ship.[133] Whether that interaction has legal significance, and what its precise import in law is, remains to be decided according to domestic law. English law (independent of the treaty) continues to prescribe whether, how, and to what extent the rights and obligations of the parties are enforceable. This can be understood to underlie a leading articulation of the rule in *CND v The Prime Minister*, that a court has jurisdiction "to interpret an international instrument which had not been incorporated into English law where it was necessary to do so in order to determine a person's rights and duties under domestic law."[134]

The classic example of this principle is *Philippson v Imperial Airways*.[135] A cargo of gold, consigned for transport from the UK to Belgium, was stolen en route. The contract for carriage, an IATA air consignment note, stipulated a number of general conditions which referred to the 1929 Warsaw Convention. At the time of the theft, 1935, only the UK had ratified the treaty and implemented it by 1932 statute, not Belgium. Imperial thus argued that Belgium was not a "High Contracting Party" within the meaning of the Convention, so that the carriage was not international, putting Philippson's action out of time. The House of Lords disagreed. The Convention, incorporated into a contract, stood not as a proposition of law, but as a matter of fact establishing the rights of the parties as a matter of contract. The case was simply one of the interpretation of a contract. Hence the UK statute incorporating the Convention was irrelevant. And who the "High Contracting Parties" were, was not to be determined by international law, but by the terms of the contract, including the Convention. The majority read the Convention to identify "High Contracting Parties" to be its signatories, Belgium included. The two dissenting Law Lords, Russell and Macmillan, understood the phrase not to be defined by the Convention *per se*, but as a commercial term meaning the parties contractually bound by the Convention—namely ratifying and acceding parties.

In an application to estop a party from relitigating an issue decided against him by a foreign or international arbitral panel, the courts may have regard to the treaties or international agreements underpinning the creation of the arbitral rights and panel: *Dallal v Bank Mellat*.[136] This international element goes to evidencing the valid existence of and tribunal for whose decisions the UK doctrine of comity would mandate recognition. Thus the UK doctrine of estoppel would apply to prevent a rehearing of an issue already decided by a recognised, competent authority. Dallal's claim against the Iranian bank was subject to a US treaty with Iran and a US Executive Order directing the resolution of disputes between

---

[133] Thus *Zoernsch v Waldock* [1964] 1 WLR 675 (CA) (whether the Human Rights Commission was an "organ" of the Council of Europe within the meaning of the International Organisations Immunities and Privileges Act 1950 was a question of fact to be resolved by considering the EConvHR and the Statute of Europe).

[134] *R (Campaign for Nuclear Disarmament) v The Prime Minister et al.* [2002] EWHC 2777 (Div. Crt.) (17 Dec. 2002).

[135] *Philippson v Imperial Airways* [1939] AC 332.

[136] *Dallal v Bank Mellat* [1986] QB 441.

the nationals of those states to come before a tribunal seated in The Hague.[137] The tribunal had ruled against Dallal, who then brought a fresh action in London on the same facts. Estoppel against Dallal would succeed only if the English courts would recognise the jurisdiction of foreign tribunals and the validity of their decisions. Adding to the difficulty, it appeared that the arbitration proceedings had no legislative or other authority under Dutch law. Hence Dutch law could not by proxy validate the decision. Given the treaty basis, supplemented by Executive Order, the arbitration was not a private law one created through commercial instruments; it was more a "statutory" one. Hobhouse J rejected a narrow rule that the validity of arbitral proceedings always derived from the law of state where they take place. It can derive equally from the law of the countries creating the tribunal:

> In my judgment, where two sovereign states have chosen to set up a tribunal to determine disputes between the nationals of their respective states in respect of choses in action for which the situs lies within the jurisdiction of those two states, there can be no warrant for the courts of this country to fail to recognise and treat as fully competent the decisions of that tribunal. It is an a fortiori case where the party who is seeking to go behind the decision of such a tribunal is the party who has himself invoked the jurisdiction of that tribunal.[138]

Hobhouse J also noted that nothing in the present case required him to explore the deeper workings of the treaty; nor the legal effects of the tribunal's decisions upon the substantive rights of the parties, either under US or Iranian law. In other words, he did not have to consider the treaty provisions in character of law, defining rights and obligations. Reference to the treaty served to establish legitimate and valid basis for committing the parties to binding arbitration, and thus a judicially cognisable arbitral award.

