

ABA Adopts ABA-ASIL Joint Task Force Policies on Implementing Treaties under U.S. Law

By [Ronald J. Bettauer](#)

Introduction



In view of the potentially broad implications of the 2008 U.S. Supreme Court decision in *Medellín v. Texas* for U.S. compliance with its existing and future international treaty obligations, in the Spring of 2008 the American Bar Association (ABA) Section of International Law (SIL) and the American Society of International Law (ASIL) decided to establish a joint task

force on Treaties in U.S. Law to assess those implications and to make recommendations.^[1] The task force began its work in July 2008 and completed its report on March 16, 2009.

At its winter 2010 meeting, the ABA House of Delegates adopted the policies recommended in the Task Force Report.^[2] The approved recommendations are thus policies that the ABA will advocate to the legislative and executive branches. (The ASIL does not generally take positions on matters of policy, and thus, from the ASIL's perspective, the recommendations are those of the task force and not the ASIL.) This article briefly summarizes the task force's report and sets out the recommendations it contains.

I. *Medellín v. Texas*

In *Medellín v. Texas*,^[3] the U.S. Supreme Court decided on March 25, 2008, that the judgment of the International Court of Justice (ICJ) in the *Avena* case,^[4] 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, the Court reasoned that the obligation in Article 94 was not self-executing as a matter of domestic U.S. law.^[5]

II. The Task Force Report

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Medellín's implications for the extent to which the United States will be able to implement domestically its existing and future international treaty obligations depend on how the Court's analysis of treaty self-execution is understood. The task force decided that it should not take a position on how the *Medellín* decision should be read; instead it should identify the most plausible interpretations of the opinion and the range of potential consequences, and develop recommendations that spanned that range. Thus, as a predicate for developing its recommendations, the task force addressed two questions: first, the circumstances under which treaties will be found to be non-self-executing (three different but plausible readings were identified), and second, the possible legal consequences of a determination that a treaty provision is non-self-executing.

The task force considered that the Court's self-execution analysis might affect a range of treaties, from a limited class to 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.

The task force considered it 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.^[6] A non-self-executing treaty, said the Court, "does not by itself give rise to domestically enforceable federal law."^[7] 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;^[8] non-self-execution therefore presumably must mean more than simply the lack of a private right of action.

The task force found that the opinion leaves unclear 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.^[9] 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."^[10] On the other hand, the opinion also contains statements that equate non-self-execution simply with lack of judicial enforceability.^[11] It is also unclear whether the Supremacy Clause of the U.S. Constitution, which states that "all" treaties entered into by the United States shall be the supreme law of the land, requires that non-self-executing treaties have some domestic law status. The Court in *Medellín* did not address this issue.

In general, the task force stated that the United States should and likely will comply with its international law treaty obligations. However, the task force found that new uncertainties were created by the *Medellín* decision about the ability of the United States as a matter of U.S. domestic law to comply with

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those obligations. 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 which the United States has ratified or acceded to—cannot be implemented domestically under existing legislation. Other countries could thus question the ability of the United States to comply with its treaty commitments.

III. The Task Force Recommendations

To address these uncertainties, the task force recommended the enactment of remedial legislation with respect to existing treaties as well as steps by the legislative and executive branches with respect to future treaties.^[12]

Specifically, the task force agreed to recommend:

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.^[13]

As approved by the ABA House of Delegates, the recommendations were slightly revised to read:

RESOLVED, That the American Bar Association urges that legislation be enacted to provide procedures for implementing on an expedited basis commitments in existing treaties where the President reports to the Congress that binding measures are necessary to avoid the imminent risk of breach by the United States; and

FURTHER RESOLVED, That the American Bar Association urges the Executive Branch, with respect to future treaties,

- i. to seek treaty language consistent with its intent as to whether treaty provisions are self-executing;
- ii. to identify in treaty transmittal documents which provisions of the treaty are self-executing and how non-self-executing

- provisions of the treaty will be implemented; and,
- iii. as a general rule, if implementing legislation is required for U.S. compliance, not to bring the treaty into force until that legislation is enacted; and

FURTHER RESOLVED, That the American Bar Association urges the Senate, with respect to future treaties, as a general rule, to declare in resolutions of advice and consent which provisions are self-executing and its expectation, where new implementing legislation is required, that the treaty will not be brought into force for the United States until such legislation is enacted.^[14]

The Task Force Report provides a detailed explanation of these recommendations. It explains possible alternate approaches for enactment of remedial legislation, modeled on the expedited procedures found in Sections 123 and 130 of the Atomic Energy Act^[15] and Section 115 of the Emergency Economic Stabilization Act of 2008,^[16] with illustrative drafts in its annex B.^[17] As explained in the Task Force Report, the new expedited procedures might be used, for example, 1) to implement a decision of the International Joint Commission taken under the 1909 Boundary Waters Treaty between the United States and Great Britain (now Canada) or a decision by the United States-Canada International Boundary Commission requiring property owners to keep a certain areas clear could be subject to domestic challenge;^[18] 2) to implement an obligation in a Safety of Life at Sea Convention,^[19] or under the Montreal Protocol;^[20] 3) to implement a standard established under the International Civil Aviation Organization or International Maritime Organization conventions;^[21] or 4) to comply with a new ICJ decision under a treaty with an existing ICJ dispute settlement clause, for example, determining that the United States was required to afford a person certain immunities.^[22]

