SELF-EXECUTING INTERNATIONAL AGREEMENTS AND PRIVATE RIGHTS OF ACTION: REVISITING THE 4TH RESTATEMENT OF FOREIGN RELATIONS LAW IN THE CONTEXT OF INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

MATTHEW SCHAEFER*

ABSTRACT

Judicial enforcement of U.S. international agreements has long puzzled courts and scholars. By building upon the Supreme Court’s 2008 Medellin opinion, the 4th Restatement of Foreign Relations Law’s Sections 310 and 311 adopted in 2018 make a significant advance in further distinguishing and clarifying how to determine whether a treaty is self-executing, whether it creates a private right of action, and the ramifications for judicial enforcement of those determinations. However, an examination of modern major international trade and investment agreements reveals that there are additional refinements and more to say on the topic than covered by the 4th Restatement.

First, the 4th Restatement only addresses these topics in the context of treaties, not all international agreements. Second, the 4th Restatement generalizes the ways in which a private party can use a

* Clayton Yeutter Chair, University of Nebraska College of Law. The author thanks Professor Kathleen Cauussen (Georgetown Law School), Professor Richard Steinberg (UCLA Law School), Professor Eric Berger (Nebraska College of Law), and Director of the Clayton Yeutter Institute Jill O’Donnell for their thoughtful comments on this article, and also thanks his research assistant Matias Cava (Editor-in-Chief, Nebraska Law Review) for his comments and assistance on footnotes. The author also acknowledges and is grateful for many hours of discussion with the late Professor John H. Jackson (University of Michigan Law School; Georgetown Law School) on matters addressed in this article. All errors and omissions and views are mine.
self-executing agreement in U.S. courts, and does not necessarily account for situations in which the political branches have elaborated different (narrower) contours for self-execution. Third, the 4th Restatement should list the various domestic documents surrounding international agreements that might be examined in order to glean U.S. political branch intent on the issue of self-execution. Fourth, the 4th Restatement should make clear that it is U.S. political branch (international agreement-maker) intent that governs not only self-execution but also private rights of action. Fifth, the 4th Restatement should make clear that in addition to precision and the obligatory nature of a treaty provision, courts should also look at whether the agreement’s text reveals an alternative enforcement mechanism at the international level, and whether other nations are giving the provision direct effect (so-called “reciprocity” factor) to glean U.S. political branch intent on the issues of self-execution and private right of action. Sixth, the 4th Restatement might consider provisions on Executive Branch enforcement of treaties, including the possibility of the United States having an inherent right of action to invalidate state laws inconsistent with international agreements, although there are complexities and conflicting signals on this possibility.
# Table of Contents

Introduction .......................................................................................................................... 746
I. Methods Utilized by the United States to Enter Binding International Legal Agreements .......... 750
II. The 2008 Medellin Supreme Court Case ...................................................... 755
III. 4th Restatement of Foreign Relations Law on Self-Execution and Private Rights of Action: Improvements and Updates to the 3d Restatement .................................................. 758
IV. Modern International Trade and Investment Agreements in Light of the 4th Restatement of Foreign Relations Law ................................................................. 763
   a. U.S. Bilateral Investment Treaties ............................................. 764
   b. Major International Trade Agreements ................................ 773
   c. Newly-Publicized Trade “Mini-Deals” .................................... 778
V. Lessons Learned from International Trade and Investment Agreements and Revisiting the 4th Restatement ................................................................. 785
INTRODUCTION

The issue of self-execution v. non-self-execution of U.S. international agreements has been written about in abundance. A self-executing agreement is automatically part of the U.S. legal system and at least in some contexts judicially enforceable. A non-self-executing agreement creates an international legal obligation for the United States, but does not enter the U.S. legal system automatically and is not judicially enforceable, except possibly in the rare circumstance that the U.S. Executive Branch brings a suit to enforce the treaty.

One does not find this distinction between self-executing and non-self-executing international agreements in the Constitution’s text. Indeed, the Supremacy Clause states that treaties are the supreme law of the land and prevail over inconsistent state constitutions and laws, leading some academics to believe that all treaties should be automatically part of the U.S. legal system. However, the distinction was first drawn by the U.S. Supreme Court in the 1829 case of Foster v. Neilson. By holding that some agreements are self-executing and some are not, the Foster decision in essence made the United States a mixed or hybrid system when it


4 See U.S. CONST. art. VI.


6 Foster, 27 U.S. 253.
comes to the impact of international agreements on the U.S. legal system.

Self-executing is distinct U.S. terminology; internationally, the more common term is “direct effect” of international agreements. In a pure monist country, all international agreements have direct effect in the domestic legal system. In a dualist system, like the United Kingdom, Canada, or Australia, international agreements can never have direct effect in the domestic legal system. In such systems, it always takes an act of parliament to incorporate the international agreement’s rules into the domestic legal system. Depending on whether a particular international agreement provision is self-executing or non-self-executing, the U.S. system can look monist or dualist and thus is labeled mixed or hybrid. There was an attempt in the early 1950s, led by U.S. Senator Bricker from Ohio, to amend the U.S. Constitution such that all treaties would be non-self-executing, thus making the United States a dualist country, at least with respect to treaties. However, the proposed amendment failed to garner sufficient support. Accordingly, U.S. courts and litigants must grapple with the issue of whether a particular provision in an international agreement is self-executing.

For nearly a century and a half, U.S. courts elaborated an almost circular test to determine whether a particular treaty provision was self-executing, asking “does the treaty operate itself without aid of legislation?” Cases in the 1970s and 1980s prior to the 3d Restatement of Foreign Relations Law sometimes listed multiple factors to determine whether a treaty provision was self-executing, including whether it was the intention of the parties to the treaty to

---

11 See Henkin, supra note 10, at 341.
12 Foster, 27 U.S. at 314; Asakura v. City of Seattle, 265 U.S. 332 (1924).
make it self-executing. The 3d Restatement of Foreign Relations Law, adopted in 1987, clarified to some degree that it was U.S. intent that was determinative on the self-executing issue.

The United States is party to thousands of treaties in the international law sense of that word – i.e., binding international legal agreements. As the number of treaties and the number of topics addressed by binding international legal agreements grew, especially into areas of private international law governing the relationship between private entities in different countries as well as those areas of public international law that impact daily transactions of private actors, the additional issue as to whether an international agreement provided a private right of action arose. The private right of action issue raises the question: under what conditions is self-execution alone sufficient for judicial enforcement, and in which situations does the additional requirement of a private right of action need to be shown? The status of international agreements, or even more specifically, the status of the various obligations in international agreements, in the U.S. legal system varies depending on whether the international obligation is self-executing, and additionally whether it creates a private right of action.

The 4th Restatement of Foreign Relations Law’s Sections 310 and 311 adopted in 2018, in part building upon the Supreme Court’s 2008 Medellin case, made a significant advance in further distinguishing and clarifying how to determine whether a treaty is self-executing, whether it creates a private right of action, and the ramifications of having the status of the former or both. However, an examination of modern major international trade and investment agreements reveals that there are additional refinements and more to say on the topic than covered by the 4th Restatement.

First, the 4th Restatement only addresses these topics in the context of U.S. international agreements entered through the treaty method, not all U.S. international agreements. Second, the 4th Restatement generalizes the ways in which a private party can use a self-executing agreement in U.S. courts and does not necessarily

13 See, e.g., Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).
17 Medellin, 552 U.S. 491.
account for situations where the political branches have elaborated different (narrower) contours for self-execution. Third, the 4th Restatement should list the various domestic documents surrounding international agreements that might be examined in order to glean U.S. political branch intent on the issue of self-execution. Fourth, the 4th Restatement should make clear that U.S. political branch (U.S. international agreement-maker) intent governs the issue of private rights of action. Fifth, the 4th Restatement should make clear that in addition to the precision and obligatory nature of a treaty provision, courts should also look at whether the agreement’s text reveals an alternative enforcement mechanism at the international level, and whether other nations are giving the provision direct effect (the so-called “reciprocity” factor) to glean U.S. political branch intent on the issues of self-execution and private right of action. Sixth, the 4th Restatement might consider provisions on Executive Branch enforcement of treaties, including the possibility of the United States government having an inherent right of action to invalidate state laws inconsistent with international agreements, although there are complexities and conflicting signals on this possibility.

Part I of this Article examines three major methods by which the United States enters into international agreements. This discussion is necessary background for examining the status of such agreements in the U.S. legal system, specifically whether a provision in an agreement is self-executing, and if so, whether it creates a private right of action. Part II discusses the Supreme Court’s 2008 Medellin decision, the Court’s latest pronouncement on the issue of self-execution, and necessary background to analyzing the 4th Restatement’s Sections 310 and 311. Part III analyzes the 4th Restatement’s provisions on self-execution and private rights of action and compares them to those of the 3d Restatement. Part IV then scrutinizes modern U.S. trade and investment agreements—bilateral investment treaties (“BITs”), major comprehensive trade agreements, trade “mini-deals,” and finally private international law conventions—to see how U.S. political branches express (or fail to express) their intent on these issues.

Part V draws lessons from the examination of trade and investment agreements for the 4th Restatement’s Sections 310 and 311, and suggests revisions to those provisions based on lessons learned from international trade and investment agreements. In addition to suggested revisions to the 4th Restatement, Part VI also makes the normative argument for U.S. political branches to make
their intent clear on issues of self-execution and private rights of action when entering an international agreement, and not leave a court’s determination on potentially ambiguous or conflicting signals within an international agreement’s text. Part VI further identifies two remaining open questions that may not yet be “ripe” for restatement: whether the Executive Branch has an inherent right of action to bring a claim to invalidate a state law inconsistent with an international agreement of the United States; and whether the Executive Branch can make presidential-executive agreements self-executing without further intent being expressed by Congress.

I. METHODS UTILIZED BY THE UNITED STATES TO ENTER BINDING INTERNATIONAL LEGAL AGREEMENTS

In a bit of foreshadowing, the analysis in Parts II and III will reveal that it is U.S. political branch intent that governs whether an international agreement provision is self-executing and whether it creates a private right of action. Thus, it is helpful to discuss the various methods by which the United States enters a binding international legal agreement, prior to discussing in greater detail the 4th Restatement’s provisions on self-execution and private rights of action and looking toward modern international trade and investment agreements, as the different methods involve different combinations of three political branch entities—the President, Senate, and Congress as a whole.