Disputes arising from international arbitration, particularly between an aggrieved foreign investor and a government or other state agent under bilateral investment treaties or joint ventures, will inevitably invoke provisions of the relevant international agreement or treaty. The presence of state agents and treaties may excite concerns ventilated in *Buttes Oil v Hammer* and the ITC case. But English courts will distinguish between the investment treaty itself and the agreement to arbitrate, even if the latter is found in the treaty. The leading case is *Ecuador v Occidental Expl*.[139] A tax dispute between Occidental and Ecuador regarding Occidental's joint venture with a state corporation led to an UNCITRAL arbitration under the US–Ecuador bilateral investment treaty, and an award in Occidental's favour. Because the panel declared London to be the place of the arbitration, Ecuador applied there under the relevant arbitration statutes to have the award set aside, in part for lack of jurisdiction. Ecuador claimed the tax dispute not to fall under the "investment disputes" contemplated under the treaty. Occidental objected that the English courts had no jurisdiction to consider and interpret the

---

[137] In the aftermath of the Iran Hostage Crisis: see, e.g., *Dames & Moore v Regan* 453 US 654 (1981).

[138] *Dallal v Bank Mellat*, 462.

[139] *Ecuador v Occidental Exploration* [2006] QB 432; and see the final outcome on the questions arbitrated: *Ecuador v Occidental Exploration* [2007] 2 CLC 16 (CA).

treaty, and thus Ecuador's application should fail as depending upon non-justiciable matters. The Court of Appeal dismissed Occidental's objection, framing the issue along the lines of *CND v The Prime Minister* that a court might interpret an unincorporated treaty if necessary to determine rights and duties under domestic law. The arbitration being in London, and thus ordinarily covered by the Arbitration Act 1996, the Court could resort to the treaty where it contained the agreement to arbitrate, in order to consider the scope of the rights and duties under that agreement. An arbitration agreement did not in principle raise any question of acts of state or immunity.

A similar characterisation of treaties as part of the factual, evidentiary framework for the courts to establish may be said to underlie the decisions in *Ex p. Launder* and *Ex p. Kebilene*.[140] In more conventional terms, these cases decide that the courts, in judicial review proceedings, may examine unincorporated treaties which an administrative authority has relied on to arrive at a decision. The courts will consult the treaty to determine whether the administrative authority has misdirected itself on its meaning and import so as to invalidate the decision. In the first case cited, Launder objected to his extradition to Hong Kong after transfer of sovereignty from the UK to China. He contended that the various safeguards to continue the rule of law in SAR Hong Kong provided in the sovereignty transfer treaty would not be observed by China, resulting in an unfair trial and inhumane punishment for him. This would, among other things, violate his EConvHR rights. Despite a long process with extensive submissions on behalf of Launder and a request for reconsideration, the Secretary of State decided (after consultation with the Cabinet too) to extradite Launder, providing written reasons set out in two letters. Launder applied for judicial review of this decision. The treaty point in issue did not concern the sovereignty transfer treaty. The House of Lords considered the treaty and the relationship between China and the UK to satisfy itself that the Secretary's understanding of the situation in China and Hong Kong as it pertained to the UK standards and statutory tests for extradition were not unreasonable or irrational. Rather, the treaty issue turned upon Launder's invocation of the EConvHR which had not yet been converted to UK law. Because the Secretary of State had taken Launder's submissions on that point into account, and addressed them in his reasons, the House of Lords (per Lord Hope) determined that the EConvHR had become an element to the overall administrative decision subject to the review jurisdiction of the courts. That unincorporated treaty had thus become part of the factual framework. Of course, it also helped that the EConvHR addressed human rights, as opposed to perhaps "mere" commercial rights, and that it obtained under the wider transnational European institutional framework of which the UK was a member.

