- (Judgment of 19 January 2009).

<sup>3</sup> 128 S.Ct. at 1358-59.

<sup>4</sup> *Id.* at 1361, 1367.

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example, the circumstances under which a self-executing treaty provision will confer a private right of action). And, while this report focuses primarily on the implications for advice and consent treaties, some of the points made may be relevant for executive agreements.

## **Circumstances Under Which Treaties Will be Found to be Non-Self-Executing**

The Court's self-execution analysis may affect a limited class of treaties or a very substantial number: under the narrowest view, it would affect only the domestic enforceability of ICJ decisions (or, perhaps, also decisions of other tribunals rendered under comparable dispute resolution schemes); under an intermediate view, it would affect treaty provisions that contemplate future action by states parties and are not specifically addressed to the judiciary; and, under the broadest view, it would affect all treaties not affirmatively providing for judicial enforceability that might otherwise have been treated as self-executing.

1. Narrowest scope. Under the narrowest interpretation of *Medellín*, the Court's self-execution analysis will affect only the domestic status of decisions of the ICJ, or perhaps also decisions of other international tribunals rendered under comparable schemes. The specific question presented to the Court, and the Court's holding, were focused on the domestic effect of an adverse ICJ decision rendered in a dispute to which the United States was a party pursuant to a treaty vesting the ICJ with jurisdiction. The Court's self-execution analysis, moreover, emphasized features particular to the UN Charter and the ICJ – most prominently, what the Court construed as “the option of noncompliance contemplated by Article 94(2)” of the Charter and the accompanying political remedy of referral to the UN Security Council, as well as the prospect that direct enforcement of politically sensitive ICJ decisions might interfere either with U.S. foreign policy or its federal system of government. In addition, in attempting to ameliorate the dissent's concern that the decision would imperil the domestic enforceability of U.S. treaty commitments in general, the majority stressed that just because “an ICJ judgment may not be automatically enforceable in domestic courts does not mean that the underlying treaty is not.”<sup>5</sup>

Under this interpretation, *Medellín* will be relevant to the domestic enforcement of a relatively limited, yet important, class of U.S. treaties. As the dissent pointed out in *Medellín*, following U.S. withdrawal from the treaty that gave the ICJ jurisdiction in *Avena*, the United States remains a party to approximately 70 treaties that provide for dispute resolution before the ICJ, including eighteen "Friendship, Commerce and Navigation" treaties negotiated by the United States between 1946 and 1966.<sup>6</sup> Several examples of clauses that provide for matters to be referred to the ICJ but do not specify that the Court's judgments are binding are set out in section I(A) of Annex A to this report. Nevertheless, the ICJ rarely issues decisions involving the United States, and it was far from clear even before *Medellín* that such decisions would be given domestic effect by U.S. courts. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit held twenty years ago that such judgments were not enforceable in U.S. courts at the behest of private parties.<sup>7</sup>

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<sup>5</sup> *Id.* at 1365.

<sup>6</sup> *Id.* at 1377 (Breyer, J., dissenting).

<sup>7</sup> See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937–38 (D.C. Cir. 1988). Cf. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006) (U.S. courts not bound to follow interpretations of law the ICJ renders).

It remains possible that the Court's holding might, even under this narrow interpretation, be extended to cases involving the judgments of other international judicial or arbitral tribunals. While most treaties providing for submission of disputes to arbitration stipulate that the decision shall be "final" and/or "binding",<sup>8</sup> some contain qualifying language. For example, several Bilateral Investment Treaties (BITs) use the verb "undertake" to describe the obligation to enforce arbitral awards, which is the same verb that applied to the U.S. obligation to comply with the ICJ decision in *Medellín*.<sup>9</sup> Several air services agreements stipulate that arbitral awards shall be enforced only "consistent with [each party's] national law."<sup>10</sup>

It is also possible that the Court's holding could involve decisions of international organizations or commissions. For example, under the 1909 Boundary Waters Treaty (BWT), the United States and Great Britain (now Canada) created an International Joint Commission (IJC) that Article IV of the BWT requires to approve certain water projects with transboundary implications. These approvals might not be self-executing post-*Medellín* since the treaty itself does not require their

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<sup>8</sup> See section II(B) and (C) of Annex A. Arguably the "binding" language would result in enforceability in domestic courts. The clearest case for enforceability is language that "the decisions of the Tribunal shall be binding" and "this Treaty shall take precedence over any inconsistent provisions of the municipal laws in the Contracting States." *Id.*, section II(A).

<sup>9</sup> See, e.g., United States-Lithuania Treaty for the Encouragement and Protection of Reciprocal Investment, TIAS No. --, -- U.S.T. -- (signed Jan. 14, 1998; entered into force Nov. 22, 2001), Art. VI(6) ("Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party *undertakes* to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.") (text in Treaty Doc. 106-42, emphasis added). Nevertheless, this bilateral investment treaty (as is typical of free trade agreements and BITs entered into by the United States since 1985) provides for arbitration under several alternative rules, including: (1) pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which provides for arbitration under the International Centre for Settlement of Investment Disputes (ICSID); (2) under the ICSID Additional Facility rules (if ICSID Convention arbitration is unavailable); and/or (3) pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). See *id.*, art. VI(3)(a), (b). *Medellín* indicates that the *first* of these arbitral formats (ICSID Convention arbitration) may lead to a domestically binding outcome. See *Medellín*, 128 S. Ct. at 1366 (noting that the "judgments" [sic.] of ICSID tribunals enjoy the status of a final judgment, pursuant to 22 U.S.C. § 1650a(a)). As regards the *second* and *third* arbitral avenues (ICSID Additional Facility arbitration and UNCITRAL rules arbitration), it is relevant to note that the U.S.-Lithuania BIT, as is standard for modern U.S. BITs and FTAs, stipulates that the treaty's expression of consent to "binding arbitration" shall be deemed to "satisfy" the requirements of Article II of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Thus, assuming the correctness of past authority holding that investor-state arbitration awards qualify for enforcement pursuant to the New York Convention (see *Minister of Defense of Islamic Republic v. Gould, Inc.*, 887 F.2d 1357, 1366 (9th Cir. 1989) (award rendered by Iran-U.S. Claims Tribunal is enforceable pursuant to New York Convention); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80, 83, 86 (D.D.C. 2007) (granting motion to confirm UNCITRAL award issued under NAFTA Chapter 11; treating such arbitration as governed by New York Convention), *aff'd* 255 Fed. Appx. 531 (D.C. Cir. 2007), *reh'g denied* 2008 U.S. App. LEXIS 1714 (D.C. Cir. Jan. 18, 2008)), it would appear that UNCITRAL or ICSID Additional Facility awards made pursuant to the U.S.-Lithuania BIT (or comparable BITs and FTAs) remain enforceable, post-*Medellín*. See *Medellín*, 128 S. Ct. at 1366 (citing 9 U.S.C. §§ 201-08, which implements the New York Convention, as an example of "implementing legislation" which "demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such as result"). Accordingly, there may be no impact of *Medellín* on modern investor-state arbitration under current U.S. BITs and FTAs.

<sup>10</sup> See section II(D) of Annex A to this report.

judicial enforcement, nor is there legislation doing so, but there is case law holding that the federal government can seek enforcement of IJC decisions.<sup>11</sup> Other international commissions, however, may not have the benefit of such case law. An example is the International Boundary Commission (IBC), which was established under a century-old United States-Canada boundary treaty; it issues decisions preserving an open vista along the United States-Canada border. Those decisions have been largely followed without need for judicial intervention until very recently.<sup>12</sup> Although the courts have yet to pronounce on the domestic legal authority of the IBC, if ICJ decisions are non-self-executing, it is not a stretch to envision IBC decisions having the same status.