Specifically, the United States has three major methods of entering binding international legal agreements: the treaty method, the congressional-executive agreement (“CEA”) method, and the presidential (or sole or inherent) executive agreement (“PEA”). The treaty method is expressly laid out in Article II, Section 2 of the Constitution giving the President power to “make treaties with the advice and consent” of two-thirds of the Senate. The CEA method is virtually interchangeable with the treaty method. Under this

18 See U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL (FAM) 723.2 (2009). I do not discuss for present purposes a fourth-type, quite rare—the treaty authorized executive agreement—where a prior Article II treaty provides the authority for the President to enter a subsequent executive agreement, perhaps providing more detailed obligations than the treaty did.
19 U.S. CONST. art. II, § 2.
method, a simple majority of both houses of Congress provide express approval for an international agreement (ex ante or ex post), allowing the President to enter an international agreement.\(^{21}\) The PEA method is when the President enters a binding international legal agreement without express approval of either two-thirds of the Senate or a simple majority of both houses of Congress.\(^{22}\)

The Jackson concurrence from the Youngstown case or the Rehnquist spectrum analysis from Dames and Moore v. Regan determines when the President can use the PEA method. Like all actions by the President, when the President enters an international agreement, his or her authority must come from the Constitution and/or an act of Congress.\(^{23}\) Since presidential powers are not fixed but fluctuate according to Congress’ actions, one might place the President’s action within one of three categories,\(^{24}\) or as more recently described by the full Court, along a spectrum of authority.\(^{25}\)

At the top of the spectrum is express congressional approval (and in the case of the action being entering an international agreement, two-thirds Senate approval would also place the action in the top of the spectrum). A bit lower on the spectrum would be implied congressional approval, and then in the middle of the spectrum is congressional silence. At the very bottom of the spectrum would be express congressional disapproval of the action, and a bit up from that, implied congressional disapproval.

PEAs are agreements upheld anywhere beneath the top of the spectrum; that is where the President does not have express approval of either the full Congress or the Senate and is thus relying at best on implied congressional approval, but perhaps only congressional silence, and in certain limited agreements maybe acting in the face of some form of congressional disapproval.\(^{26}\)

---

\(^{21}\) Hathaway, supra note 20, at 2.

\(^{22}\) Id. at 7.

\(^{23}\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (discussing how presidential powers fluctuate based on congressional support or lack thereof, with it being at its greatest when the President has the support of Congress and at their weakest when the President goes against Congress).


\(^{25}\) Id. at 669 (“[E]xecutive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”).

\(^{26}\) Youngstown, 343 U.S. at 637.
complete the analysis, once pegging a proposed presidential action along the spectrum, one must look at presidential powers under the Constitution, congressional powers under the Constitution, and past practice and case law to determine if it is a valid action by the President.27 A sole or inherent executive agreement label seems more appropriate for those involving congressional silence or disapproval, while a PEA label seems broader and one that would more clearly include those in part authorized by implied congressional approval.

Examples of where the President has implied but not express approval for an international agreement can include situations in which Congress has passed a statute calling on the Executive Branch to coordinate or cooperate with foreign countries on an international problem, or develop strategic plans with respect to an international problem, as well as situations where none of the provisions in the international agreement would conflict with current U.S. law on the topic.28 In the trade agreement context, the U.S. Trade Representative’s Office has even pointed to its organic statute creating it as the trade negotiations arm of the U.S. government as implied authority to enter or conclude trade agreements,29 an argument that (standing alone) seems to be a bit of a stretch recognizing the Executive Branch already has authority under the Constitution to negotiate on any topic and any time30 and realizing that entering or concluding a trade agreement is a separate inquiry.

Some agreements have chapters or sections that sit in different categories of the Jackson concurrence or Rehnquist spectrum, i.e., appear in one section to look like a CEA and in a different section would be labeled a PEA. For example, in 2019, the United States concluded a non-comprehensive free trade agreement with Japan that had Japan agree to cut tariffs on agricultural goods that allowed

27 Id. at 635-37.
28 See, e.g., Letter from Ron Wyden, Sen. (D-Or), to Harold Koh, State Dep’t. Legal Adviser (July 25, 2012) (on file with author) (highlighting that Congress did not explicitly give the Executive Branch the authority to bind the United States to international intellectual property agreements).
30 See U.S. v. Curtiss-Wright Export Corp, 299 U.S. 304 (1936) (establishing that the President is the sole organ of communication and negotiation functions but not foreign-policy making); U.S. CONST. art. II, § 3 (asserting that the President “shall receive Ambassadors and other public Ministers . . . .”).
the United States to receive Comprehensive and Progressive Agreement for a Transpacific Partnership ("CPTPP") tariff treatment on most such goods in exchange for the U.S. cutting tariffs on agricultural and industrial goods of export interest to Japan.\(^3\) The agreement also contained a digital trade chapter that looked a lot like the U.S.-Mexico-Canada Agreement ("USMCA") digital trade chapter—a chapter with which current U.S. laws are in full conformity—along with significant annexes on rules of origin and agricultural standards.\(^3\) The tariff-cutting portions of the agreement were expressly approved by Congress ex ante via Section 103(a) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, making those portions look like a CEA.\(^3\) The digital chapter was entered into with an argument of implied approval based on current U.S. law being consistent with it.\(^3\) The authority of the Executive to conclude the rules of origin portion has been questioned as lacking either express or implied approval.\(^3\) The Executive Branch documents surrounding the agreement do not indicate any intent on the self-execution issue, but the tariff cuts were implemented by a presidential proclamation, an implementation act, and the digital trade agreement needed no implementation since current U.S. law was in conformity with it. Thus, it appears from the context and the acts taken to implement the agreement that it was not self-executing.

More recently, U.S. Congress gave express ex post approval to a trade agreement with Taiwan that the Executive Branch did not

---

\(^3\) In other words, the agreement eliminated the negative tariff preferences U.S. agricultural exporters faced when eleven countries went forward with the CPTPP after the United States decided not to pursue ratification of the original Transpacific Partnership ("TPP") in exchange for the United States cutting tariffs on some Japanese-origin goods. See Trade Agreement Between the United States of America and Japan, Japan-U.S., Oct. 7, 2019.

\(^3\) Id.

\(^3\) See Christopher Casey & Brandon Murill, Cong. Rsch. Serv., IFI1400, Presidential Authority to Address Tariff Barriers in Trade 2 (2023).


\(^3\) See Claussen & Meyer, supra note 29; Casey & Murill, supra note 33, at 2 ("[Congressional] concerns have focused on whether Section 103(a) authorizes the President to go beyond cutting tariff rates to modify quotas and create rules of origin.").
submit for formal express approval but rather was content to conclude as a PEA. The American Institute in Taiwan, the de facto embassy of the United States in Taiwan, signed the Agreement Regarding Trade Between the United States of America and Taiwan as part of the U.S.-Taiwan Initiative on 21st Century Trade on June 1, 2023. The agreement contains chapters on customs administration and trade facilitation, good regulatory practices, development and administration of services authorization measures, anti-corruption, and small and medium-sized enterprises.

None of the obligations in any of the chapters are inconsistent with U.S. law, which is one argument for the implied congressional approval of the agreement and the ability of the Executive Branch to enter into the agreement as a PEA. However, Congress—increasingly concerned with the use of the PEA method for trade agreements, even mini-deals such as the Taiwan agreement—on its own initiative passed a bill giving its express approval for the agreement sixty-seven days after the Executive Branch signed the agreement. Congress also provided in that bill that any future agreements with Taiwan under the 21st Century Trade Initiative will only take effect if a bill is enacted into law expressly approving the agreement and providing any necessary changes into U.S. law. President Biden signed the bill into law but did make a signing statement in which he indicated that he would treat as non-binding any provisions of the law that impermissibly infringe on the President’s power to negotiate, such as those prohibiting sharing negotiating texts with Taiwan prior to sharing such texts with Congress.

---


37 Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Trade Between the United States of America and Taiwan, Taiwan-U.S., May 2023.


39 One such provision prohibited the President from sharing negotiating texts with a foreign negotiating partner unless the President shared these texts with Congress first and gave Congress time to review them. See Presidential Statement on H.R. 4004, the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, WHITE HOUSE (Aug. 7, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/07/statement-from-president-joe-biden-on-h-r-4004-the-united-
The above background on methods is necessary to an examination of the 4th Restatement’s provisions on self-executing treaties and private rights of action because one needs to know what U.S. political branches are involved in a particular agreement to know where to look for U.S. political branch intent on these issues. The Supreme Court’s 2008 Medellin case makes clear that U.S. political branch intent determines whether an international agreement is self-executing, and the Medellin case has significantly influenced the 4th Restatement’s provisions as it is the Court’s most recent pronouncement on this issue.

II. The 2008 Medellin Supreme Court Case

The Supreme Court in Medellin examined not whether a particular treaty provision was self-executing but rather whether a decision of the International Court of Justice (“ICJ”) interpreting the Vienna Convention on Consular Relations (“VCCR”) was self-executing, and thus could be directly raised by a habeas petitioner to require judicial review and reconsideration of his conviction and sentence by Texas courts. In the so-called ICJ Avena ruling, a case brought by Mexico against the United States for failure to inform fifty-one Mexican nationals of their rights under the VCCR to meet with consular officials for assistance with their defense, the ICJ ruled that those Mexican nationals were entitled to the “review and reconsideration” of their conviction and sentences, strongly indicating this should occur through judicial mechanisms (i.e., courts). Medellin sued Texas, arguing that the ICJ’s Avena ruling was self-executing and required his conviction and sentence to be reviewed by Texas’ courts.

The U.S. Supreme Court defined the self-executing issue in somewhat conflicting ways in different portions of the opinion, first

\[\text{states-taiwan-initiative-on-21st-century-trade-first-agreement-implementation-act/ [https://perma.cc/4QDB-X4DB].}\]

\[40\] Medellin, 552 U.S. 491.

\[41\] Id.


\[43\] Id.

\[44\] See Medellin, 552 U.S. at 502-04 (“Medellin first contends that the ICJ’s judgment in Avena constitutes a ‘binding’ obligation on the state and federal courts of the United States.”).
claiming that the issue was whether the international obligation was
“directly enforceable as domestic law in [U.S.] courts” but later
making a broader statement: “[w]hat 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.” However,
it is clear from the context of the decision that it was judicial
enforceability that was at issue and that is the operative definition
of what this article will use for self-execution. More specifically, self-
enforcement concerns if and when the provision of the relevant
international agreement is judicially enforceable in some contexts.

The Supreme Court’s approach taken in the Medellin case, although technically involving an ICJ ruling, is equally applicable to
the more common situation that arises, specifically whether a particular treaty provision itself is self-executing. The Court
examined three treaties connected with the ICJ ruling in determining whether the ICJ ruling was self-executing. The Court
said that determining whether a treaty provision is self-executing is
in large part an exercise in treaty interpretation, emphasizing that it
turns first to the text of the treaty but that it has also examined the
post-ratification understanding of parties to the treaty and drafting
history as “aids to [the treaty provision’s] interpretation.” The Court also employed the rule of treaty interpretation to give “great
weight” to Executive Branch views on such matters.