In like measure, and relying on *Ex p. Launder*, the *Ex p. Kebilene* case required the House of Lords to assess on a judicial review application whether the decision to

[140] *R v Sect. State Home Dep't ex p Launder* [1997] 1 WLR 839 (HL); *R v Dir Public Prosecutions ex p. Kebilene* [2002] AC 326, esp. 341–342.

prosecute under antiterrorist legislation properly accounted for the EConvHR. The trial judge had ruled that the statutory section under which the prosecution would take place, and for which the consent was given, was in breach of EConvHR rights incorporated into the Human Rights Act 1998 but not yet in force. The Director, after taking legal advice on the point, maintained his consent to prosecute. Thus it was open to the courts on the ordinary principles of administrative law to consider whether the advice relied upon was sound, and thus the decision properly made.

In neither of the two cases was the public official required by domestic law to account for the EConvHR as a matter of law. He could not be faulted for ignoring them, had that been the case. But having thus been relied on, the unincorporated treaty became part of the factual matrix substantiating a reviewable administrative decision. If the administrative decision maker had misunderstood or failed duly to appreciate all the relevant facts, his decision would accordingly be vitiated and voidable.

Characterising thus the unincorporated treaty as part of the factual matrix suggests that the nature and intensity of judicial review ought to proceed on the basis of the tests applied for mistake of fact and *Wednesbury* unreasonableness.[141] So doing may be said to temper some of the risk of the courts merely substituting their own views and interpretation of the treaty for that of the administrative authority. The issue framed is not whether the interpretation of the import of the treaty or other international obligation is correct, but whether the conclusion reached is reasonable and justifiable. In other words the standard of review does not go to the merits, but to the rationality of the decision. This provides a needed consistency with the constitutional concerns against any erosion of the separation of powers. A measure of judicial deference regarding the merits would recognise that foreign affairs remain substantially a Crown prerogative, and involve considerations beyond the safe capacities of a judicial determination as noted in *Buttes Oil v Hammer*.[142] The House of Lords has already taken steps in this direction in its *Corner House Research* decision.[143] The Director of the Serious Frauds Office had discontinued an investigation into allegations of bribery, fraud and corruption relating to an arms deal with Saudi Arabia. Corner House sought judicial review, claiming that the discretionary decision was improperly influenced by the significant diplomatic pressure brought to bear by Saudi Arabia (threatening effectively to end strategic and economic cooperation with the UK in the area). Part of the case was based upon a faulty understanding of Article 5 of the OECD Convention, not part of domestic law, but taken nonetheless into account. The Law Lords considered that the review permitted by *Ex p. Kebilene* and *Ex p. Launder* should not engage the courts in a merits review of the decision (and act to deter administrative authorities from considering non-binding international

[141] On these principles, see, e.g., Craig 2008, Chaps. 15, 19.

[142] For a like view, see Sales & Clement 2008, pp. 405–406 (the "tenable view" approach).

[143] *R (Corner House Research) v Director SFO* [2008] 3 WLR 568 (HL) (and applying *Ex p. Launder* and *Ex p. Kebilene* as settled law).

commitments).[144] The ruling concerns were that the administrative authority's reading of the international obligations was a reasonable and justifiable in the circumstances.

3.4 The United States: Constitutional and Congressional Controls

The United States position represents by far the most complex and widely—onsidered of all the four states considered here. The combination of general constitutional provisions, a jealously guarded separation of powers among national government organs, a like protected division of powers between federal and state levels, and an active judicial attention to and resolution of constitutional issues, with the significance and engagement of the United States in world affairs has generated a wealth of judicial precedent and academic comment and controversy. So as to distil the multitude of issues and arguments concerning the judicial application of treaty provisions in domestic US law into a manageable package, let us take our cue from the core feature to the separation of powers, namely, the power to make law.

3.4.1 From the Outside In: Transposing the International to the National

It is a well-established and generally accepted principle of modern US constitutional law that the control and direction of US foreign relations is substantially in the hands of the President, in whom is vested the executive power pursuant to Article II of the Constitution.[145] The President represents and acts on behalf of, in the name of, the United States as a sovereign state within the community of world powers.[146] Quite simply, the President is the Head of State. And in dealing with the US, other world powers assume and acknowledge as much. They address and deal with the President and his delegates and representatives, rather than the Congress or the legislatures or

---

[144] See, e.g., *R (Corner House Research) v Director SFO*, 584–86 (Lord Bingham); 591–592 (Lord Brown).