Ultimately, however, such assertions rely on speculation. The *Medellín* Court disavowed any intention of suggesting “that treaties can *never* afford binding domestic effect to international tribunals judgments,” instead emphasizing the particular language and context of treaties relating to the ICJ.<sup>13</sup> Examples of such ICJ clauses are set out in sections B and C of the Annex A to this report.<sup>14</sup> The Court’s analysis also emphasized specific features of ICJ dispute resolution – the fact that only nation-states could be parties to contentious cases, and that the ICJ does not itself give *stare decisis* effect to prior decisions<sup>15</sup> – that may differentiate other treaties providing for dispute resolution, and permit courts to construe the judgments of other tribunals as self-executing.

2. Intermediate scope. Under a somewhat broader interpretation of *Medellín*, the Court’s self-execution analysis is relevant to treaty provisions, even outside the context of dispute resolution, that call upon states parties to take future action and are not specifically addressed to the judiciary. In *Medellín*, the Court concluded that the U.S. obligation in Article 94 of the UN Charter to comply with decisions of the ICJ was not self-executing because Article 94 states that nations “undertake[] to comply” with ICJ decisions, which the Court (like the Executive Branch) concluded was “*a commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.”<sup>16</sup> Although this construction of the phrase is debatable, the Court contrasted the phrase with terms that it regarded as more present-tense and mandatory, such as “shall” and “must.”<sup>17</sup>

<sup>11</sup> Lower courts have not considered the BWT to include a private right of action to challenge such decisions. *See, e.g.,* Miller v. United States, 583 F.2d 857 (6th Cir. 1978). But in *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), the Supreme Court did find the federal government could enforce the BWT where a U.S. state had failed to achieve the requisite IJC approval. That precedent alone might be enough to qualify the BWT and its IJC decisions as self-executing even under the narrowest of *Medellín*’s readings.

<sup>12</sup> *See* Leu v. Int’l Bound. Comm’n, 523 F.Supp. 1199 (W.D. Wash. 2007).

<sup>13</sup> 128 S. Ct. at 1365-66 (emphasis added).

<sup>14</sup> As Justice Stevens noted in his concurring opinion in *Medellín*, the ICSID Convention goes further and requires an arbitration award of an ICSID panel to be enforced “as if it were a final judgment of a court” of a State party; the Law of the Sea Convention mandates that decisions of the Seabed Disputes Chamber be enforced “in the same manner as judgments or orders of the highest court” of a State party. 128 S.Ct. at 1373.

<sup>15</sup> *Id.* at 1360-61.

<sup>16</sup> *Id.* at 1358 (quoting Brief for United States of America as *Amicus Curiae* in *Medellín I*, O. T. 2004, No. 04-5928, p. 34); *accord id.* at 1359 n.5 (expressing the view that the phrase “undertakes to comply” “confirms that further action to give effect to an ICJ judgment was contemplated”).

<sup>17</sup> *Id.* at 1358.

It is not clear to what extent this interpretation of the decision would entail a change from past practice. The Supreme Court decision that is viewed as first establishing the distinction between self-executing and non-self-executing treaty provisions – *Foster v. Neilson* – emphasized what it thought to be future-oriented language in finding non-self-execution.<sup>18</sup> Some lower courts have also pointed to future-oriented treaty language as evidence of non-self-execution.<sup>19</sup> The fact that Justice Stevens concurred with the majority on this point, despite his sympathy for the dissent, further suggests that it may not entail a substantial change in approach.<sup>20</sup> Nevertheless, if language like “undertake” appears in treaty provisions that in the past would have been viewed by U.S. courts as self-executing, *Medellín* may result in a change of practice.

3. Broadest scope. Some commentators read *Medellín* broadly and suggest that the Court’s analysis indicates a general presumption against treaty self-execution. Such a presumption might follow either indirectly or directly from the Court’s analysis. It might follow indirectly from the Court’s heavy emphasis on treaty text. The Court noted that “[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text,”<sup>21</sup> and much of the Court’s self-execution analysis is focused on the language of the relevant treaty provisions. Also, in response to criticism by the dissent, the Court observed that, “[g]iven our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue.”<sup>22</sup>

As the dissent suggested, parties to treaties do not typically address domestic judicial enforceability when negotiating the text of treaties; so, treaties are unlikely to have language directly on point. Indeed, some states, like Canada and Great Britain, do not have *any* self-executing treaties; so, it seems impossible that U.S. treaties with those partners would ever involve a mutual intent to treat the treaty as judicially enforceable, let alone self-executing. (The U.S. Senate is seeking to remedy this by attaching declarations of self-execution in providing advice and consent<sup>23</sup> – as it sometimes previously attached non-self-execution declarations. In

<sup>18</sup> See 27 U.S. 253, 315 (1829) (concluding that a provision in a treaty between the United States and Spain stipulating that land grants made by Spain before the treaty “shall be ratified and confirmed” was non-self-executing because it was phrased in “the language of contract”), *overruled in part by* United States v. Percheman, 37 U.S. 51 (1833).

<sup>19</sup> See, e.g., *Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929) (citing “language of futurity” as evidence of non-self-execution); *Sei Fujii v. California*, 242 P.2d 617, 622 (Cal. 1952) (finding UN Charter provisions to be non-self-executing because, among other things, they were “framed as a promise of future action by the member nations”).

<sup>20</sup> See 128 S. Ct. at 1373 (Stevens, J., concurring).

<sup>21</sup> *Id.* at 1357.

<sup>22</sup> *Id.* at 1362.

<sup>23</sup> See Congressional Record daily editions for September 23, 2008 (pages S9328-S9335), for September 25, 2008 (pages S9554-9557), and for September 26, 2008 (page 9850). The Senate Foreign Relations Committee stated its intention that such declarations be added in the future. See Report on Extradition Treaties with the European Union, Ex. Rept. 110-12 (September 11, 2008), at 9 (relevant text set out at page 20 of this report). The status of these declarations remains untested but seems likely to receive judicial recognition. Compare *Power Authority of New York*, 247 F.2d 538 (1957) (refusing to give legal effect to treaty reservation) and *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005) (joined by then-judge Alito) (“for purposes of domestic law, the understanding proposed by the President and adopted by the Senate in its resolution of ratification are the binding standard to be applied in domestic law.”).

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addition, *Medellín* could be read to suggest that this could be remedied by a clearly reflected shared understanding by the executive branch and the Senate that the treaty is self-executing.<sup>24</sup>) Given that, an emphasis on text might indirectly result in a presumption against self-execution. The strength of that presumption would of course depend on what the sought-for text has to establish, but it is conceivable such a standard would require more than the mere absence of future-oriented language, such as might satisfy the intermediate understanding of *Medellín*'s scope.

Again, however, it is unclear to what extent the Court's emphasis on text in *Medellín* represents a change from past practice. The Court in *Foster* also focused heavily on treaty text. Moreover, the Court in *Medellín* did not focus exclusively on the text. It looked, for example, to the materials presented to the Senate when it was considering whether to give its advice and consent to the treaties, and it also gave weight to the Executive Branch's construction of the treaties.<sup>25</sup> It does appear that there was more emphasis on treaty text in *Medellín* than in most Supreme Court decisions that have found treaty provisions to be self-executing, including many of the decisions from the 1800s and early 1900s in which the Supreme Court enforced provisions in bilateral treaties, such as those protecting the economic and other interests of aliens. Whether and to what extent this additional emphasis on text will affect the extent of treaty self-execution, however, is uncertain.