Because the ICJ ruling was linked to provisions in at least three
treaties—the United Nations (“U.N.”) Charter’s Article 94, the
Optional Protocol to the VCCR, and Article 59 of the ICJ—the
Supreme Court explored the text of these three key treaty provisions
in trying to determine whether the Avena judgment was self-
executing. Critically, the text of these treaties as well as post-ratification understanding of nations party to the treaties and their

45 Id. at 519.
46 Id. at 505.
47 Id.
48 Id. at 504-05 (citing Foster, 27 U.S. 253; United States v. Percheman, 32 U.S. 51 (1833); Whitney v. Robertson, 124 U.S. 190 (1888)).
49 Id. at 507.
50 Id. at 513.
51 Id. at 499-501. Respectively, these provisions cover compliance with and enforcement of ICJ rulings, the jurisdictional basis for Mexico’s case against the
United States, and the rules of the ICJ. However, Article 59 also posits that rulings
of the ICJ only bind parties to the dispute as to the facts of the dispute.
drafting history is examined by the Supreme Court to assess the U.S. political branches’ intent on self-execution as the Court made clear in several passages in its opinion:

[The U.N. Charter] does not provide that the United States “shall” or “must” comply with an ICJ decision, nor indicate that the Senate that [consented to the ratification of] the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.53

As a result, we have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.54

Contrary to the dissent’s suggestion, . . . neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court’s opinion. Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.55

Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by “many of our most fundamental constitutional protections.”56

In Medellin, the Court indicated that a private right of action was not at issue in the case, and that presumably a finding of self-execution alone would have been enough to have judicial enforceability of the Avena ruling. However, while emphasizing that the private right of action issue is distinct, the Court stated in a

---

52 See Bradley, supra note 1; contra Michael D. Ramsey, A Textual Approach to Treaty Non-Self-Execution, 2015 BYU L. Rev. 1639, 1660-61 (2015) (for a contrary argument that the intent of the political branches unless expressed in text of treaty itself or a reservation to the treaty should generally not be looked at by the courts on the issue of self-execution); see also Carlos M. Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int’l L. 695, 706-08 (1995) (for a critique of looking to the intent of U.S. political branches and how such an inquiry may not comport with the original U.S. Supreme Court case making the distinction).

53 Medellin, 552 U.S. at 508 (emphasis added).

54 Id. at 519. (emphasis added).

55 Id. at 521. (emphasis added).

56 Id. at 523.
footnote that there is a presumption against a treaty having a private right of action even where the treaty is self-executing. In other words, self-execution is a necessary but not sufficient precondition to finding a private right of action.

III. 4TH RESTATEMENT OF FOREIGN RELATIONS LAW ON SELF-EXECUTION AND PRIVATE RIGHTS OF ACTION: IMPROVEMENTS AND UPDATES TO THE 3D RESTATEMENT

The 4th Restatement of Foreign Relations Law was drafted beginning in 2010, shortly after the Medellin case, and adopted by the American Law Institute in 2018. Section 310 deals with self-execution and Section 311 deals with private enforcement of treaties, including private rights of action. This is an improvement from the 1987 3d Restatement, which limited its discussion of private rights of action to a reporter’s comment, although it admittedly also specified that they were separate inquiries. Section 111, Comment (h), of the 3d Restatement stated that “[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.” However, even after the 3d Restatement, U.S. courts continued to confuse and mix the concepts. For example, the Second Circuit has stated that “self-executing treaties are those that immediately create rights and duties of private individuals which are enforceable and are to be enforced by domestic tribunals.” The U.S. District Court of the Southern District of New York claimed that “courts have assessed whether a treaty is ‘self-executing’ in several ways, including, most commonly, asking whether the treaty creates a private right of action.” Hopefully, the 4th Restatement’s separate treatment of the issues within its rules will lead to less confusion amongst courts.

Another major improvement of the 4th Restatement is that it clarifies and highlights, in accordance with Medellin, that it is the

57 Id. at 507 n.3.
59 Id.
60 Restatement (Third) of Foreign Relations (Revised) § 111 cmt. h (Am. L. Inst. 1987).
61 Flores v. S. Peru Copper Corp., 414 F.3d 233, 257 n.34 (2nd Cir. 2003) (internal citations and brackets omitted).
intent of the U.S. political branches that ultimately determines whether a treaty provision is self-executing. The 3d Restatement’s Section 111 paragraph 4 had provided:

(4) An international agreement of the United States is “non-self-executing”

(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation

(b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or

(c) if implementing legislation is constitutionally required. 63

Thus, by speaking in terms of “the agreement manifest[ing] an intention,” the 3d Restatement appeared to leave somewhat open whose intent on the issue of self-executing matters as reference to the agreement could harken back to older cases speaking in terms of the intention of the parties to the agreement. 64 However, the 3d Restatement’s Section 111(4)(b) does indicate that the Senate can declare an agreement non-self-executing. 65 Further, Comment (h) makes clear that it is the intention of the U.S. political branches that control the issue of self-execution:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to Congress as a whole for approval, and of

---

63 RESTATEMENT (THIRD) OF FOREIGN RELATIONS (REVISED) § 111(4) (AM. L. INST. 1987).

64 See Bradley, supra note 1, at 139.

65 RESTATEMENT (THIRD) OF FOREIGN RELATIONS (REVISED) § 111(4)(b) (AM. L. INST. 1987).
any expression by the Senate or by Congress in dealing with
the agreement.\textsuperscript{66}

The U.S. political branches, specifically the President and the
Senate for those agreements going through the treaty method, and
the President and both houses of Congress for those agreements
going through the CEA method, have been much more aggressive
in making their views known on the issues of self-execution and
private rights of action over the past several decades, spurred on
even more by \textit{Medellin}.\textsuperscript{67} International trade and investment
agreements are part of this trend.

On self-execution, the 4th Restatement that focuses only on
international agreements entered into through the treaty method
builds on \textit{Medellin}. In Section 310, the 4th Restatement clearly
elaborates that it is U.S. political branch intent that controls the issue
of self-execution and does not relegate that critical point to a
comment as the 3d Restatement did:

Courts will evaluate whether the text and context of the
[treaty] provision, along with other treaty materials, are
consistent with \textit{an understanding by the U.S. treatymakers} that
the provision would be directly enforceable in courts in the
United States . . . . If the Senate's resolution of advice and
consent specifies that a treaty provision is self-executing or
non-self-executing, courts will defer to this specification.\textsuperscript{68}

The 4th Restatement did not seek to address international
agreements entered through the CEA method,\textsuperscript{69} but if it had, the
same rule would apply. It is the understanding, or perhaps as better
said by the Supreme Court in \textit{Medellin}, the intention of, the U.S.
international agreement-makers (i.e., U.S. political branches) that
determines whether an international agreement provision is self-
executing and also whether it has a private right of action.

The 4th Restatement’s Section 311, labeled “Private Enforcement
of Treaties,” curiously does not state what determines whether a

\textsuperscript{66} \textit{Id.} at § 111 cmt. h (emphasis added).
\textsuperscript{68} \textsc{Restatement (Fourth) of Foreign Relations} § 310 (Am. L. Inst. 2018) (emphasis added).
\textsuperscript{69} The decision to limit the 4th Restatement’s provisions to the treaty-method
was criticized by some. See Leila Sadat, \textit{The Proposed Restatement (Fourth) of Foreign
Relations Law of the United States: Treaties – Some Serious Procedural and Substantive
treaty obligation contains a private right of action in its formal rule.\textsuperscript{70} Rather, the 4th Restatement provides that just because a treaty obligation is self-executing that does not necessarily mean it contains a private right of action.\textsuperscript{71} The 4th Restatement thus emphasizes these are distinct inquiries. In a reporter’s comment, the 4th Restatement indicates that there is a presumption against a private right of action even where a treaty provision is self-executing, citing to footnote 3 of \textit{Medellin}.\textsuperscript{72} This appropriately goes beyond the statement in the 3d Restatement Section 907, Comment (a), that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”\textsuperscript{73}

The 4th Restatement also indicates in reporters’ comment 3 that the presumption can be overcome “by evidence that the provision was intended to be enforceable by private parties,” but it should have specified that the intention referred to is the intention of the treaty-makers, the President and the Senate since the 4th Restatement focuses on the treaty method.\textsuperscript{74} Section 907 of the 3d Restatement, Comment (h) stated “[w]hether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement.”\textsuperscript{75} That is certainly partially true but U.S. political branch intent might not only be reflected in the interpretation of the text of an international agreement but also in surrounding documents.

In the second paragraph of the 4th Restatement’s Section 311 rule, it states what can be done with a self-executing treaty:

Subject to general limitations on their ability to invoke legal provisions, private parties may invoke a self-executing treaty provision as a basis for a defense that a law being applied against them is displaced by the provision, or as a basis for injunctive or declaratory relief to prevent application to them of a law that has been displaced by such a provision.\textsuperscript{76}

\begin{flushright}
\textsuperscript{70} \textsc{Restatement (Fourth) of Foreign Relations} § 311 (Am. L. Inst. 2018).
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} § 311 rep. n.1.
\textsuperscript{73} \textsc{Restatement (Third) of Foreign Relations} § 907 cmt. a (Am. L. Inst. 1987).
\textsuperscript{74} \textsc{Restatement (Fourth) of Foreign Relations} § 311 cmt. b (Am. L. Inst. 2018).
\textsuperscript{75} \textsc{Restatement (Third) of Foreign Relations} § 907 cmt. h (Am. L. Inst. 1987).
\textsuperscript{76} \textsc{Restatement (Fourth) of Foreign Relations} § 311 (Am. L. Inst. 2018).
\end{flushright}
Thus, a self-executing international agreement provision is sufficient if a private party before a court is using the provision as basis of defense or seeking injunctive or declaratory relief to prevent a law from being applied to them. In many instances, this means the opposing party will be the government—an entity that can generally seek to apply a law to a private party. Comment (a) proceeds to define a private right of action as “a right by a private party to seek a judicially imposed remedy—such as damages, an injunction, or declaratory relief—to address a violation of law.” On its surface, one might think that the definition in Comment (a) contradicts the rule that self-execution alone is enough when seeking injunctive or declaratory relief “to prevent application to them of a law that has been displaced by such a provision.” However, there must be something to the difference of “address a violation of law” used in Comment (a) and the “prevent application to them of a law that has been displaced by such a provision” used in Section 311 itself.