[145] See e.g., *Mackenzie v Hare* 239 US 299; *Oetjen v Central Leather Co* 246 US 297 (1918); *Curtiss Wright v US* 299 US 304 (1936); *Ludecke v. Watkins* 335 US 160 (1948); *Banco Nacional de Cuba v Sabbatino* 376 US (1964); *First Nat. Bank v Bank Nacional de Cuba* 406 US 759 (1972); *Dames & Moore v Regan* 453 US 654 (1981); *Crosby v National Foreign Trade Council* 530 US 363 (2000).

[146] See e.g., Hamilton et al. 1961, pp. 264–271 (Madison). And see e.g., *Burnet v Brooks* 288 US 378; *Curtiss Wright v US* 299 US 304 (1936); *US v Belmont* 301 US 324 (1937). Of course, for the most part, the day-to-day administration of US foreign relations is delegated to the State Department and the Secretary of State. For simplicity, however, we refer to and consider only the President as the constitutionally nominated organ.

government agents of the several states. The US Congress has no general or inherent powers over foreign relations, but only specific powers conferred in Article 1 §8 of the Constitution relating to import and export tariffs, foreign trade, piracy, "offences against the law of nations", immigration, to declaring war, and to governing and regulating the military. Article VI §3 also invests the Congress with the power to admit new states and dispose of the property and territory of the US. Nonetheless, and quite obviously, the US Congress also has significant legislative jurisdiction over matters of domestic, national concern, as granted by Article 1 §8. Congressional legislation in these areas may certainly have an indirect or direct bearing upon extant or future foreign policy undertakings, and current international rights and obligations binding the US.[147] And by section 10 of that same Article, the Constitution considerably restricts the jurisdiction of several US states over matters touching upon foreign relations. They have no power to enter into treaties, alliances, compacts, nor have they any power to assess maritime, import or export duties without the consent of Congress. It is the President (in cooperation with Congress for certain matters) who possesses all those powers necessary to conduct such business and enter such relations for the US as might be required or usual in the international sphere. Thus from an external perspective, for international law, it is the President of the United States who enters and binds that state to international commitments. It is the body of the President's decisions on foreign policy which may further serve to establish the necessary elements for customary international law. It is the President who makes treaties and other international agreements with other foreign powers, with the intention of binding the US.

But it is also a well-established principle of modern US constitutional law that all presidential authority—not only that in foreign affairs—derives from the Constitution.[148] Indeed, any exercise of authority howsoever described, whether executive, legislative, and judicial or rule-making and -enforcing, must originate in and from the Constitution. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[149] The basis for the President's authority must be found either in an independent power conferred by the Constitution, a grant of authority in an otherwise constitutionally valid Act of Congress, or in the demonstrable and longstanding acquiescence of Congress to such presidential action. These are the criteria first expressly articulated by

[147] See e.g., *Edye v Robertson* (Head Money Cases) 112 US 580 (1884) (Congress may authorise collection of immigration fees notwithstanding prior, potentially inconsistent, treaty obligations); *Whitney v Robertson* 124 US 190 (1888) (id.); *Van der Weyde v Ocean Transport* 297 US 114 (1936) (Congress requesting and directing President to communicate abrogation of treaties President deemed inconsistent with newly enacted Seaman's Act), *Clark v Allen* 331 US 503 (1947) (reconciling *Trading with the Enemy Act* with 1923 US–Germany Treaty).

[148] Only one attempt has been made to find an extra-constitutional grounding: *Curtiss Wright v US* 299 US 304 (1936); on which see below.

[149] *Reid v Covert* 354 US 1 (1957) 5–6 (Black J, citing, *inter alia*, *Marbury v Madison* 5 US 179, and *Martin ex. p Fairfax v Hunter's Lessee* 14 US 304).