*Medellín* could also be read to establish a presumption against self-execution more directly. The Court appeared to look for affirmative evidence that Article 94 of the UN Charter was "a directive to domestic courts,"<sup>26</sup> and the Court invoked the *Head Money Cases* (a Supreme Court decision from 1884) for the proposition that a treaty is "primarily a compact between independent nations" that ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."<sup>27</sup> The Court's statement that a treaty would not be viewed as self-executing unless "the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms"<sup>28</sup> might also be read as suggesting a presumption against self-execution. At least one lower court has already relied on this language to explain its non-self-executing classification of the Safety of Life at Sea Convention (SOLAS) and its resulting holding that implementing regulations were unauthorized.<sup>29</sup> Separately, in discussing the domestic effect of ICJ judgments, the Court stated that "[g]iven that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the

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<sup>24</sup> The Court states that a non-self executing treaty is one ratified "with the understanding that it is not to have domestic effect of its own force." 128 S.Ct. at 1369. Arguably the opposite is also true: if the executive branch transmittal documents and the Senate Foreign Relations Committee report clearly state that a treaty *is* self-executing, that may be enough for the courts to find that it is, absent language in the treaty itself that clearly indicates that it is not or any constitutional limitations on self-execution (such as limitations relating to the exclusive prerogatives of Congress).

<sup>25</sup> *Id.* at 1359-60, 1361.

<sup>26</sup> *Id.* at 1358.

<sup>27</sup> *Id.* at 1358 (quoting *Head Money Cases*, 112 U.S. at 598).

<sup>28</sup> *Id.* at 1356 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)).

<sup>29</sup> *Defenders of Wildlife v. Guitierrez*, 2008 U.S. App. Lexis 15294 (D.C. Cir. 2008).

relevant treaties to have *clearly stated* their intent to give those judgments domestic effect, if they had so intended.”<sup>30</sup>

But there is also language that suggests there is no presumption against self-execution. The Chief Justice referred to treaty “stipulations which are self-executing, that is, require no legislation to make them operative.”<sup>31</sup> The opinion in the *Head Money Cases* referred to provisions “which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts.”<sup>32</sup>

So far as can be determined, the political branches have not been operating under the assumption that there is a presumption against self-execution, even in areas affecting state law and private litigants. In the area of private commercial law,<sup>33</sup> for example, Congress has not – with only a few prominent exceptions<sup>34</sup> – enacted detailed statutes implementing treaty provisions that establish procedural or substantive rules applicable to transnational commercial lawsuits between private parties. The best example is the Vienna Sales Convention which governs many contracts for the sale of goods between private entities in different countries without implementing legislation.<sup>35</sup> Over the years there have been quite a few other provisions in treaties affecting private commercial law that are enforced without the need for implementing legislation.<sup>36</sup>

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<sup>30</sup> *Id.* at 1363-64 (emphasis added); *see also id.* at 1369 (“If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented ‘in mak[ing]’ the treaty, by ensuring that it contains language *plainly providing* for domestic enforceability.”) (emphasis added).

<sup>31</sup> 128 S. Ct. at 1356.

<sup>32</sup> 112 U.S. 580, 598 (1884).

<sup>33</sup> While this area is often referred to as “private international law,” as noted in *Black’s Law Dictionary*, that label has traditionally been a synonym for choice-of-law rules.

<sup>34</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 UST 2517, TIAS 6997, 330 UNTS 1, Treaty Doc. 90-21 (1968); *see* 9 U.S.C. § 201 et seq. Inter-American Convention on International Commercial Arbitration of January 30, 1975, Treaty Doc. 97-12 (1981); *see* 9 U.S.C. § 301 et seq. Convention on Bills of Lading [Carriage of Goods By Sea] of August 25, 1924, 51 Stat. 233, TS 931, 120 LNTS 155 (“Hague Rules”); *see* 46 U.S.C. § 1300 et seq. republished as a note following 46 U.S.C. § 30701.

<sup>35</sup> United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980, 1489 UNTS 3.

<sup>36</sup> Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of October 5, 1961, 527 UNTS 198; Protocol on Powers of Attorney Which Are To Be Utilized Abroad of February 17, 1940, 56 Stat. 1376, TS 982, 161 UNTS 229; Protocol on Juridical Personality of Foreign Companies of June 25, 1936, 55 Stat. 1201, TS 973, 161 UNTS 217; Convention for International Carriage by Air of May 29, 1999, Treaty Doc. 106-45. Also in this category are provisions in Friendship, Commerce, and Navigation treaties extending national or most favored nation treatment for access to the courts, enforcing arbitration agreements and awards, or waiving sovereign immunity for government owned commercial enterprises. *See, e.g.*, United States-Belgian Treaty of Friendship, Establishment and Navigation of February 21, 1961, arts. 3(2), 3(3), 3(6), 14 UST 1284, TIAS 5432, 480 UNTS 149; United States-People’s Republic of China Agreement on Trade Relations of July 7, 1979, art. VIII, 31 UST 4651, TIAS 9630, 1202 UNTS 179; Danish FCN of October 1, 1951, arts. V, XVIII(3), 12 UST 908, TIAS 4797, 421 UNTS 105. For application of these provisions concerning access to the courts, *see* *Irish Nat. Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1989).

Several additional private commercial law treaties were implemented only by executive orders or court rules. For example, while general statutes authorizing federal courts to assist foreign courts, 28 U.S.C. §§ 1696, 1781, were enacted before the United States became a party to the Hague Service and Evidence Conventions, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638, 658 UNTS 163 (done November 15, 1965); Convention on the Taking of Evidence Abroad in Civil or

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In connection with yet some other private commercial law treaties, implementing legislation has been enacted for only a few provisions.<sup>37</sup> For example the 1910 and 1989 Salvage Conventions consist almost entirely of terms that courts apply when adjudicating cases of ocean salvage.<sup>38</sup> Federal legislation implements only four of their many provisions, leaving the others as self-executing.<sup>39</sup> The UNIDROIT Convention on International Interests in Mobile Equipment (the Cape Town Convention)<sup>40</sup> has implementing legislation<sup>41</sup> establishing a registry to implement its Protocol on Matters Specific to Aircraft Equipment, but as noted in response to a question from the Senate Committee on Foreign Relations during the advice and consent process, the financing and other basic provisions of the Convention and Protocol, including provisions on secured interests and transaction remedies, do not require implementing legislation and are self-executing.<sup>42</sup>

A presumption against self-execution would also appear to be inconsistent with a number of earlier Supreme Court decisions that enforced treaties without searching for affirmative evidence of self-execution, although such a presumption would arguably be consistent with the reluctance among some lower courts in the post-World War II period to enforce some treaties, especially multilateral treaties.<sup>43</sup> But the potential novelty of a presumption against self-execution almost certainly cuts against its inference.

Indeed, the Court in *Medellín* denied the charge by the dissent that its decision was inconsistent with past Supreme Court decisions on treaty self-execution, noting that the prior decisions listed by the dissent in an appendix “stand only for the unremarkable proposition that some international agreements are self-executing and others are not,”<sup>44</sup> and referring with approval to past decisions holding that Friendship, Commerce, and Navigation treaties were self-executing.<sup>45</sup> The Court further denied that any “talismanic words” were required for self-execution, and made

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Commercial Matters, 23 UST 2555, TIAS No. 7444, 847 UNTS 231 (done March 18, 1970), these treaties were implemented by executive orders, Executive Order 11471, 34 Fed. Reg. 8349 (May 28, 1969); Executive Order 11698, 38 Fed. Reg. 2207 (Jan. 19, 1973), supplemented by “circulars” of the Marshal’s Service of the Justice Department in its capacity as the Central Authority for both conventions, and finally orders of the Supreme Court, which promulgated FRCP Rules 4(f) and 28(b)(1)(A) to regulate the use in federal civil lawsuits of service of process abroad and efforts to obtain evidence abroad. However, the Federal Rules themselves are legislatively authorized under the Rules Enabling Act, which authorizes the Supreme Court to issue rules unless vetoed or changed by subsequent legislation, 28 U.S.C. § 2074. *See also* the statute authorizing the President to accept future changes to the Collision Regulations unless Congress rejected them. 33 U.S.C. § 1602.