The difference might have something to do with the opposing party. Self-execution alone is enough when a private party seeks injunctive or declaratory relief against the government to prevent application of a law to them that has been displaced by such a provision, but if a private party is seeking relief—certainly damages, but also injunctive or declaratory relief, against another private party for violation of a treaty provision—the private party must show the treaty provision is not just self-executing but also creates a private right of action. Thus, the 4th Restatement could have spoken with more detail and clarity on whose intent is looked at to determine whether a treaty provision creates a private right of action, when self-executing status is sufficient for a private party to obtain injunctive or declaratory relief, and when a private right of action is necessary.

---

77 Id. § 311 cmt. a.
78 Id. § 311.
79 Id. § 311 cmt. a.
80 Id. § 311.
IV. MODERN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS IN LIGHT OF THE 4TH RESTATEMENT OF FOREIGN RELATIONS LAW

Major international trade and investment agreements are entered into by the United States through the CEA method and the treaty method, respectively. The Executive Branch can certainly enter more minor agreements that are not at the top of the spectrum (i.e., lack express congressional or Senate approval) in these areas and has done so many times, but major, comprehensive agreements in these areas require express approval. The United States is not party to any broad multilateral comprehensive investment agreements, but has entered wide-scope bilateral investment treaties with roughly 40 countries, all through the treaty method. The United States is party to the World Trade Organization (“WTO”) agreements that has 166 member countries and has comprehensive free trade agreements with twenty partner countries. These have all been concluded as CEAs with ex post approval of the agreements by Congress (except for tariff-cutting portions that have ex ante approval within certain bounds).

Past practice tends to control which of these two largely interchangeable methods is used for a particular type of agreement because if the Executive Branch seeks to change the method the Senate can force the Executive Branch to go through the treaty method. This dynamic played out in the late 1990’s when the Executive Branch indicated that it would seek to have a multilateral agreement on investment (“MAI”) that was being negotiated under the auspices of the Organization for Economic Cooperation and Development (“OECD”), an organization largely comprised of industrialized countries, approved by Congress as a CEA. The then

81 See Sloss, Treaty Enforcement in Domestic Courts, supra note 1, at 1.
84 United States of America and the WTO, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/usa_e.htm [https://perma.cc/9WW8-AWSB] (last visited Mar. 25, 2024) (Although, tariff cutting portions of the agreements are pre-approved within certain limits.).
85 See Young, supra note 1, at 139 (“[T]he prevailing view is that the [c]ongressional-[e]xecutive agreement can be used as an alternative to the treaty method in every instance.”).
chairperson of the Senate Foreign Relations Committee objected, pointing out that all pure investment agreements had previously gone through the treaty method. The Executive Branch relented and indicated it would seek approval through the treaty method, although ultimately the OECD negotiations failed to produce an agreement. The analysis below turns first to BITs as they are achieved through the treaty method that the 4th Restatement Section 310 exclusively focuses on, and then turns to a discussion of major trade agreements concluded as CEAs.

a. U.S. Bilateral Investment Treaties

The first United States BIT entered into force in 1989, and the most recent one with Rwanda entered into force in 2012. The United States also has an investment chapter in its free trade agreements with twenty additional countries that have provisions mimicking BIT provisions, i.e., essentially BITs engrafted into free trade agreements, but those trade agreements with investment chapters are approved as CEAs. The Senate often conditions its advice and consent to a treaty through the inclusion of reservations, understandings and declarations (“RUDs”), with declarations being

86 See Administration to Seek Approval of OECD Investment Pact as a Treaty, 15 INSIDE U.S. TRADE 39 (Sept. 26, 1997) (“U.S. Trade Representative Charlene Barshefsky said at the Brookings Institution on September 23 that the Administration has consulted with the Senate on the MAI. ‘Many congressmen take the view that as an investment agreement it should be subject to treaty ratification as our bilateral investment treaties are,’ she said.”).

87 See id. (“A senior Clinton Administration this week confirmed that the Administration proposal for the renewal of fast-track negotiating authority would not cover the Multilateral Agreement on Investment. Instead, Assistant Secretary of State for Economic and Business Affairs Alan Larson said that the Administration believes it can secure ratification of the agreement in the Senate as a treaty.”).


90 Id.
related to the domestic impact of the agreement, including the self-executing issue.\footnote{See, generally, Curtis Bradley & Jack Goldsmith, Treaties, Human Rights and Conditional Consent, 149 U. Pa. L. Rev. 399, 416-23 (2000) (highlighting that there are various substantive and interpretive reservations that Congress can include in giving its consent to a treaty); Stephen Mulligan, Cong. Rsch. Serv., IF12208, Reservations, Understandings, Declarations and other Conditions to Treaties (2002) (providing an overview of the various conditions that congress can put on its consent to a treaty).}


The Senate failed in the context of BITs to express their intention on these issues despite trade agreement (approval and) implementing laws for two major trade agreements, the North American Free Trade Agreement ("NAFTA") and the WTO Uruguay Round agreements, passed in December 1993 and December 1994, respectively, by the U.S. Congress, paying close attention to the impact of such agreements on the domestic legal system\footnote{See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2062 (1993) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect"); see also Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809, 4815 (1994) (containing similar provisions regarding judicial enforceability as the NAFTA implementation act)); Matthew Schaefer, Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?, 17 Northwestern J. Int’l L. & Bus. 609 (1997) (analyzing political branch intent express in trade agreement implementing acts on judicial enforceability of trade agreements, in particular against state government officials).} and human rights treaties approved by the Senate in the early 1990s.
containing declarations addressing whether those treaties were self-executing.  

This speaks to the Senate’s inconsistencies in making its intentions on self-execution and private rights of action known in its resolutions of consent for treaties. It is also peculiar that the Senate did not pay attention self-execution and private rights of action for BITs prior to Medellin because BITs have a few obligations similar to those found in old Friendship Commerce and Navigation (“FCN”) treaties, and the Supreme Court has found FCN treaty provisions self-executing on dozens of occasions—as was highlighted by the dissent in Medellin in an Annex to their opinion. However, shortly after Medellin, the Senate paid acute attention to these issues in their 2012 Resolution of Consent for the US-Rwanda BIT, the lone BIT concluded post-Medellin:

Resumed (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed at Kigali on February 19, 2008 (Treaty Doc. 110-23), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration: Articles 3 through 10 and other provisions that qualify or create exceptions to these Articles are self-executing. With the exception of these Articles, the Treaty is not self-executing. None of the provisions in this Treaty confers a private right of action.

If one were to take the 4th Restatement at face value, the self-executing nature of the BIT’s substantive obligations found in

---

94 See, e.g., The International Covenant on Civil and Political Rights, Oct. 5, 1977, S. TREATY Doc. No. 95-20, 99 U.N.T.S. 171 (“The Senate’s advice and consent is subject to the following declarations: (I) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing . . . .”).

95 Medellin, 552 U.S. at 571-73 (Breyer, J., dissenting) (noting several self-executing FCNs).

articles 3 through 10, such as the national treatment obligation requiring treatment of foreign investors as favorable as domestic investors except for pre-existing measures exempt from coverage, would allow a private foreign investor from Rwanda to sue a state official for non-compliance with those substantive obligations for injunctive or declaratory relief to prevent application of the state law to the private foreign investor. However, if one reads the Senate Foreign Relations Committee report, the Senate only made those provisions self-executing to allow the U.S. Attorney General to bring a claim to invalidate the state law and bring the state into compliance with substantive BIT provisions. The committee report quotes from State Department testimony before the committee:

Articles 3 through 10 of the BIT and other provisions that qualify or create exceptions to these Articles, such as Article 15, are self-executing but do not confer a private right of action. All remaining articles of the BIT are non-self-executing. As a result, should an arbitral decision conclude that U.S. state law is inconsistent with the BIT, the U.S. government could, if necessary, choose to initiate a legal action against the state to ensure compliance with a self-executing provision of the BIT.

The committee’s own analysis was similar:

The resolution of advice and consent contains a statement reflecting the committee’s understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3 through 10 of the Treaty are self-executing and do not confer private rights of action enforceable in United States courts.

Under the approach outlined by the administration, state-to-state arbitral awards against the United States will not be directly enforceable in U.S. courts by private parties. Rather, in most cases (i.e., those involving awards that interpret

---


99 See id. (Wesley Scholz, Director of the State Department’s Office of Investment Affairs, answering a question for the record on the authorities available to enforce awards).
Articles 3 through 10 of the treaty, the executive branch will rely on the self-executing character of substantive provisions of the treaty to give effect to arbitral awards that interpret those provisions.\footnote{S. Rep. No. 111-8, at 10-12 (2010) (Exec. Rep.) (accompanying U.S.-Rwanda BIT).}

Thus, any court hearing a claim for injunctive or declaratory relief by a Rwandan investor to prevent application of a state law based on the violation of the substantive obligations of the BIT would be running counter to U.S. treatymakers’ (President and Senate’s) intent as to who can sue for what relief based on the BIT. Two further related questions are raised as well.

First, what would happen in a circumstance in which a private foreign investor from a BIT-partner country sued based on an earlier U.S. BIT with that country in which the Senate made no declaration regarding self-executing or private rights of action? There the court would turn, in accord with Medellin, to the text of the BIT, including any alternative enforcement mechanisms revealed in the text and subsequent practice of the parties, including the so-called reciprocity factor asking if the partner country gave the BIT direct effect in their legal system. Some obligations within BITs may be sufficiently precise to possibly be self-executing, such as the national treatment obligation, noting again that some old FCN treaties contain a similar obligation and have been found self-executing. Other obligations would be too imprecise to be self-executing, such as the customary international law minimum standard of treatment. However, even for those obligations like national treatment that are relatively precise, the rest of the textual analysis and post-ratification understanding analysis would point toward non-self-execution.

The text of nearly all U.S. BITs would reveal not only state-to-state (government-to-government) dispute settlement mechanisms but also an investor-state dispute system (“ISDS”) that allows private investors to bring host state governments before international arbitrators claiming violation of substantive provisions of the agreement. From these alternative enforcement mechanisms at the international level, courts would glean an intent of the treatymakers not to have U.S. courts enforcing provisions of the agreement in cases brought by private foreign investors from the BIT-partner country. The presence of the ISDS mechanism would distinguish modern BITs from old FCN treaties and could lead to a
different conclusion on the self-executing status of the national treatment obligation in such agreements.

The 4th Restatement focuses on one factor, namely whether the substantive obligation in the treaty is “sufficiently precise,” but should also add specifically whether there are alternative enforcement mechanisms internationally, with the presence of such mechanisms cutting against the self-execution of treaty provisions. Further, BITs do not appear to have direct effect in domestic legal systems of other countries, and there do not appear to be any cases brought in foreign courts by U.S. investors for violations of BITs. This so-called reciprocity factor was pointed out by the Supreme Court in Medellin as part of the “post-ratification understanding” of nations party to the agreement factor. The Court in Medellin pointed out no other country in the world had given direct effect to ICJ rulings. Thus, a court would likely find other prior BITs non-self-executing and not allow private parties to sue for injunctive or declaratory relief to prevent the application of federal or state laws displaced by the BIT’s provisions. However, if this non-self-executing status also stopped the Executive Branch from enforcing the prior BITs against a non-compliant state, it would lead to a curious result in that the Executive Branch could only have a cause of action to invalidate a state law inconsistent with the US-Rwanda BIT but no cause of action to ensure state compliance with the other roughly 40 prior BITs.