Jackson J in *Youngstown Steel v Sawyer*.[150] In the middle of the Korean War, a seemingly unresolvable labour dispute between steel companies and their workers led to the declaration of a national strike. Just before the strike was to begin, the President issued an executive order instructing the Secretary of Commerce to take possession and continue operating the steel mills. The seizure was claimed in the national interest, to ensure a continued supply of steel for the war effort. Congress did not react. The steel company owners complied under protest, and sought a repossession order lifting the seizure. The Supreme Court agreed: the President's power derived from the Constitution, and there was no constitutional basis, whether expressly or through appropriate legislation, empowering the President to issue and enforce such an order.[151] The President had no independent law-making authority. No statute, labour or defence production, authorised the seizure. Indeed, Congress had expressly rejected that option earlier in its labour legislation. Presidential powers as commander-in-chief play themselves out in the theatre of war, or in circumstances closely connected therewith, and not in domestic labour and property disputes.[152] Moreover, pursuant to Article I §8, Congress also has jurisdiction over certain war and military matters, including supplies for the military wing. Finally, the circumstances themselves did not represent an emergency or urgency, necessary and sufficient to justify such executive action.

While all concurring Justices approached the legal analysis and judicial resolution of the constitutional question along the same broad lines, it has been the framework articulated by Jackson J which has become the classic touchstone for the (constitutional law) analysis of any Presidential activity, including that dealing with foreign affairs and their domestic effect.[153] For convenience, let me reproduce it once again:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential

---

[150] *Youngstown Steel v Sawyer* 343 US 579 (1952), 635–639 per Jackson J. See also *Field v Clark* 1892; *US v Pink* 315 US 203 (1942), *US v Belmont* 301 US 324 (1937). and *Weinberger v Rossi* 456 US 25 (1982).

[151] Vinson CJ and Reed and Minton JJ dissenting.

[152] "There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants." *Youngstown Steel v Sawyer*, 643–45 per Jackson J.

[153] Black J and Douglas J also approaching the issue from the same tack.

> responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [*footnotes omitted*].[154]

This constitutional framework structures the domestic legal appreciation of international legal rules claimed to have effect in the US national legal system: the analysis and evaluation of the domestic legal effect of international law begins and ends with the Constitution. The prime concern for US courts involved in questions having foreign elements is enforcing the Constitution, not the least of which are the separation and division of powers. As we will see in what follows, the transposition of rights and obligations entered into by the President at the international level must pass through the constitutional portal, which allocates law-making authority for the US according to its terms.

The Constitution is supreme over any treaty or international agreement: *Reid v Covert, De Gefroy v Riggs, Doe ex dem Clark v Braden*.[155] That is, neither the Senate nor Congress (in cooperation with the President), nor President alone (with the acquiescence of Congress) may expand or exceed their constitutional grant of powers for law-making by treaty or foreign affairs. The leading modern articulation of the principle is found in *Reid v Covert*:

> The obvious and decisive answer … is that no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution.
>
> … It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[156]

Reid v Covert dealt with an executive agreement concluded with the UK under authority of the federal statute, the Uniform Code of Military Justice. If it were thought that *Reid v Covert* was somehow limited to those international agreements, did not extend to Article II treaties, the *locus classicus* expressly dealing therewith (and which was followed and applied in *Reid*) is *De Geofroy v Riggs*. "The treaty power, as expressed in the constitution, is in terms unlimited except by those

---

[154] *Youngstown Steel v Sawyer*, 635–638 per Jackson J, [footnotes omitted].

[155] *De Geofroy v Riggs* 133 US 258 (1890) 267; *Doe ex dem Clark v Braden* 16 Howe 635, 657; *Reid v Covert* 354 US 1 (1957) 17 and citing as well *US v Minnesota* 270 US 181, 207–8; *Holden v Joy* 17 Wall 211, 242–3; *The Cherokee Tobacco* 11 Wall. 616, 620–621. See also *Missouri v Holland* (nothing in the treaty or subsequent congressional implementation expressly contrary to the Constitution).