<sup>37</sup> Most implementing legislation is federal. But it is conceivable that in some areas where the States retain primary competence, implementing legislation could be enacted by States. *Cf.* N.Y. U.C.C. § 5-116(c) (subordinating State law to the Uniform Customs and Practice for Documentary Credits, an unofficial international code issued by the International Chamber of Commerce).

<sup>38</sup> 37 Stat. 1658, TS 576 ; 1953 UNTS 193.

<sup>39</sup> 46 U.S.C. § 2304; 46 U.S.C. § 80107.

<sup>40</sup> TIAS No. --, -- U.S.T. --, 2307 UNTS 285 (done Nov. 16, 2001) (available at [www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf](http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf)).

<sup>41</sup> P.L. 108-297 (Aug. 9, 2004), 118 Stat. 1095; 49 U.S.C. §§ 40101 note, 44107, 44108, 44113.

<sup>42</sup> Exec. Report 108-14 (2004) at p. 28.

<sup>43</sup> *See, e.g.,* Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992).

<sup>44</sup> *Id.* at 1364.

<sup>45</sup> *Id.* at 1365-66.

clear that self-execution would be determined on a treaty-by-treaty basis.<sup>46</sup> This suggests that a future attempt to claim this broadest interpretation of *Medellín* – based either on the implications of its textual focus, or its occasional suggestion that clarity is required – might be met with the insistence on a more context-sensitive approach.<sup>47</sup>

## II. Legal Consequences of Non-Self-Execution

Just as there is more than one potential interpretation of *Medellín* with respect to the circumstances under which treaties will be found to be self-executing, there is also more than one potential interpretation of *Medellín* with respect to the consequences of non-self-execution.<sup>48</sup>

It seems reasonably clear that, by non-self-execution, the Court meant at least that a treaty provision is not subject to judicial enforcement absent implementing legislation.<sup>49</sup> The Court therefore implicitly rejected the argument that had been made by some academic commentators that deeming a treaty non-self-executing merely means that it fails to provide a private right of action so that it can be enforced by courts when such a cause of action is not necessary, such as when a treaty is invoked defensively in a criminal case or when a statute, like 42 U.S.C. §1983,

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<sup>46</sup> *Id.* at 1366.

<sup>47</sup> Even if *Medellín* falls short of adopting a presumption against self-execution, the Court’s context-sensitive approach might nonetheless be regarded as inconsistent with a presumption in *favor* of self-execution. In any event, it is not clear that this would constitute a change in approach, since the Court had not in the past said that it was applying such a presumption. *But see* Carlos Manuel Vázquez, *Treaties As Law Of The Land: The Supremacy Clause And The Judicial Enforcement Of Treaties*, 122 Harv. L. Rev. 599 (2008).

<sup>48</sup> *See generally* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 Am. J. Int’l L. 540 (2008).

<sup>49</sup> To be clear, treaty provisions that have been implemented by domestic legislation do not pose this issue of judicial enforceability because in those circumstances the relevant statute supplies the domestic law in question. Although the Court appeared focused on *prospective* implementing legislation, the Executive and the Senate have often consented to treaties on the assumption that prior law can also suffice as a treaty’s implementing legislation. *See, e.g.*, International Convention for the Suppression of Terrorist Financing, Treaty Doc. 106-49 (2000) (treaty transmittal package details existing U.S. laws that satisfy the treaty’s terms); International Plant Protection Convention, Treaty Doc. 106-23 (1997) (same). Some International Labor Organization and International Maritime Organization treaties have been implemented by regulations issued pursuant the Coast Guard’s already existing statutory authority to regulate seafarer licensing. Certification of Able Seamen Convention of June 29, 1946 (ILO No. 74), 5 UST 605, TIAS 2949, 94 UNTS 11; Convention on Standards of Training, Certification and Watchkeeping for Seafarers of July 7, 1978, – UNTS – . *See* United States v. Ionia Management, – F.3d –, 2009 WL 116966 (C.A.2 (Conn.)) (describing the 1973 Convention for the Prevention of Pollution from Ships, 1340 UNTS 184, and the Protocol of the 1978 Convention Relating to the International Convention for the Prevention of Pollution from Ships, 1340 UNTS 61, as non-self-executing treaties implemented by 33 U.S.C. § 1903(c)(1) authorizing the Coast Guard to “prescribe any necessary or desired regulations to carry out the provisions [of these treaties].” Further, by “judicially enforce” this report refers to direct enforcement of a treaty’s provisions and not to the practice of courts occasionally to refer to treaties as potential aids to interpretation of statutory or constitutional provisions. *See* United States v. Santos, 128 S.Ct. 2020, 2036 & n.3 (2008) (dissent by Justice Alito using treaty as aid in interpreting term in domestic statute); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

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provides for a general cause of action.<sup>50</sup> A non-self-executing treaty, said the Court, “does not by itself give rise to domestically enforceable federal law.”<sup>51</sup> The Court also expressly distinguished the issue of self-execution from the issue of private rights of action and suggested that even self-executing treaties will often not confer privately enforceable rights;<sup>52</sup> non-self-execution therefore presumably must mean more than simply the lack of a private right of action.

The opinion leaves unclear, however, whether a non-self-executing treaty is merely judicially unenforceable, or whether it more broadly lacks the status of domestic law. On the one hand, the opinion contains many statements, including in a footnote purporting to set forth the Court’s view of self-execution, that equate non-self-execution with lack of domestic law status.<sup>53</sup> This position is consistent with the Court’s view that “domestic effect” for a non-self-executing treaty “depends upon implementing legislation passed by Congress.”<sup>54</sup> It is not clear this interpretation of the decision would entail a change from past practice.<sup>55</sup> On the other hand, the opinion also contains statements that equate non-self-execution simply with lack of judicial enforceability.<sup>56</sup> This ambiguity persisted in the Supreme Court’s subsequent *per curiam* order denying a stay of execution to Medellín. In that order, the Court observed that the treaty obligation in question there (under Article 94 of the UN Charter) “does not itself have the force and effect of domestic law *sufficient to set aside the judgment or the ensuing sentence.*”<sup>57</sup> It is unclear whether the Court intended for the language italicized here to limit, or merely illustrate one application of, the earlier part of the sentence. It is also unclear whether the Supremacy Clause of the Constitution, which states that “all” treaties made by the United States shall be the supreme law of the land, requires that non-self-executing treaties have some domestic law status, and the Court in *Medellín* did not address that issue. At a minimum, it would seem, however, that if

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<sup>50</sup> See, e.g., David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103 (2000). See also *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008) (rejecting a claim for damages based on § 1983 used in conjunction with a violation of article 36(1) of the Vienna Convention on Consular Relations).

<sup>51</sup> 128 S.Ct. at 1356 n.2.

<sup>52</sup> *Id.* at n.3.

<sup>53</sup> See, e.g., *id.* at 1356 (“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—*do not by themselves function as binding federal law.*”) (emphasis added); *id.* at 1356 n.2 (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law.”); *id.* at 1365 (“[T]he particular treaty obligations on which Medellín relies do not of their own force create domestic law.”).

<sup>54</sup> *Id.* at 1356 n.2.