With respect to future treaties, the report explains that the executive branch and Senate were already taking steps along the lines of its recommendations, but proposes, for example, that such steps be formalized in the State Department's Circular 175 procedure.^[23]

IV. The Significance of the Recommendations

While the *Medellín* decision has been applied in a number of lower court decisions involving treaties other than the Vienna Convention on Consular Relations^[24] (and discussed in a significant number of law reviews) in the last two years, the consequences of the decision—exactly which U.S. treaty provisions will be found non-self-executing, and what such a finding would mean for the ability of the United States to comply with the obligations in non-self-executing treaties in various contexts—remain unclear. The Supreme Court could of course provide further clarification, but since the Court often limits its holdings to the facts of the specific case before it, uncertainties at home and abroad about whether the United States will comply with the commitments it undertakes may well continue for some time, unless other steps are taken to clarify the situation.

The task force recommendations thus remain important since they are aimed at reducing these uncertainties. For existing treaties, if the recommendations

are followed, there would be a new statutory mechanism for implementing commitments where deemed necessary to avoid imminent risk of breach, providing a way to comply with U.S. international obligations in existing non-self-executing treaty obligations for which there is no implementing legislation. For future treaties, the recommendations would institutionalize procedures designed to make clear during the ratification process which treaty provisions are self-executing and, for those that are not, generally ensure that a domestic implementation mechanism is in place before the United States is bound by an international legal commitment.

The task force recommendations were unanimously approved by the SIL Council at its July 31, 2009, meeting in Chicago, Illinois, and then forwarded to the ABA House of Delegates for consideration at its 2010 Midyear Meeting, which, as noted, approved the recommendations.

About the Author

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Endnotes

[1] The membership of the Task Force is set out in ABA/ASIL Joint Task Force on Treaties in U.S. Law, Report (Mar. 16, 2009), Annex C, *available at* <http://www.asil.org/files/TreatiesTaskForceReport.pdf> [hereinafter Task Force Report].

[2] The ABA House of Delegates action on the recommendations is set out in its Daily Journal, ABA, House of Delegates, Midyear Meeting (Feb. 8-9, 2010), *available at* http://www.abanet.org/leadership/2010/midyear/docs/daily_journal.pdf. The recommendations as approved by the ABA as well as the Task Force Report (without its annexes) have been posted by the ABA, Recommendation Adopted by The House of Delegates (Feb. 8-9, 2010), *available at* http://www.abanet.org/leadership/2010/midyear/daily_journal/108C.pdf. The Task Force Report (with its annexes) was posted by the ASIL, *at* <http://www.asil.org/files/TreatiesTaskForceReport.pdf>.

[3] 552 U.S. 491 (2008); *Medellin v. Texas*, 129 S.Ct. 360, 171 L. Ed .2d 833 (2008) (stay and *habeas corpus* denied).

[4] *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), 43 I.L.M. 581 (2004), *available at* <http://www.icj-cij.org/docket/files/128/8188.pdf>; see also Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Judgment of Jan. 19, 2009), 48 I.L.M. 202 (2009), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=4?>.

[5] 552 U.S. at 507-23.

[6] 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.

[7] 552 U.S. at 505 n.2.

[8] *Id.* at 506 n.3.

[9] See, e.g., 552 U.S. at 505 (“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 505 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 520 (“[T]he particular treaty obligations on which Medellín relies do not of their own force create domestic law.”).

[10] *Id.* at 505 n.2.

[11] See, e.g., *id.* at 504 (“[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 513 (“The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments *through direct enforcement in domestic courts . . .*”) (emphasis added); *id.* at 508 (stating that “Article [94] is not a *directive to domestic courts*”) (emphasis added).

[12] The task force thought 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, 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.

[13] This version of the recommendations is in the body of the Task Force Report, *supra* note 1. A number of questions were raised about the initial Task Force Report and at the ASIL Council’s meeting on April 18, 2009 in Washington D.C., the recommendations were revised, as it is reported in n.78 of the Task Force Report.

[14] This version is at the beginning of the document, at http://www.abanet.org/leadership/2010/midyear/daily_journal/108C.pdf.

[15] 42 U.S.C. 2153, 2160.

[16] Pub. L. No. 110-343, 122 Stat. 3765 (enacted Oct. 3, 2008).

[17] Annex B is reproduced at <http://www.asil.org/files/TreatiesTaskForceReport.pdf>.

[18] Task Force Report, *supra* note 1, at 4, 16.

[19] *Id.* at 7, 16.

[20] *Id.* at 12, 16.

[21] *Id.* at 16. See International Civil Aviation Organization [ICAO], <http://www.icao.int/icao/en/anb/mais/index.html> (explaining how ICAO standards are made); and International Maritime Organization [IMO], <http://www.imo.org/> (reviewing IMO standard-setting activities).

[22] *Id.* Annex A of the Task Force Report provides examples of dispute settlement clauses in existing treaties that might be affected.

[23] See 11 Dept. For. Aff. Manual § 720, *available at* <http://www.state.gov/documents/organization/88317.pdf>.

[24] See, e.g., *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010); *Safety Nat'l Cas. Corp. v. Certain Underwriters*, 587 F.3d 714 (5th Cir. 2009).