[156] *Reid v Covert* 354 US, 16, 17 [footnote omitted], per Black J.

restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and that of the States."[157]

One possible but isolated exception to this rule, *Curtiss–Wright v US*, presents little if any trouble.[158] Curtiss–Wright had been charged with contravening a congressional prohibition on selling weapons in the US to Bolivian interests during civil unrest there. In the joint resolution establishing that prohibition, Congress conferred on the President the power to proclaim the law in force or suspend its operation depending on his assessment of the foreign situation in conjunction with US foreign policy.[159] Rather than concentrating on the constitutional powers of Congress to regulate foreign commerce, the President's foreign affairs powers, and the executive power, Sutherland J (writing for the majority) advanced the proposition that a fundamental distinction in "origin and nature" existed between the powers of the federal government relating to international matters and those to national matters.[160] At the conclusion of a rather curious path of historical reasoning, he concluded that, "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[161] Absent any explicit grant in the Constitution (and there were indeed some) powers in foreign affairs would still reside in the federal government as the "necessary concomitants" of sovereignty and nationality, pursuant to the law of nations. Yet he appears to pull back somewhat, by characterising the President's powers in the case as a combination of authority vested by legislation and his full constitutional powers in international relations "a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other act of governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[162] Whatever the social and political circumstances surrounding the decision,[163] this decidedly Kelsen-oriented view that international law somehow defines and delimits the scope of national constitutionalism and law has not met with acceptance in the US.[164] Indeed Black J's opening in *Reid v Covert* may even be read to doubt or

---

[157] *De Geofroy v Riggs*, 267 per Field J. See also *Asakura v Seattle* 265 US 332 (1924) 341.

[158] 299 US 304 (1936). See e.g., White 1999, p. 98ff.

[159] On the use of such "proclamation laws", see, e.g., Ackerman and Golove 1995.

[160] *Curtiss–Wright v US*, 315–319. Perhaps unwisely disregarding that second of two cardinal rules in judicial review of legislation, "… never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia Steamship v Comm'rs of Emigratio*n 113 US 33, 39.

[161] *Curtiss–Wright v US*, 318.

[162] *Curtiss–Wright v US*, 319–320. Note the phrasing of Souter J's comment in *American Ins Assoc v Garamendi*, 417 n. 9.

[163] See further White 1999 and Ackerman and Golove 1995.

[164] *Quaere* whether the earlier "Chinese exclusion" cases and discussion in the US Supreme Court provide a precedent for Sutherland J's "extra-constitutional" hypothesis: see e.g., *Fong Yue Ting v US* 149 US 698 (1893) 705–711, per Gray J. (and cases cited therein).

disapprove the "extra-constitutional" hypothesis, "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." It is not insignificant that no subsequent judgment has taken up and developed Sutherland J.'s view on the origin of powers.[165] The unreceptive ears of the US judiciary and constitutional organs speak rather loudly and unhesitatingly in favour of the constitutional foundation for powers exercised inside and outside the state.

Therefore, with this in mind, treaties and like international agreements may obtain force of law within the US legal system in one of three ways.[166] First, the courts have granted treaties legal effect in accordance with their terms pursuant to the Article VI Supremacy Clause, if they have been ratified upon the advice and consent of a 2/3 majority in the Senate (Article II Treaty Clause). That Article provides that the Constitution, the laws of the US, and treaties made under the authority of the US shall be the "supreme law of the land", binding federal and state levels alike. This rule of recognition is subject to qualification. Not all treaties intend to confer immediately justiciable private or public rights, absent further implementing legislation. Not all are "self-executing" in this fashion. Moreover, the Senate may grant its consent upon the reservation, declaration or condition that all or sections of the treaty are not self-executing. The US courts have generally reserved "treaty" as a term of art to cover only those agreements thus ratified by the Senate, whether of a purely international character or whether of an internal nature between the US federal government and its indigenous Indian tribes.[167] Nevertheless, in the interpretation of congressional statutes, the courts will interpret a general statutory reference to a "treaty" as including executive agreements unless the language of the statute requires otherwise.[168] All other international agreements not submitted to the Article II process are generally classified as "executive agreements", further subdivided into "congressional-executive agreements" and "sole/presidential executive agreements".

Second, the courts have recognised the domestic legal effect of executive agreements (albeit "treaties" in the international sense) where authorised and

---

[165] I located but one case citing it for what amounts to be that proposition: *Dole v Carter* 444 F. Supp 1065 (1977) (DC Kansas), motion for injunction pending appeal dismissed as non-justiciable: F 2nd 1109 (10th Cir 1977).