<sup>55</sup> See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-315 (1829) (stating treaties addressed to the legislative branch rather than the courts have no effect on existing domestic law); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) (non-self-executing treaty has no effect on U.S. domestic law); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 133 (2d Cir. 2005) (same); *Louis Henkin, Foreign Affairs and the Constitution* 199 (2d ed. 1996) (same).

<sup>56</sup> See, e.g., *id.* at 1356 (“[N]ot all international law obligations automatically constitute binding federal law *enforceable in United States courts.*”) (emphasis added); *id.* (“The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect *such that the judgment of its own force applies in state and federal courts.*”) (second emphasis added); *id.* at 1361 (“The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments *through direct enforcement in domestic courts . . .*”) (emphasis added); *id.* at 1358 (stating that “Article [94] is not a *directive to domestic courts*”) (emphasis added).

<sup>57</sup> *Medellín v. Texas*, 129 S.Ct. 360, 361 (2008) (*per curiam*).

decisions of organizations such as the IJC or the IBC are non-self-executing (or the treaties that created them are qualified as such), then the authority to enforce such decisions in court would require further legislative support.

While this distinction between mere lack of judicial enforceability and lack of domestic law status was not material to the Court's Article 94 analysis in *Medellín*, it might matter in some contexts. It could affect, for example, the executive branch's ability to take action to enforce a non-self-executing treaty.<sup>58</sup> In *Medellín* itself, the Court reasoned that "the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts."<sup>59</sup> At the same time, the Court disavowed any suggestion that a non-self-executing treaty, without implementing legislation, "preclude[d] the President from acting to comply with an international treaty obligation," and indicated that "[t]he President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution."<sup>60</sup>

The distinction between lack of domestic law status and lack of judicial enforceability might also be relevant in four contexts. First, it could constrain the President's ability to comply with rules and standards promulgated under various treaties, whether they are decisions on consumption and production of ozone-depleting substances under the Montreal Protocol, standards issued by the International Civil Aviation Organization, or safety regulations for the shipping industry done in the International Maritime Organization.<sup>61</sup> In each case, the United States has a treaty under which it has agreed to participate in the formulation of certain global rules or standards and then to implement those rules or standards, most often through executive action. But if the treaties on which the authority of these rules and standards rests lack the status of domestic law and there is no relevant statutory authority, what authority does the President have to implement them? Second, if non-self-executing treaties are more than judicially unenforceable and actually lack any domestic legal status, it may mean the President has no obligation to follow them as a matter of U.S. law.<sup>62</sup> Third, differences in the legal effect of non-self-executing treaties might also affect the obligation of U.S. state officials to comply with a non-self-executing treaty, an obligation asserted by Justice Stevens in his concurrence in

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<sup>58</sup> See generally Edward T. Swaine, *Taking Care of Treaties*, 108 Colum. L. Rev. 331 (2008).

<sup>59</sup> 128 S. Ct. at 1371.

<sup>60</sup> *Id.* at 1371.

<sup>61</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 2H(5 *bis*) 1522 U.N.T.S. 29 (authorizing parties to identify critical use exemption to parties' obligation to phase out production and consumption of methyl bromide); Chicago Convention on International Civil Aviation, Dec. 7, 1944, arts. 37, 54, 90, 61 Stat. 1180, 1190-91, 1186-97, 1205 (parties may adopt international standards for civil aviation); International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, 32 UST 47.

<sup>62</sup> In *Natural Resources Defense Counsel v EPA*, 464 F.3d 1 (D.C. Cir. 2006), the D.C. Circuit concluded that post-ratification decisions of the parties to the Montreal Protocol did not constitute "law" such that EPA's interpretation of those decisions was not subject to judicial review. That reasoning, however, might extend beyond the courtroom, such that EPA could employ it to suggest that it has no obligation under U.S. law to comply with those Montreal Protocol decisions in the first place. Thus, the effect given to a non-self-executing treaty may implicate not only what authority the Executive has to act, but also the ability of treaties to constrain executive action as a matter of U.S. law. In any event, as the *Medellín* Court recognized, the United States still has an obligation to enforce treaty provisions under international law. 128 S. Ct. at 1356.

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*Medellín*,<sup>63</sup> i.e., if non-self-executing treaties are not domestic law in the sense they are not the “supreme Law of the Land,” then they would fall outside the states’ Supremacy Clause obligations. Fourth and finally, the distinction might be relevant to the application of the canon of construction pursuant to which statutes are to be interpreted, where possible, to avoid treaty violations.<sup>64</sup>

## III. Recommendations

The previous sections of this report have identified what the task force considers to be the reasonable range of readings and the potential consequences flowing from those readings. With this in mind, the task force discussed potential recommendations and reached agreement on the following points.

### Existing Treaties

In general the task force considers that the United States should, and expects it will, comply with its treaty obligations. This is required by customary international law as reflected in article 26 of the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>65</sup> Moreover, as reflected in article 27, it is also accepted that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Compliance with treaties by the United States—whether they are considered self-executing as a domestic matter or not—is critical to the U.S. reputation internationally. Moreover, we have significant interests in holding other countries to their treaty obligations and will not be in a position to do so if we do not ourselves comply with them. In addition, if we are not seen as complying with our treaty obligations, we will not have the leverage we need to negotiate future treaty provisions that protect our interests.

This view is consistent with the position taking by the Senate Foreign Relations Committee on September 11, 2008, in Executive Report No. 110-12, at page 10:

The committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the

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<sup>63</sup> See *id.* at 1374-75 (Stevens, J., concurring).

<sup>64</sup> Compare *Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169 (2005) (finding the Americans with Disabilities Act (ADA) applies to foreign-flag cruise ships in U.S. waters but does not require the removal of physical barriers that would conflict with U.S. treaty obligations under the Safety of Life at Sea Convention, which lower courts have characterized as non-self-executing) with *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (arguing that this canon should not apply to non-self-executing treaties, “which have no force as a matter of domestic law”). Cf. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

<sup>65</sup> Although not a party, the United States has long recognized the VCLT as generally declarative of customary international law. See, e.g., S. Exec. Doc. No. 65-118, at 1 (1971) (Secretary of State Rodgers emphasizing that VCLT “is already generally recognized as the authoritative guide to current treaty law and practice”); Robert E. Dalton, *National Treaty Law & Practice: United States*, in NATIONAL TREATY LAW & PRACTICE 765, 766 (Duncan Hollis et al. eds., 2005).

Constitution, all treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed. In general, the committee does not recommend that the Senate give advice and consent to treaties unless it is satisfied that the United States will be able to implement them, either through implementing legislation, the exercise of relevant constitutional authorities, or through the direct application of the treaty itself in U.S. law. While situations may arise that were not contemplated when the treaty was concluded and ratified that raise questions about the authority of the United States to comply, the committee expects that such cases will be rare. Accordingly, in the committee's view, a strong presumption should exist against the conclusion in any particular case that the United States lacks the necessary authority in U.S. law to implement obligations it has assumed under treaties that have received the advice and consent of the Senate.

New uncertainties have been created by the *Medellín* decision. A range of possible situations may occur in which obligations contained in a treaty, for which the Senate has given its advice and consent and to which the President has ratified or acceded, cannot be implemented domestically under existing legislation. Other countries will therefore question the ability of the United States to comply with its treaty commitments. The task force recommends the prompt enactment of remedial legislation to deal with those situations.

The task force believes that it would be impractical to determine exactly which provisions in each existing U.S. treaty are non-self-executing and whether legislation exists that would allow implementation of each of those provisions,<sup>66</sup> and then to enact implementing legislation for each provision where a problem might exist. This would be an arduous, time-consuming, and potentially contentious task, both for the Executive Branch and the Congress, and the task force doubts that definitive findings would be possible.