Further, as we will see in the discussion immediately below, it may be that the Senate believed that the prior BITs were enforceable without regard to the non-self-execution status in the pre-2008 Medellin period because of an old U.S. Supreme Court decision that the U.S. Attorney General in essence had an inherent right to sue a state for non-compliance with a treaty without need for a statute and without regard to the self-executing status of the treaty. Thus, the Senate may have seen no need in the pre-Medellin period to indicate a BIT was self-executing if all the Senate wanted was the possibility of Executive Branch suit to bring a state into compliance with the BIT.

This leads us to the second question: do the political branches have to make an international agreement’s substantive provisions self-executing in order to ensure that the Executive Branch can enforce the treaty in courts against a non-compliant U.S. state? Prior Supreme Court case law appears to indicate that the Executive Branch essentially has the inherent right to enforce treaty compliance by the states in an action by the U.S. Attorney General
regardless of any examination of self-executing status and without an authorizing statute.\textsuperscript{101} Why this is the case was not exactly elaborated in detail by the Court in earlier cases. Perhaps all international agreements are self-executing for the limited purpose of U.S. Executive Branch suit to enforce an international agreement obligation on a state, or perhaps self-execution is not important in such cases as it is part of the treaty becoming supreme law of the land even when non-self-executing.

In the 1925 case of \textit{Sanitary District v. United States}, the Court enjoined an Illinois state agency from continuing to divert water from Lake Michigan, in part because of its inconsistency with the Canadian Boundary Waters Treaty of January 11, 1909.\textsuperscript{102} The Court found the U.S. Attorney General "by virtue of his office may bring the proceeding and no statute is necessary to authorize the suit" and did not examine whether the treaty was self-executing.\textsuperscript{103} It is hard to believe the Court simply forgot to analyze or overlooked analyzing if the Canadian Boundary Waters Treaty was self-executing. Just one year prior, in 1924, the Court found a national treatment-type provision, requiring Japanese citizens to be treated equally with U.S. citizens in the carrying on of trade, in the U.S.-Japan FCN treaty to be self-executing, thus allowing a Japanese citizen to have a Seattle ordinance prohibiting foreign nationals from being pawn brokers declared invalid.\textsuperscript{104}

The fact that the Court examined whether a treaty obligation was self-executing in a case by a private party but a year later did not

\textsuperscript{101} See Schaefer, supra note 93, at 632.

\textsuperscript{102} Sanitary Dist. Of Chicago v. United States, 266 U.S. 405, 425-26 (1925) ("The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes . . . . [T]he Treaty of January 11, 1909, with Great Britain, expressly provides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein.").

\textsuperscript{103} See id. at 426 ("With regard to the second ground, the Treaty of January 11, 1909, with Great Britain, expressly provides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein.").

\textsuperscript{104} Asakura v. City of Seattle, 265 U.S. 341 (1924) ("It operates itself without the aid of any legislation, state or national, and it will be applied and given authoritative effect by the courts.") (internal citations omitted).
examine whether a treaty obligation was self-executing in a suit by the Executive Branch does indicate that the Executive Branch may have an inherent right to sue a state (or local) government official for non-compliance with treaty obligations. The inherent right of the Executive Branch to sue a state for non-compliance also draws support from the Framers’ main concern in drafting the Supremacy Clause.105

Yet, the Senate Foreign Relations Committee Report for the U.S.-Rwanda BIT appears to call into question whether the Executive Branch can always sue to enforce a treaty against a state, that is the Executive Branch may only be able to sue a state official to ensure compliance by a state official with the treaty if the provision at issue is self-executing. Article 11 of the BIT is a transparency obligation, and it appears both the State Department and the Senate Foreign Relations Committee took the view that because Article 11 was non-self-executing, the Executive Branch would need to seek legislation and could not sue a state official to come into compliance with an award issued under the state-to-state dispute settlement mechanism finding a violation by a state of Article 11’s transparency obligation.

The committee stated:

There remains a category of disputes that could be referred to state-to-state arbitration involving provisions of the Treaty that are not self-executing. Such disputes could arise under Article 11 of the treaty, which addresses transparency measures to be taken by the two parties. Because Article 11 is not self-executing, the executive branch would be unable to rely on the authority of the Treaty itself as the basis for giving effect to an arbitral award related to that article. The executive branch has represented to the committee that existing federal and state laws regarding transparency measures governed by the treaty are fully adequate to satisfy U.S. obligations under the treaty, and that the possibility of an arbitral award against the United States relating to these provisions is accordingly extremely remote. In the event of such an adverse award, the executive branch has observed

105 See Julian Ku, Treaties as Law: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes, 80 IND. L.J. 319, 377 (2005); see also Bradley, supra note 1, at 145-47 (“The Founders understandably concluded that, unless it was clear that treaties took precedence over state law, an individual state could enact laws that would impose harmful externalities on the entire nation, and the national government would be powerless to prevent it.”).
that it could seek legislation after the fact to provide the necessary authority to give effect to the award.

The committee is concerned that failure to put the United States’ ability to implement awards relating to non-self-executing provisions of this treaty on sounder footing at the time of ratification of the treaty creates the risk of this unfortunate situation repeating itself. The committee’s concerns on this issue—which arise only with respect to a single, relatively narrow provision of this Treaty—do not lead it to decline to recommend ratification of the Treaty.106

The Senate’s view may have been inspired by the Medellin opinion as that opinion could also be read as not allowing an Executive Branch suit to enforce a treaty provision if the provision is non-self-executing. The Supreme Court in Medellin did not allow the Executive Branch to implement the ICJ’s Avena ruling by a presidential memorandum because that action by the President would fall within the lowest end of the Jackson concurrence or Rehnquist spectrum analysis—with at least implied Senate disapproval—because the Senate approved three related treaties with the intent that ICJ ruling be non-self-executing. The 4th Restatement seems to agree with this reading of Medellin while arguing there may be other scenarios in which, and means by which, the President could enforce a non-self-executing agreement.107

At the same time, other older cases also seem to run counter to the suggestion in Medellin. The Supreme Court in the late 1930s and early 1940s found that the Litvinov Assignment, a PEA, was not onlyvalid but could be enforced by the U.S. Executive Branch in suits against a private banker and a state insurance commissioner without any examination of whether the Litvinov Assignment was self-executing.108 Maybe these cases can best be reconciled because allowing Executive Branch suit to enforce PEAs in which neither Congress nor the Senate have expressed intent on self-execution is different than allowing an Executive Branch suit to enforce a treaty


that the Senate has expressed an intention of non-self-execution.\textsuperscript{109} Additionally, in 2003 the Court allowed the private American Insurance Association to successfully invalidate a California state law based on conflict with the German Foundation Agreement, a PEA, without discussion of whether the PEA was self-executing. Notably, however, the analysis by the Court in this dispute was a bit muddled as to whether the California law was struck down under obstacles conflict preemption doctrine (based on the international agreement itself) or the dormant foreign affairs doctrine as an undue interference with U.S. foreign relations.\textsuperscript{110}

In summary, these conflicting signals by the Court over whether an international agreement must be self-executing for the Executive Branch to sue a state official to ensure compliance with an international agreement certainly support the 4th Restatement’s decision not to take a definitive position on Executive Branch enforcement of non-self-executing treaties. The important takeaway for the 4th Restatement from the examination of U.S. BITs is that self-execution does not always allow a private party to utilize an international agreement to obtain injunctive or declaratory relief and displace a state law or an earlier federal law inconsistent with the agreement because the exact contours of self-execution in a particular context depend on U.S. political branch intent.

\textit{b. Major International Trade Agreements}

Major international trade agreements, including the WTO Uruguay Round agreements concluded in 1994 and comprehensive free trade agreements that the United States currently maintains with twenty partner countries, including with Canada and Mexico originally through the NAFTA in 1994 and now through the 2020 USMCA that replaces the NAFTA, are concluded as CEAs rather than through the treaty method. These agreements are concluded with a simple majority of both houses of Congress approving the agreement rather than seeking two-thirds Senate approval. The constitutionality of the CEA method for trade agreements has been

\textsuperscript{109} It is also possible that the criminal procedure context of the case influenced the Court’s discussion in \textit{Medellin}.

upheld by U.S. courts\textsuperscript{111} and the vast majority of academics and commentators looking at the issue have concluded that the two methods are completely or at least largely interchangeable.\textsuperscript{112} The 4th Restatement’s Section 310 was drafted with only the treaty method in mind — this is clear from the 4th Restatement’s use of the word “treatymakers” and it only including Senate resolutions of advice and consent in its rule without referring at all to congressional approval laws.

The implementation acts of every major U.S. trade agreement since the early 1980s has followed (quite closely, if not exactly) the formula seen most recently in the USMCA.\textsuperscript{113} USMCA Implementation Act Section 101\textsuperscript{114} and Section 102 provide congressional approval for the agreement and describe the agreement’s impact in the U.S. legal system, respectively.\textsuperscript{115} The essence of the system that Congress seeks to establish with respect to major trade agreements is that the U.S. Attorney General can bring a court action to invalidate a U.S. state law or regulation in non-compliance with the trade agreement but no private party can use the agreement in a defensive or offensive posture against the state or federal governments or any other entity for that matter. USMCA Implementation Act Section 102 provides:

\begin{quote}
\begin{itemize}
\item[(a)]\textit{Approval and Entry into Force of the USMCA.}—Pursuant to section 106 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4205) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), Congress approves—
\begin{itemize}
\item[(1)] the Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada, done at Buenos Aires on November 30, 2018, as submitted to Congress on December 13, 2019;
\item[(2)] the Agreement between the United States of America, the United Mexican States, and Canada, attached as an Annex to the Protocol, as amended by the Protocol of Amendment to the Agreement between the United States of America, the United Mexican States, and Canada, done at Mexico City on December 10, 2019, as submitted to Congress on December 13, 2019; and
\item[(3)] the statement of administrative action proposed to implement that Agreement, as submitted to Congress on December 13, 2019. See United States-Mexico-Canada Agreement Implementation Act, 19 U.S.C. § 4511 (2020).
\end{itemize}
\end{itemize}
\end{quote}

\textsuperscript{112} See, e.g., Hathaway, supra note 20, at 12; David M. Golove, Against Free Form Formalism, 73 N.Y.U. L. Rev. 1791 (1998).
\textsuperscript{113} Schaefer, supra note 93, at 635-42.
\textsuperscript{114} \textit{APPROVAL AND ENTRY INTO FORCE OF THE USMCA.}

\textsuperscript{115} \textit{Id.}, §§ 4501-4713.
SEC. 102. RELATIONSHIP OF THE USMCA TO UNITED STATES AND STATE LAW.