[166] See Hathaway 2008, pp. 1257–1271 for statistical breakdown.

[167] See e.g., *The Cherokee Tobacco* 11 Wall. 616 78 US 616 (1870); *Choctaw Nations v US* 318 US 423 (1943); *Seminole Tribe of Florida v Florida* 517 US 44 (1996).

[168] *Altman v US* 224 US 583 (1912), 601 (right of appeal in revenue cases to the Supreme Court involving the "validity or construction of any treaty" under 1891 *Circuit Court Appeals Act* available based on reciprocal tariff agreement with France under 1897 *Tariff Act*); *Weinberger v Rossi* 456 US 25 (1982) 30–31 (Act prohibiting labour discrimination against US citizens on US military bases unless "prohibited by treaty" to give way to statutorily authorised executive agreement with the Philippines).

approved in advance or afterwards by Act of Congress.[169] congressional-executive agreements far outstrip treaties in number.[170] Because the process does involve enacting legislation, it has invited close juridical attention to the constitutional allocation of legislative powers between the state and federal levels. More specifically, the concern is whether Congress is unduly and unconstitutionally encroaching upon the legislative domain of the states by way of the foreign affairs power; that is, whether it is achieving indirectly what it may not do directly, constitutionally.[171] The US Supreme Court has generally favoured the federal position, deferring to a broadly conceived understanding of what foreign relations powers encompass.[172] Moreover it is unclear whether a distinction in approach is perceptible or feasible between congressional authorisation *ex ante*, requiring a narrower, more focussed constitutional grounding in the division of powers, and such authorisation *ex post* through or including subsequent legislation, allowing for a more generous appreciation though the treaty power and the presidential foreign relations power. It is also by way of this Article I legislative process in ordinary that Congress may implement treaties deemed executory. And of course, it is within Congress' power to enact statutes which incorporate general international law, such as treaties, customary international law, the "law of nations", the "laws of war", without specific compacts or international law rules in mind.[173]

Following from the understanding of the presidential foreign affairs powers and the *Youngstown* framework, the third port of entry to the US domestic legal system occurs without active congressional approval. Where the President concludes an executive agreement with a foreign power, but without the benefit of direct statutory authorisation (*ex post* or *ex ante*), courts have been willing nonetheless to give it legal effect providing that there is a colourable constitutional basis for presidential action, and a demonstrable, established record of congressional acquiescence to that practice. These "presidential executive agreements" or "sole executive agreements" have a long-established presence in US political history,

---

[169] Reisenfeld and Abbott 1991, p. 636 (co-extensive with Treaty Power). Instead of by specific statute, Congress may approve and implement a treaty by joint resolution, which resolution has constitutionally the same effect as an Act of Congress.

[170] See Hathaway 2008 (and suggesting why presenting international compacts as such agreements rather than treaties may be generally preferred by the executive branch); Ackerman and Golove 1995 (accord).

[171] Franck et al. 2007.

[172] Hence, e.g., *Ex parte Cooper* 143 US 472 (1892); *Missouri v Holland* 252 US 416 (1920); *Curtiss–Wright v US* 299 US 304 (1936); *US v Belmont* 301 US 324 (1937); *US v Pink* 315 US 203 (1942); *Dames & Moore v Regan* 53 US 462 (1994); *Crosby v National Foreign Trade Council* 530 US 363 (2000), and *American Ins Corp v Garamendi* 539 US 396 (2003). See generally, White 1999; Ackerman and Golove 1995. Nonetheless arguments for greater states' rights do continually arise: see, e.g., Rosenkranz 2005, Vazquez 2008a, b.

[173] For example, the Uniform Code of Military Justice (*Reid v Covert* 354 US 1 (1957) and *Hamdan v Rumsfeld* 548 US 557 (2006)), tariff statutes (*Whitney v Robertson* 124 US 190 (1888) and *Altman v US*), anti–discrimination legislation (*Weinberger v Rossi*) or the Alien Tort–Claims Statute.