The task force therefore proposes that the Congress and the Executive Branch consider the enactment of general remedial legislation for the implementation of existing treaty provisions in particular situations where there is an imminent risk of breach, along the lines of one of the alternative proposals set out in Annex B. (Where the risk is not imminent, the normal legislative process can be used.) The task force recognizes that there may be exceptional situations where the political branches may not wish to implement a treaty provision. Thus, the proposed legislation would authorize the President to propose implementation measures that would have the effect of binding federal law, but would not compel him to do so. The proposed legislation would only apply to existing treaties; future treaties should be handled as recommended below. It is further recognized that the Congress would not likely be willing to grant the President broad new authority without retaining an effective check on any such measures. Thus the proposed legislation sets up a mechanism under which the President could propose measures to implement a particular treaty obligation. Under the first alternative, there would be a waiting period before

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<sup>66</sup> Information on implementing legislation for certain treaties is contained in C. Wiktor, *TREATIES SUBMITTED TO THE UNITED STATES SENATE: LEGISLATIVE HISTORY, 1989-2004* (Martinus Nijhoff 2006).

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the measures become effective. During that period the Congress could overturn the measures by a joint resolution of disapproval, which would be considered under expedited procedures. (A joint resolution is the equivalent of a statute and is subject to veto by the President, which can be overridden by the Congress.<sup>67</sup>) Under the second alternative, the measures would not become effective unless a joint resolution of approval is enacted—i.e., the equivalent of new implementing legislation—but expedited procedures would be triggered for consideration of such legislation. This would, in effect, allow for the enactment of situation-specific implementing legislation on an expedited basis.<sup>68</sup>

The joint resolution of disapproval mechanism is similar to that found in sections 123 and 130 of the Atomic Energy Act.<sup>69</sup> An agreement for peaceful nuclear cooperation is negotiated under certain statutory criteria but is subject to a joint resolution of disapproval during a waiting period before entry into force.<sup>70</sup>

The proposed legislation in Annex B does not state that it applies only to non-self-executing treaties or only to measures that would avoid violation of the treaty because there is a good deal of ambiguity as to which existing treaty provisions are self-executing and whether a specific measure is strictly needed to avoid violation. Thus, inserting these requirements would generate litigation. Further, the proposed legislation does not require that the President determine that the situation involves an imminent breach of a treaty commitment, since such a statement against interest could be used by a foreign nation to argue that the United States is violating its commitments should the measures ultimately not be taken, which could lead to termination or suspension of the treaty in whole or in part, to countermeasures, or to a proceeding before an international body. For these reasons, the task force considered it preferable to stipulate that the President would have to explain why the measures he proposes are required to implement the treaty commitment in question and why he considers them urgent, and then to allow the political branches to resolve with finality whether or not a joint resolution of disapproval or approval is enacted pursuant to expedited procedures.

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<sup>67</sup> The *Chadha* Supreme Court decision, 462 U.S. 919 (1983), invalidated Congressional vetoes by any non-statutory procedure.

<sup>68</sup> Some members of the Task Force favor the first alternative because they believe it is more likely to enable compliance with U.S. treaty obligations. Other members of the Task Force are concerned that the first alternative does not provide a sufficient check on presidential action and thus favor the second alternative.

<sup>69</sup> The *Chadha* decision, cited in the footnote 67, found that Congressional veto procedures are constitutionally defective except if done by legislation, and consequently joint resolution procedures were substituted in the Atomic Energy Act and elsewhere.

<sup>70</sup> The Emergency Economic Stabilization Act of 2008, enacted October 3, 2008, P.L. 110-343, 122 Stat. 3765, contains a recent example of a joint resolution of disapproval mechanism in section 115, 12 U.S.C. 5225. Subsection (c) made any use of funds in excess of \$350 billion under the Act subject to disapproval by enactment of a joint resolution, required 15 calendar day advance notice of any plan for such use, and established expedited procedures for the consideration of such a joint resolution during that period. *See also* 28 U.S.C. § 2074 (providing that rules of procedure and evidence transmitted by the Supreme Court to the Congress become effective “unless otherwise provided by law”) and 33 U.S.C. § 1602 (authorizing the President to accept future changes to the International Regulations for Preventing Collisions at Sea unless disapproved by Congressional resolution within specified time periods).

The task force does not expect that this proposed mechanism would be used frequently or as a substitute for action under existing implementing legislation. Rather, it would be used in limited situations where there is a specific implementation problem created by the *Medellín* decision. Further, the task force expects that the enactment of this mechanism would help restore the confidence of U.S. treaty partners that the United States government fully intends to honor its treaty commitments.

For example, as indicated above, the approval of a water project by the IJC or the decision by the IBC to require property owners to keep a certain areas clear could be subject to domestic challenge. There might be a question concerning the ability of the United States to implement domestically an obligation in a SOLAS convention, an obligation under the Montreal Protocol, or a standard established under the ICAO or IMO conventions. And there may be a question as to the authority of the United States to comply with a new ICJ decision under treaties in section A of the Annex, for example, determining that the United States was required to afford a person certain immunities. In such a case, if, in the specific circumstances, the President decided that it was urgent to implement the obligation, without the delay of litigating the matter or seeking case-specific legislation using normal procedures, he would be able to have recourse to the mechanism provided by the proposed legislation described above. He would have to report to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs the domestic measure he proposed to take and why he considered the specific measure was necessary to implement the U.S. treaty commitment in question and why the measure was urgent.

Under the first alternative, before the measure could be implemented, the President would have to wait 30 days of continuous session of Congress. During that period, expedited procedures would be available to ensure that the Congress could pass a joint resolution if it wished to block the measure. For example, had this legislation been in place when the ICJ handed down its *Avena* judgment and had the President decided that it was urgent to comply, he could have notified Congress of his intention to direct that none of the individuals subject to the judgment be executed unless the state court system conducted a review and determined that the individual in question had not suffered prejudice because of the failure to provide consular notification. The directive could not have been effective for thirty days of continuous session (continuous session is broken by an adjournment of Congress sine die at the end of a Congress and the days on which either House is not in session for a period of more than three days are excluded in the computation). During this period, expedited procedures would have been available for the consideration of a joint resolution of disapproval. If such a resolution were passed by a majority in both Houses, it would be enrolled and sent to the President. He could sign it into law or veto it. If vetoed, the veto could be overridden by a two-thirds majority of both Houses. If a resolution of disapproval were enacted either because it was signed into law or because a veto was overridden, the directive could have no effect.

Under the second alternative, the measure could not be implemented unless there was enacted a joint resolution endorsing it. Expedited procedures would be utilized to consider the joint resolution in recognition of the urgency. Under this alternative, for example, had this legislation been in place when the ICJ handed down its *Avena* judgment and had the President decided that

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it was urgent to comply, he also could have notified Congress of his intention to direct that none of the individuals subject to the judgment be executed unless the state court system conducted a review and determined that he or she had not suffered prejudice because of the failure to provide consular notification. But the directive could never go into effect unless a joint resolution of approval was enacted stating that it favored his proposed measure. During this period, expedited procedures would have been available so that proponents of a joint resolution of approval could obtain a prompt hearing, obtain discharge of the resolution from committee consideration, and obtain a floor vote. If such a resolution were passed by a majority in both Houses, it would be enrolled and sent to the President. He could then sign it into law. (He would presumably not veto a joint resolution approving the measure he had proposed.) If a resolution of approval were enacted, the directive would have effect. If such a resolution were not enacted, the directive could have no effect.

Neither of these alternative procedures is intended to impede or affect actions the President could otherwise take pursuant to existing statutory or Constitutional authority.