(a) Relationship of USMCA to United States Law.—

(1) United states law to prevail in conflict. — No provision of the USMCA, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States, shall have effect.

(2) Construction. — Nothing in this Act shall be construed —

(A) to amend or modify any law of the United States, or

(B) to limit any authority conferred under any law of the United States, unless specifically provided for in this Act.

(b) Relationship of USMCA to State Law.—

(1) Legal challenge. — No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the USMCA, except in an action brought by the United States for the purpose of declaring such law or application invalid.

(2) Definition of state law. — For purposes of this subsection, the term “State law” includes—

(A) any law of a political subdivision of a State; and

(B) any State law regulating or taxing the business of insurance.

(c) Effect of USMCA With Respect to Private Remedies. — No person other than the United States—

(1) shall have any cause of action or defense under the USMCA or by virtue of congressional approval thereof; or

(2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a
State, on the ground that such action or inaction is inconsistent with the USMCA.\textsuperscript{116}

USMCA Implementation Act Section 102(b) makes clear that only the United States may bring a claim to declare a state law invalid. Section 102(c) makes clear no person other than the United States has a cause of action or defense under the USMCA, nor can they challenge a state law or action for its inconsistency with the USCMA.\textsuperscript{117} Section 102(a) appears to indicate that the USMCA is non-self-executing, for if the USMCA was self-executing it would prevail over an earlier federal law under the hierarchy of norms principles established in the 1888 Supreme Court opinion Whitney \textit{v.} Robertson.\textsuperscript{118} Another indicator of the non-self-executing nature of the USMCA is the title of the act as an implementation act realizing there would be little need for implementation if rules of the USMCA automatically entered the U.S. legal system as would be the case for a self-executing agreement.

The delegation of certain implementation authority in the act to the Executive Branch\textsuperscript{119} is another indication. Instead, the implementing act is giving the United States a cause of action to invalidate a state law for non-compliance with the USMCA. As discussed above, some early case law of the U.S. Supreme Court indicates the Executive Branch might always have an implied right to bring an action against a U.S. state official believed to be violating a binding international agreement of the United States, but the Supreme Court’s \textit{Medellin} opinion seems to undercut this possibility.

If this view of the USMCA is correct—that it is non-self-executing and Congress in the implementing act has granted a cause of action (or affirmed an inherent cause of action) for the U.S. Attorney General to bring a claim to invalidate a state law based on its non-compliance with an international trade agreement—then international agreement-makers achieve the same limited enforcement mechanism in terms of who can enforce an international economic agreement and against whom in two unique ways, one within BITs under the treaty method, and another in major trade agreements under the CEA method.

\textsuperscript{116} Id. § 4512.

\textsuperscript{117} Id.

\textsuperscript{118} See Whitney \textit{v.} Robertson, 124 U.S. 190 (1888).

In BITs, substantive obligations are made self-executing but with no private rights of action in order to, as made clear by the Senate Foreign Relations Committee Report, enable the U.S. Attorney General to bring a claim to invalidate a state law for non-compliance.\textsuperscript{120} In the latter case of major international trade agreements, the international agreement provisions are made non-self-executing with further clarification and emphasis that private parties have no cause of action nor defense under the international agreement, but Congress in the implementation act grants (or affirms) a cause of action for the U.S. Attorney General to invalidate a state law for non-compliance with the trade agreement.\textsuperscript{121} In the trade agreement situation, because the full Congress is involved in passing an actual law approving the agreement and creating an enforcement mechanism in which only the US Attorney General can bring suit to invalidate a state law for non-compliance, this can be achieved even with a non-self-executing status for the international agreement because the law can—and does—grant a cause of action to the U.S. Attorney General.\textsuperscript{122} In the BIT context, since only the Senate is involved there is no way to provide (or affirm) a cause of action for the U.S. Attorney General to sue to invalidate a state law as the Senate cannot pass laws by itself and so must have believed that enforcement mechanism could only be achieved by making the BIT self-executing for that limited purpose of the U.S. Attorney General suit to invalidate a state law not conforming with the BIT. That Senate belief may not be true if the older Supreme Court case law recognizing enforcement by the Executive Branch of treaty obligations with no discussion of the self-executing status of that treaty obligation remains operative.

In any event, the BIT example provides another important lesson in how the 4th Restatement’s Section 311 provisions on private enforcement of treaties must be qualified.\textsuperscript{123} The 4th Restatement indicates that self-executing treaties can be used as a defense or for injunctive or declaratory relief to prevent the application of a law displaced by the treaty.\textsuperscript{124} However, the U.S.-Rwanda BIT shows us that self-executing obligations cannot always be used in that manner. Again, the committee report makes clear that it has made

\textsuperscript{120} S. Exec Doc. No. 112-2, at 11 (2011).
\textsuperscript{121} Moore, supra note 1, at 2236-37.
\textsuperscript{122} Id.
\textsuperscript{123} Restatement (Fourth) of Foreign Relations § 311 (Am. L. Inst. 2018).
\textsuperscript{124} Id.
the BIT self-executing for the limited and sole purpose of allowing the U.S. Attorney General suit to ensure compliance by U.S. states.\textsuperscript{125} An aggrieved Rwandan investor could not sue a state for injunctive or declaratory relief to prevent the application of a state law that, to them, was in violation of a self-executing substantive obligation of the BIT. Thus, the exact contours of self-execution are controlled by U.S. political branch intent, and the 4th Restatement should qualify its finding that self-executing treaties can be used for injunctive or declaratory relief to prevent the application of law displaced by the treaty with the word “generally.”\textsuperscript{126}

The alternative way to view congressional intent expressed in Section 102 of the USMCA Implementation Act is that Congress wants the agreement to be self-executing but only for the limited purpose of allowing the U.S. Attorney General to sue a state for non-compliance with the USMCA, which would be similar to what we viewed above in the U.S.-Rwanda BIT. If this alternative view is correct, it is further indication that not only does U.S. political branch intent govern whether an international agreement is self-executing, but that intent also governs the exact contours of what self-execution encompasses in terms of judicial enforceability. But BITs alone are evidence enough.

Prior to summarizing some potential lessons for the 4th Restatement’s Sections 310 and 311 provisions on self-execution and private rights of action, it is useful to widen the lens of examination to some other international economic agreements, specifically some newly-publicized trade “mini-deals,” generally much more limited in scope than the major comprehensive trade agreements just examined, and some private international law treaties.

c. Newly-Publicized Trade “Mini-Deals”

Professor Claussen and her team have brought to light over a thousand largely-invisible (to the public), behind-the-scenes trade “mini-deals” that are not as comprehensive as the free trade agreements and WTO agreements examined above.\textsuperscript{127} One issue regarding these agreements is the Executive Branch’s authority to conclude them since they are not subject to ex post express approval

\textsuperscript{125} See S. Exec Doc. No. 112-2, supra note 120.

\textsuperscript{126} Restatement (Fourth) of Foreign Relations § 310 (Am. L. Inst. 2018).

by Congress nor Senate, nor ex ante express approval by Congress. Rather, given Congress’ power over foreign commerce, they are typically justified with some degree of implied congressional approval.

For example, in early 2023, the Executive Branch began negotiations with the European Union (“EU”) and Japan on trade “mini-deals” that would allow Europe and Japan to gain the benefits of the Inflation Reduction Act (“IRA”)’s consumer tax credit for electric vehicles. The IRA requires that certain critical minerals be harvested or processed in the United States or a country with which the United States has a “free trade agreement” in order to allow a vehicle’s consumer to benefit from half the tax credit ($3,750).\footnote{Pub. L. No. 117-169, § 12401, 136 Stat. 1818, 1954 (2022).} The United States does not have a comprehensive free trade agreement with the EU nor with Japan (despite the earlier “mini-deal” under the Trump Administration discussed above), and concluding such a major agreement would require express approval of Congress. However, neither the IRA nor existing U.S. trade law defines “free trade agreement,” so the Treasury Department has significant flexibility in determining what qualifies as one for purposes of the IRA electric vehicle tax credit.\footnote{See Section 30D New Clean Vehicle Credit, 88 Fed. Reg. 23376-77 (proposed Apr. 17, 2023) (to be codified at 26 C.F.R. pt. 1) (“The Treasury Department and the [Internal Revenue Service] propose to identify the countries with which the United States has free trade agreements in effect for purposes of [Section 30D] consistent with the statute’s purposes of promoting reliance on such supply chains and of providing eligible consumers with access to tax credits for the purchase of new clean vehicles. Based on these considerations, the Treasury Department and the [Internal Revenue Service] propose criteria the Secretary would consider in identifying these countries. As set forth in proposed [Section] 1.30D- 3(c)(7)(i), those criteria would include whether an agreement between the United States and another country, as to the critical minerals contained in electric vehicle batteries or more generally, and in the context of the overall commercial and economic relationship between that country and the United States: (A) reduces or eliminates trade barriers on a preferential basis, (B) commits the parties to refrain from imposing new trade barriers, (C) establishes high-standard disciplines in key areas affecting trade (such as core labor and environmental protections), and/or (D) reduces or eliminates restrictions on exports or commits the parties to refrain from imposing such restrictions on exports.”) Applying those factors, Treasury finds that all comprehensive U.S. free trade agreement partners plus Japan (as a result of its critical minerals agreement with the United States) meet the criteria.} The USTR relied, in part, on the mention of “free trade agreement” in the IRA’s EV tax credit as implied approval to conclude “mini-deals” on critical mineral supply chains—doing so with Japan on March 28, 2023 with the expectation that a deal with the EU will be concluded sometime in
2024. Some members of Congress, including Senator Wyden, who had expressed concerns with implied approval arguments of the Executive Branch a decade earlier when the Anti-Counterfeiting Trade Agreement ("ACTA") was being negotiated,\textsuperscript{130} have expressed concerns with this implied approval argument. This led Congress to provide express approval for the limited trade agreement with Taiwan after the fact as discussed above.\textsuperscript{131}

The reason for delving into the method of entering these agreements is that often times Congress has said nothing on the domestic status of any agreement entered into by the Executive with implied Congressional approval, which is no surprise given that Congress is not necessarily contemplating an agreement. As discussed above, in cases of implied approval, a congressional statute may simply call on the Executive Branch to coordinate or cooperate with foreign countries or may mention a “free trade agreement,” and/or it may simply be that the provisions of the agreement do not conflict with current U.S. law. Thus, it is often up to the Executive Branch to determine how to implement the agreement.\textsuperscript{132}

Professor Claussen identifies two major methods employed by the Executive Branch, with lots of variations even within those two methods: 1) further rulemaking by the relevant Executive Branch agency; or 2) treating it as already part of the U.S. legal system without further action.\textsuperscript{133} In the latter scenario, “agencies interpret executive agreements as having direct effect on individuals, substituting them for domestic rules.”\textsuperscript{134} Examples given by Professor Claussen include an “organics equivalency agreement” with Taiwan in which the U.S Department of Agriculture (”U.S.D.A.”) agreed that products “handled in accordance with Taiwan’s organics regime may be sold, labeled and represented in the United States as organically produced,” and a U.S.-Chile


\textsuperscript{132} See Kathleen Claussen, Improvised Implementation of Executive Agreements, 89 U. Chi. L. Rev. 1655, 1668-69 n.43 (2022) ("[A]gency often may undertake nearly any strategy it chooses to implement the agreement and incorporate it into U.S. law. Alternatively, the agency may take no further action at all.").