Either of the two alternative forms of the legislation described above could be tailored so as to apply only to one or more categories of treaty provisions, such as ICJ dispute settlement clauses, private commercial law treaties, or treaties specifying investment protections. Such a limitation on the scope of the legislation could reduce any misgivings that some may have about providing the President wider-ranging authority to implement treaties, even though that power would be subject to expedited Congressional review procedures allowing the enactment of a joint resolution with respect to the President's measures. The focus on particular subjects-matter is also broadly consistent with Justice Breyer's dissent in *Medellín*, to which he appended a list of treaties containing provisions for the submission of treaty-based disputes to the International Court of Justice – and noted in particular those treaties involving subjects that the Supreme Court had previously identified as self-executing.<sup>71</sup>

Limiting the legislation to apply to one or more categories would allow it to be tailored to the areas of greatest concern, and the legislation could be adapted to the particular needs of each subject. But the approach also has some distinct drawbacks. Because it may be difficult to describe definitely particular categories of treaties, it would almost certainly be necessary to identify particular treaties in the legislation itself, and the enumeration of them – and the accompanying debates over inclusion or exclusion – could be arduous, inexact and time-consuming. The resulting list of subjects or treaties, in any event, would almost certainly be partial, and permit an inappropriate and potentially damaging inference about U.S. willingness to tolerate non-compliance in other areas.

For these reasons, the task force considers that the best solution may be more general remedial legislation. It recommends that the Congress and the Executive Branch promptly consider legislation along the lines of one of the two alternative proposals explained above and set out in the attachment.<sup>72</sup>

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<sup>71</sup> *Medellín v. Texas*, 128 S.Ct. 1346, 1393-96 (2008) (Breyer, J., dissenting) (App. B).

<sup>72</sup> Some members of the Task Force favor including an additional provision in either variant of the proposed legislation that would mandate courts to construe any other applicable law consistently with treaty provisions where

## Future Treaties

There are certain steps that can be taken by the Executive Branch and the Congress to promote clarity in the future about which provisions in new treaties are self-executing and which are not.

### 1. Recommendations to the Executive Branch

As noted above, the *Medellín* decision can be read to place significant focus on the language of the treaty provision. It suggested that a treaty provision that clearly says it must be applied by the courts would be self-executing and domestically enforceable in U.S. courts. It suggested that language that might be read as creating a future obligation (“undertakes to”) is likely to be read as non-self-executing, in contrast to ordinary language of legal obligation (“shall”) that can more readily be read as self-executing.

The task force recognizes that in international negotiations, the focus is on the substance of the treaty obligation being negotiated and not on what mechanism each state party will use to implement that obligation in its domestic system. Nevertheless, the task force recommends that U.S. treaty negotiators keep in mind whether they wish provisions under negotiation to be self-executing in the United States and, if so, attempt, where possible, to use language of legal obligation, avoiding language that can be read to put the obligation into the future and, where possible, explicitly provide that courts of states parties shall apply the obligations.

As a procedural check to ensure that this is considered appropriately, the task force recommends that the issue of the treaty’s self-executing status, of any legislative measures necessary to implement it, or how the treaty’s provisions will otherwise be implemented be addressed in every new Circular 175 memorandum (or in the appended legal memorandum) seeking approval to initiate the negotiation of an international agreement, unless circumstances indicate this is unnecessary (e.g., the agreement is not likely to be treated as an advice and consent treaty or to be enforced in U.S. courts).<sup>73</sup> Existing blanket Circular 175 authorities should be reviewed and, if necessary, amended. In cases where Circular 175 authority is traditionally not required (e.g.,

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such a construction is reasonably available, so as to avoid breaches of U.S. treaty commitments wherever possible. Such a provision would be an extension to treaties, for all organs of Government – Federal and State – of the basic principle for avoiding conflicts between an Act of Congress and customary international law that was announced by Chief Justice Marshall more than 200 years ago: “an act of congress ought never be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The principle was recently reaffirmed in *F. Hoffmann–La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004). Such a provision in the proposed legislation could read: “Unless extraordinary circumstances otherwise require, Federal and State courts should avoid reaching decisions which would cause the United States to be in breach of its international obligations under a treaty.” While not disputing the principle stated in the *Charming Betsy* case, other members of the Task Force do not favor such a provision.

<sup>73</sup> The Circular 175 procedure is the process by which the Secretary of State authorizes the negotiation and conclusion of international agreements. For a general discussion of the procedure, see [www.state.gov/s/l/treaty/c175/index.htm](http://www.state.gov/s/l/treaty/c175/index.htm). The text of Circular 175 is contained in section 720 of volume 11 of the Foreign Affairs Manual, [www.state.gov/documents/organization/88317.pdf](http://www.state.gov/documents/organization/88317.pdf). The requirement that all international agreements be coordinated with the Secretary of State is set out at 22 CFR 181.4.

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for negotiating implementing agreements), the task force recommends reviewing whether to institute a requirement that this procedure be used. Use of this procedure would ensure that relevant U.S. agency lawyers review the proposed treaty language to see whether, if they intend the provision to be self-executing, the language is consistent with that intent.

Finally, when a new treaty has been negotiated, the task force recommends that the transmittal documents for sending it to the Senate – and specifically, the Secretary of State’s report to the President on the treaty, either in the cover letter or the sectional analysis – specifically address whether the Executive Branch considers each provision self-executing or non-self-executing, and, if the latter, state specifically whether the provision is aspirational or whether implementation is needed and, if implementation is necessary, how the provision will be implemented (through which specific existing legislation, through new legislation, through executive branch action authorized by existing legislation, or through constitutionally authorized executive branch action).<sup>74</sup> As a rule, transmittal packages to date have not adequately done this. Generally, if new legislation is required to implement any provision, the Executive Branch should not deposit the U.S. instrument of ratification or accession or otherwise bind the United States to comply with the treaty until the legislation has been enacted.<sup>75</sup>

## 2. Recommendations to the Senate

The task force is encouraged that the Senate Foreign Relations Committee has already adopted new procedures to deal with the uncertainties created by the *Medellín* decision. On July 29, 2008,

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<sup>74</sup> When a new transmittal package deals specifically with the self-executing or non-self-executing status of a provision in a new treaty that is identical to a provision or provisions in prior treaties, if the Senate provides advice and consent to the new treaty expressing the same understanding as the Executive Branch as to the status of the provision or provisions in question, it is expected that courts would interpret both the new treaty and the identical language in prior treaties consistent with that understanding, absent clearly contrary language in the treaty itself.

In some cases, there are advisory committees that could provide their analysis to the Secretary of State prior to submission to the Senate for advice and consent to ratification on the question of whether implementing legislation is necessary. An example is the Tripartite Advisory Panel on the International Labor Organization (composed of representatives of the government, employers and labor), which, among other things, reviews whether existing U.S. legislation is sufficient to implement conventions of the International Labor Organization. Created by Executive Order Executive Order 12216, June 18, 1980, 45 FR 41619 (subsequently amended and extended, *see* [www.archives.gov/federal-register/codification/executive-order/12216.htm](http://www.archives.gov/federal-register/codification/executive-order/12216.htm)), the Panel for example advised that it considered existing U.S. legislation sufficient to implement the Convention concerning Discrimination in respect of Employment and Occupation of June 25, 1958 (No. 111), 362 UNTS 31. The Executive Branch subsequently, on May 18, 1998, submitted this Convention to the Senate for advice and consent to ratification.