\textsuperscript{133} Id. at 1670-72.

\textsuperscript{134} Id. at 1669-72.
agreement whereby the United States “commits to protecting the intellectual property rights of a Chilean spirit called ‘Pajarete’.” Neither agreement was implemented by a further regulatory process but rather treated as part of U.S. law and enforceable by the U.S.D.A. and the U.S. Treasury Department, respectively.

Professor Claussen concludes that Congress ought to give greater guidance to the Executive Branch on the method to follow for agreement implementation for these trade “mini-deals.” This is feasible when Congress is specifically encouraging negotiations and contemplating an agreement. However, if the Executive Branch is relying on arguments of implied approval based on consistency of the international agreement with current U.S. law, or simply broader language that the Executive Branch should coordinate or cooperate with foreign countries on a particular problem but where an international agreement is not foreseeable or clearly contemplated, it will be more difficult for Congress to make its wishes known on the domestic law status of the agreement.

Yet, the Case-Zablocki Act, imposing requirements on the Executive Branch to inform Congress of executive agreements entered into, could possibly open a door for Congress to make its wishes known ex ante in an amendment to the law. If Congress reacts to a mini-deal ex post by providing approval, like with the U.S.-Taiwan first agreement under the 21st Century Trade Initiative,

---

135 Id. at 1674.
136 Claussen, Trade’s Mini-Deals, supra note 127, at 370.
137 The Case-Zablocki act was recently amended to provide enhanced transparency obligations on the Executive Branch. See Curtis Bradley et al., Congress Mandates Sweeping Transparency Reforms for International Agreements, LAWFARE (Dec. 23, 2022) https://www.lawfaremedia.org/article/congress-mandates-sweeping-transparency-reforms-international-agreements [https://perma.cc/UDC6-Y3MV]. However, in those amendments, Congress did not indicate its views on the self-executing nature of any of those agreements in advance, and perhaps it would be difficult for Congress to do so in a broad-brush stroke. See Claussen, Improvised Implementation of Executive Agreements, supra note 132, at 1660-61 (“Perhaps unexpectedly, improvised implementation has certain virtues. These ad hoc mechanisms deployed by the executive hold promise for their enhancement of administrative efficiency and for achieving foreign-policy aims. I argue that agencies’ heightened discretion sometimes creates unanticipated space for innovation, public participation, and flexibility, and that those assets are worth preserving even at the danger of compromising certain other rule of law values. Improvised implementation’s most unsettling feature is the confusion it creates as to the legal status of executive agreements. In a conflict between a preexisting rule and a new agreement, it is unclear which preempts the other. We lack a well-defined understanding as to the conditions under which an agreement or a rule made pursuant to an agreement carries the force of law, including preemption authority.”).
it can also indicate its view on the self-executing nature of the mini-deal. Indeed, in the approval law for the 2023 Agreement Regarding Trade Between the United States and Taiwan, Congress included provisions nearly identical to that seen in major trade agreement implementing acts, such as those for the USMCA and WTO—and those provisions make clear only the U.S. government can bring a claim to invalidate a state law but no private party may utilize the agreement for a cause of action or defense in U.S. courts.\textsuperscript{138} However, Congress has not reacted ex post to every recent mini-deal. For instance, Congress has not provided after the fact approval to the U.S.-Japan critical minerals deal, and thus also not expressed any intent on the self-executing nature of the agreement. Further, despite recent 2022 amendments to the Case-Zablocki Act furthering transparency of agreements, Congress has not sought to make any general statements of the status of PEAs in the U.S. legal system.\textsuperscript{139}

Thus far, no courts have addressed whether they will respect an Executive Branch agency determination to treat one of these “mini-deals” as part of the U.S. legal system, but as shown above in contexts outside the international economic realm, the Supreme Court has been willing to allow the Executive Branch to enforce PEAs against state officials and even private parties without an examination of whether such an agreement was self-executing.\textsuperscript{140} This is a strong indication that Executive Branch choice on automatic implementation will be respected, at least in the context of Executive Branch enforcement. The analysis above with respect to BITs and major trade agreements shows that political branch intent controls the issue of self-execution but also the specific contours of that status. Thus, these decisions by the Executive Branch to treat some trade mini-deals as automatically part of the U.S. legal system (without further regulations being issued) and having executive branch officials enforce the norms, still leaves open who, and in what circumstances, might be able to use the agreement in U.S. courts.

To the extent some party attempts to have a U.S. court enforce one of these “mini-deals,” the court is likely to give “great weight” to the Executive Branch’s views on interpretation of the

\textsuperscript{139} See supra note 137.
\textsuperscript{140} Belmont, 301 U.S. 324; Pink, 315 U.S. 203; see also Claussen, Improvised Implementation of Executive Agreements, supra note 132, at 1689 (“[A]greement-implementation issues have not been litigated in their modern manifestations.”).
agreement\textsuperscript{141}, including the questions of self-execution and its contours, and private rights of action. Given the general approach taken with respect to trade and investment agreements, it is unlikely the Executive Branch would want to allow private parties the ability to utilize the mini-deals in U.S. courts. Certainly, private parties and Congress may have little or no knowledge of these agreements, and widespread knowledge would be highly unlikely, so a private party attempting to use a “mini-deal” agreement in court, say to sue a competitor attempting to import or sell a liquor using a protected name under the agreement, seems possible but unlikely. Sometimes the “mini-deal” may be published on an agency website, sometimes not.\textsuperscript{142}

For larger impact, and more highly-publicized mini-deals, such as the U.S. critical mineral agreement with Japan, it is perhaps not such a stretch to envision such a deal winding up in the courts given the importance of automobile trade. However, in that situation, a statute referring to countries that maintain a free trade agreement with the United States grants the tax credit, so the self-executing nature of the agreement is unlikely to be an issue in such a case, rather the issue might be the validity of the agreement itself and whether it qualifies as a free trade agreement. The Case-Zablocki Act requires notification to Congress of agreements struck by the Executive Branch, but it is not clear this requirement is complied with in the case of these “mini-deals.”\textsuperscript{143} Perhaps, it is no surprise that Congress has not turned its attention to expressing its intent on the domestic law impact of trade mini-deals, given that Congress, and the Senate when the treaty method is involved, have only in recent decades, and still imperfectly and inconsistently, made their intent on self-execution and private rights of action definitely known for major trade and investment agreements. However, the momentum of Congress and the Senate in making their intent known in greater detail with respect to the issues of self-execution and private rights of action in major trade and investment agreements make it more likely that expressions of intent from the U.S. international agreement-makers on trade mini-deals may occur


\textsuperscript{142} See Claussen, Trade’s Mini-Deals, supra note 127, at 322.

more frequently in the future. Congress enacting the U.S.-Taiwan Initiative on 21st Century Trade First Agreement Implementation Act, including provisions on the status of the agreement in the U.S. legal system, is one such indication.


U.S. Courts have uniformly held the U.N. CISG to be self-executing and create a private right of action.\textsuperscript{144} However, the Senate did not include a declaration to that effect in the Resolution of Consent for the CISG.\textsuperscript{145} Instead, indications to that effect, as is the case with many pre-\textit{Medellin} private international law conventions, are found in the Senate Foreign Relations Committee Reports or floor statements by Senators. For example, the Senate made no indication on the self-executing status of the Montreal Convention on Air Carrier Liability\textsuperscript{146} in its Resolution of Consent but did include a statement in the Foreign Relations committee report that “The Montreal Convention is self-executing. No separate implementing legislation is required to fulfill U.S. obligations under it . . . . [It] will provide the basis for a private right of action in U.S. Courts for cases arising under it.”\textsuperscript{147}

However, perhaps due to \textit{Medellin} and the 4th Restatement itself, a more recent private international law convention—the 2003 Convention on Assignment of Receivables for which the Senate gave its advice and consent in 2019—contains a declaration making clear that the treaty is self-executing, yet curiously remains silent on the private right of action issue.\textsuperscript{148}


\textsuperscript{145} Text of Resolution of Advice and Consent to Ratification Reported by the Committee on Foreign Relations, S. \textsc{Treaty Doc.} No. 98-9 (1986).


\textsuperscript{147} See S. \textsc{Exec. Doc.} No. 108-8, at 3, 6 (2003); see also, 149 \textsc{Cong. Rec.} S10870 (daily ed. July 31, 2003) (statement of Sen. Biden) (arguing for the adoption of the Montreal Convention as a much-needed replacement for earlier agreements on air carrier liability).

Senate resolution of consent are preferred due to some judges being skeptical of committee reports in the context of statutory interpretation and recognizing that resolutions of consent are voted on by full Senate. The Senate should take care to address both of the distinct but related issues of self-execution and private right of action in their declarations within resolutions of consent and address the specific contours within those resolutions.

V. LESSONS LEARNED FROM INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS AND REVISITING THE 4TH Restatement

Medellin and the 4th Restatement, although both drafted in the context of agreements made through the treaty method only, make explicit that U.S. political branch intent controls whether an international agreement is self-executing and whether the agreement creates a private right of action.\textsuperscript{149} Both the Court and the 4th Restatement also make clear that one can look to the text of the international agreement as well as the post-ratification understanding of parties to the treaty, and domestic documents surrounding the agreement such as the Presidential transmittal letter and the appended State Department analysis of the treaty, the Senate committee reports, and most importantly the Senate resolution of consent (looking specifically at the declarations conditioning Senate consent) in the case of a treaty method agreement to determine intent.\textsuperscript{150} In the case of CEAs these documents would include in the context of trade agreements, the Administration’s Statement of Administrative Action, House and Senate committee reports, and most importantly, Congress’ approval and implementation act.

However, the examination of modern trade and investment agreements reveals additionally that it is political branch intent that controls the exact meaning and contours of self-execution and private rights of action within a particular international agreement. For example, it is generally true as the 4th Restatement states that a self-executing agreement can be utilized by a private party in a defensive or plaintiff posture for injunctive or declaratory relief to prevent the

\textsuperscript{149} \textit{Restatement (Fourth) of Foreign Relations} §§ 310-11 (Am. L. Inst. 2018); \textit{Medellin}, 552 U.S. at 506.

\textsuperscript{150} \textit{Restatement (Fourth) of Foreign Relations} §§ 310-11 (Am. L. Inst. 2018); \textit{Medellin}, 552 U.S. at 506.
application of a law that has been displaced by the agreement. But it is not always true. For example, the U.S.-Rwanda BIT has substantive obligations, such as the national treatment obligation, that are made self-executing. But a private party could not sue a state to prevent the application of that state’s law that was inconsistent with that substantive obligation because the Senate Foreign Relations Committee Report makes clear that an intent of self-execution was expressed by the Senate for the limited purpose of allowing the U.S. Attorney General to bring suit to invalidate a state law and bring the state into compliance with the BIT. Thus, the contours of self-execution vary depending on the intent of the political branches.

In essence, the Senate was seeking to set up a domestic enforcement process of BIT norms similar to the long-standing one created for trade agreements ever since the 1987 U.S.-Canada Free Trade Agreement and the 1994 NAFTA—suit exclusively by U.S. Attorney-General to bring state laws into compliance. However, because trade agreements are concluded as CEAs with the full Congress passing an “approval law” for the agreement along with implementing provisions for the agreement, Congress can make international trade agreements “non-self-executing” and simply provide (or affirm) a cause of action by the U.S. Attorney General to invalidate non-conforming state laws via the approval and implementing legislation. The Senate does not have that option under the treaty method, as the Senate alone cannot pass legislation.

If the 4th Restatement’s Sections 310 and 311 are modified to account for actual experience with major trade and investment agreements achieved through the CEA method and treaty method respectively, then in addition to replacing all references to “treaty” with the more general term “international agreement” throughout the sections, one might suggest the following modifications:


(2) Courts will evaluate whether the text and context of the provision, along with other treaty materials [related to the

151 S. Rep. No. 112-2, at 13-14 (2011) (“Articles 3 through 10 and other provisions that qualify or create exceptions to these Articles are self-executing.”).
152 See Moore, supra note 1, at 2229.
153 See Schaefer, supra note 93, at 637-38.
international agreement, including domestic documents, such as the Senate resolution of consent or Congress’ approval law, Senate and House Committee reports and hearings, presidential transmittal documents and appended analyses, are consistent with an understanding [or intention] by the U.S. treatymakers [international agreement-makers] that the provision would be directly enforceable in the courts of the United States.

Explanation: It is important to add to the rule itself specific listing of domestic documents that might reveal the intent of the U.S. international agreement-makers on the issue of self-execution or non-self-execution, especially since the President, the Senate, and Congress are more frequently expressing clear intentions in these domestic documents over the past decade or two. Further, attempts to glean political branch intent from textual provisions of a treaty can be an exercise fraught with uncertainty. The majority and dissent in Medellin debated whether the phrase “undertakes to comply” in Article 94 of the U.N. Charter cut towards an intent of self-execution, splitting 6-3 with the majority finding that “undertakes” was suggestive of a further step of implementation being needed and thus cut toward non-self-execution.

Relevant considerations include:

(a) Whether the treaty provision [in the international agreement] is sufficiently precise or obligatory to be suitable for direct application by the judiciary;

(b) [Whether the provision has an alternative enforcement mechanism within the international system;

(c) Whether post-ratification understanding reveals the other party or parties to the international agreement are giving the provision direct effect with judicial enforcement]; and

(d) Whether the provision was designed to have immediate effect as opposed to contemplating additional measures by the political branches.

154 Currently the 4th Restatement relegates to § 310, rep. n.9 a discussion of other domestic documents that might reveal the intent of the treaty-makers (“less formal materials, such as transmittal package sent by President to the Senate, the report on the treaty by the Senate Foreign Relations Committee, or in Senate Hearings”).
Explanation: The list of relevant considerations adds several factors found in the Court’s Medellin opinion beyond the precise nature of the obligation. For example, the presence of an alternative enforcement mechanism at the international level cuts towards finding an intent of non-self-execution. The Court in Medellin found that U.N. Security Council enforcement authority for ICJ rulings cut against an intention to make ICJ awards self-executing. The discussion above of BITs, that contain not only a State-to-State dispute settlement mechanism but also an ISDS mechanism, would also cut against the self-executing status of substantive provisions in those agreements. However, the political branches best opportunity to express clear intent on self-execution as well as its specific contours is in the domestic documents surrounding the international agreement, rather than relying on sometimes innocuous or vague treaty language.

If the Senate’s resolution of advice and consent [or Congress’ approval law] specifies that a treaty provision is self-executing or non-self-executing, courts will defer to this specification.

Explanation: The change accounts for the CEA method used for international trade agreements but also carries the normative benefit of encouraging the Senate and Congress to specifically address the issue of self-execution in the resolution of consent or approval law, respectively, rather than relegating their intention to committee reports and speeches on the floor as has been done with some older international economic agreements.  

Section 311: Private Enforcement of Treaties

(1) A treaty provision, even if it is self-executing, does not by virtue of that fact alone establish a private right of action or confer a right to seek particular remedies such as damages. [There is a presumption that a provision of an international agreement, even if self-executing, does not create a private right of action. Whether a provision creates a private right of action

155 Restatement (Fourth) of Foreign Relations § 310 (Am. L. Inst. 2018) (suggested modifications with strikethrough); see also Bradley, supra note 1, at 156 (“[Senate] declarations are therefore in effect part of the relevant text, not a mere piece of legislative history.”).
depends on the intent of the U.S. international agreement-makers.

Explanation: The revision clarifies that the intention of the U.S. political branches or international agreement-makers controls whether a provision of an international agreement creates a private right of action. These changes also reflect Medellin’s footnote 3 presumption against a private right of action even where a provision is self-executing. Even in the statutory context, the Supreme Court has held determinations on creation of private rights of action are best left to legislative judgment.\textsuperscript{156}

(2) Subject to general limitations on their ability to invoke legal provisions, private parties may [generally] invoke a self-executing treaty provision [of an international agreement] as a basis for a defense that a law being applied against them is displaced by the provision, or as a basis for injunctive or declaratory relief to prevent application to them of a law that has been displaced by such a provision. [However, the exact contours of self-execution in terms of who can seek judicial enforcement and against whom and for what relief under a particular provision of a particular treaty is determined by the intention of the U.S. international agreement-makers].

Explanation: The U.S.-Rwanda BIT is an example of a situation in which the Senate evinced an intent to make the substantive provisions of the agreement, specifically Articles 3 through 10, self-executing but only for the limited purpose of allowing the U.S. Attorney-General to sue a state for non-compliance. The Senate did not intend for private parties to sue a state for injunctive or declaratory relief to prevent the application of a U.S. state law displaced by the BIT.\textsuperscript{157}

Two open questions remain that are not included in the above revisions to the 4th Restatement. One is whether it is necessary for an international agreement to be self-executing in order for the U.S. Attorney-General bring a claim to invalidate a state law for non-compliance with the agreement. If that is an inherent right of the


\textsuperscript{157} \textsc{Restatement (Fourth) of Foreign Relations} at § 311 (Am. L. Inst. 2018) (modifications denoted with strikethrough).
federal government, then it was not technically necessary for the Senate to make a declaration that certain articles of the U.S.-Rwanda BIT were self-executing. But Medellin calls into question this inherent right theory, as does the Senate Foreign Relations Committee report itself when discussing Article 11 of the BIT that was made non-self-executing. Thus, the Senate making Articles 3 through 10 self-executing eliminates any uncertainty over the Executive Branch’s ability to bring a claim to invalidate a state law for non-compliance.

Similarly, if the Executive Branch has an inherent claim to invalidate a state law due to non-compliance with an international agreement regardless of its self-executing status, it is unnecessary for Congress in its approval law and implementing act for trade agreements to grant a cause of action to the United States to bring an action declaring a state law inconsistent with the agreement invalid. Nonetheless, presumably doing so eliminates any uncertainty which would appear more substantial post-Medellin than it did in the 1920s-1940s. The post-Medellin approach to the issue, of course, may weaken the Executive Branch’s ability to enforce older pre-existing BITs against the states.

One must also realize that the Senate may well have thought there was no need to indicate the substantive provisions of those BITs were self-executing for the purpose of allowing Executive Branch suit based on the treaty against a non-complying state official given the existing Supreme Court jurisprudence pre-Medellin. Thus, if one were to propose a provision in a future restatement to deal with this question, one might suggest the following: “The U.S. government may have an inherent right to bring a cause of action to declare invalid a state law inconsistent with an international agreement, particularly those entered prior to the 2008 Supreme Court Medellin decision, but the Senate and Congress providing for Executive Branch causes of action for purposes of clarity and certainty in future Senate Resolutions of Consent and Congressional approval laws is at least appropriate and perhaps necessary.”

The second open question is whether the revisions to the restatement can and should apply to PEA method agreements, agreements without the express approval of Senate or Congress, such as trade “mini-deals.” How are we to know and what are we to look at to know if they are self-executing and whether they provide a private right of action? Sometimes the Executive Branch treats these PEA-method mini-deals as automatically part of U.S. law, but there is never a public statement regarding self-executing
and private right of action issues. Congress could try to gain more control over such agreements and also express their intent on the issues either through ex post approval laws as was done with the 2023 first agreement under the U.S.-Taiwan 21st Century Trade Initiative, or through an amendment to the Case-Zablocki Act that indicates congressional intent on the domestic status of all PEAs.

In reality, it appears that the most likely way such agreements might wind their way into the courts is if the Executive Branch brought suit to enforce the agreement against a state official or private actor. Presumably a court would allow such a suit without regard to self-execution, like the Court did with PEAs in the 1930s and 1940s, or alternatively allow the Executive Branch suit by giving “great weight” to the Executive Branch’s interpretation of the agreement, including whether the Executive Branch believed the agreement was self-executing and how the Executive Branch described the exact contours of the concept. It is also possible that a court could rely on the dormant foreign affairs doctrine (that focuses on whether a state action has more than some incidental effect on U.S. foreign relations) rather than preemption doctrine in such cases to avoid having to address the self-execution issue. However, reliance on the dormant foreign affairs doctrine and employing a threshold effects test in such situations bears the risk of minimizing U.S. political branch intent on the issue of self-execution in other situations.158

---

158 See Schaefer, Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine, supra note 110, at 317.