<sup>75</sup> For example, the United States became bound in 1956 to the four 1949 Geneva Conventions relative to the protection of victims of war, 6 U.S.T. 3114, 3217, 3316, and 3516, TIAS Nos. 3362-5, 75 UNTS 31, 85, 135, and 287, without having in place legislation to implement the “try or extradite” provisions applicable to grave breaches (found respectively in arts. 49, 50, 129, and 146 of the four conventions respectively). The United States was not in a position to comply with its obligations under these provisions for forty years, until enactment of the War Crimes Act, 18 U.S.C. § 2441, in 1996. A more recent example is the Basel Convention on the Transboundary Movement of Hazardous Waste to which the U.S. Senate gave advice and consent to ratification in 1992, but which the United States has refrained from joining pending the passage of the requisite implementing legislation.

the Committee ordered reported 76 new treaties. In its September 11, 2008, report on extradition treaties with the European Union (Ex. Rept. 110-12), it said at page 9:

In every resolution of advice and consent, the committee has included a proposed declaration that states that each treaty is self-executing. This declaration is consistent with statements made in the Letters of Submittal from the Secretary of State to the President on each of these instruments and with the historical practice of the committee in approving extradition treaties. Such a statement, while generally included in the documents associated with treaties submitted to the Senate by the executive branch and in committee reports, has not generally been included in Resolutions of advice and consent. The committee, however, proposes making such a declaration in the Resolution of advice and consent in light of the recent Supreme Court decision, *Medellín v. Texas*, 128 S.Ct. 1346 (2008), which has highlighted the utility of a clear statement regarding the self-executing nature of treaty provisions.

On September 23, 2008, the Senate approved these treaties using the approach set out in this report, and on September 23, 25, and 26, 2008, the Senate approved a large number of other treaties using the same approach.<sup>76</sup>

The task force endorses this approach: generally, each future Committee report should specifically address the issue, and a declaration should explicitly set out the Senate's understanding in the resolution of advice and consent. It is particularly important that provisions intended to be self-executing be specifically identified. If the Committee's position is not the same as that of the Executive Branch in the treaty transmittal documents, the Committee and the Executive Branch should reach a common position on the matter before sending the treaty to the full Senate, and that position should be reflected in the Committee report, which should annex a communication from the Executive Branch stating the same position (if a different position is agreed than that found in the transmittal documents). If new legislation is required to implement any provision in the treaty, generally the resolution of advice and consent should state the Senate's expectation that the instrument of ratification or accession will not be deposited (or, if applicable, exchange of notes bringing the treaty into force will not be effected) until such legislation is enacted.<sup>77</sup>

### **Summary of recommendations<sup>78</sup>**

The task force recommends:

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<sup>76</sup> See Congressional Record daily editions for September 23, 2008 (pages S9328-S9335), for September 25, 2008 (pages S9554-9557), and for September 26, 2008 (page 9850).

<sup>77</sup> See, e.g., two ILO Conventions which received advice and consent of the Senate in 1952, but the instruments of ratification have not been deposited because the implementing legislation was never enacted. Convention Concerning Food and Catering for Crews on Board Ship of June 27, 1946 (ILO No. 68), 264 UNTS 163; Convention Concerning the Certification of Ships Cooks of June 27, 1946 (ILO No. 69), 164 UNTS 37.

<sup>78</sup> Recommendations text revised on May 15, 2009.

# 108C

1. That legislation be enacted to provide procedures for implementing commitments in existing treaties on an expedited basis where the President reports to the Congress that binding measures are necessary to avoid the imminent risk of breach by the United States; and
2. That the Executive Branch, with respect to future treaties,
  - (i) seek treaty language consistent with its intent as to whether treaty provisions are self-executing;
  - (ii) identify in treaty transmittal documents which provisions are self-executing and how other provisions will be implemented; and,
  - (iii) as a general rule, if implementing legislation is required for U.S. compliance, not bring the treaty into force until that legislation is enacted; and
3. That the Senate, with respect to future treaties, as a general rule, declare in resolutions of advice and consent which provisions are self-executing and its expectation, in instances where new implementing legislation is required, that the treaty will not be brought into force for the United States until such legislation is enacted.

Respectfully Submitted,

Glenn P. Hendrix  
Chair

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Glenn Hendrix, Chair

1. Summary of Recommendation(s).

Urges that legislation be enacted to provide procedures for implementing commitments in existing treaties on an expedited basis where the President reports to the Congress that binding measures are necessary to avoid the imminent risk of break by the U.S. Urges that the Executive Branch, with respect to future treaties, seek treaty language consistent with its intent as to whether treaty provisions are self-executing; to identify in treaty transmittal documents which provisions are self-executing and how other provisions will be implemented; and if implementing legislation is required for U.S. compliance, not to bring the treaty into force until that legislation is enacted. Also urges the Senate, with respect to future treaties, to declare in resolutions of advice and consent which provisions are self-executing and its expectation, in instances where new implementing legislation is required, that the treaty will not be brought into force for the U.S. until such legislation is enacted.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved the filing of this Report with Recommendation on July 31, 2009, during its meeting at the ABA Annual Meeting in Chicago, IL.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

There are ABA policies related to adoption of specific treaties, but no policy on the treaty process.

5. What urgency exists which requires action at this meeting of the House?

As the Administration continues to review treaties, this policy would provide guidance in that process.

6. Status of Legislation. (If applicable.)

None.

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7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

10. Contact Person. (Prior to the meeting.)

Glenn P. Hendrix  
Arnall Golden Gregory LLP  
171 17<sup>th</sup> Street NW, Suite 2100  
Atlanta, GA 30363  
Tel: 404-873-8692  
[glenn.hendrix@agg.com](mailto:glenn.hendrix@agg.com)

Ronald Bettauer  
1518 Highwood Drive  
McLean, VA 22101-5800  
Tel: 703-536-0729  
[ron.bettauer@verizon.net](mailto:ron.bettauer@verizon.net)

11. Contact Person. (Who will present the report to the House.)

A. Joshua Markus  
Carlton Fields PA  
100 SE 2<sup>nd</sup> Street, Suite 4000  
Miami, FL 33131  
Tel: 305-539-7433  
[jmarkus@carltonfields.com](mailto:jmarkus@carltonfields.com)

Michael H. Byowitz  
Wachtell Lipton Rosen & Katz  
51 W 52<sup>nd</sup> Street  
New York, NY 10019  
Tel: 212-403-1268  
[mhbyowitz@wlrk.com](mailto:mhbyowitz@wlrk.com)

**EXECUTIVE SUMMARY****(a) Summary of the Recommendation.**

The recommendation urges that legislation be enacted to provide procedures for implementing commitments in existing treaties on an expedited basis where the President reports to the Congress that binding measures are necessary to avoid the imminent risk of break by the U.S. Urges that the Executive Branch, with respect to future treaties, seek treaty language consistent with its intent as to whether treaty provisions are self-executing; to identify in treaty transmittal documents which provisions are self-executing and how other provisions will be implemented; and if implementing legislation is required for U.S. compliance, not to bring the treaty into force until that legislation is enacted. Also urges the Senate, with respect to future treaties, to declare in resolutions of advice and consent which provisions are self-executing and its expectation, in instances where new implementing legislation is required, that the treaty will not be brought into force for the U.S. until such legislation is enacted.

**(b) Summary of the issue(s) which the recommendation addresses.**

The recommendation addresses the issue of treaties without clear treaty provisions as to whether or not they are self-executing and urges the Executive Branch and Congress to adopt such language.

**(c) How the proposed policy position will address the issue.**

The proposed policy position will enable the ABA to support the Executive Branch, with respect to future treaties, to seek treaty language consistent with its intent as to whether treaty provisions are self-executing and how other provisions will be implemented.

**(d) Summary of any minority views of opposition which have been identified:**

None identified.