

UGA International Law Colloquium
February 9, 2007

Unratified Treaties, Domestic Politics and the U.S. Constitution

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Under contemporary treaty practice, a nation's signature of a treaty typically does not make the nation a party to the treaty. Rather, nations become parties to treaties through an act of ratification or accession, which sometimes occurs long after signature. Nevertheless, Article 18 of the Vienna Convention on the Law of Treaties, which many commentators regard as reflecting customary international law, provides that when a nation signs a treaty it is obligated to refrain from actions that would defeat the “object and purpose” of the treaty until such time as it makes clear its intent not to become a party to the treaty. Some commentators further claim that this object and purpose obligation means that a nation that has signed a treaty is prohibited either from violating the treaty altogether or from violating the treaty's “core” or “important” provisions. Attaching legal obligations to the signing of a treaty, however, poses a constitutional issue for the United States because the U.S. Constitution divides the treaty power between the President and Senate, whereas only the President and his agents are involved in the signing of treaties. This constitutional issue has broad significance because, for a variety of political and other reasons, the United States often signs but fails to ratify treaties. The constitutional issue is not eliminated by the president's authority to conclude “sole executive agreements,” since both constitutional structure and historical practice suggest that this authority is significantly narrower than the power of the President and Senate to jointly conclude treaties. The drafting history of Article 18, however, offers a partial solution to this difficulty, since it indicates that the object and purpose obligation was intended to prohibit only actions that would substantially undermine the parties' ability to comply with or benefit from a treaty after ratification, an obligation that has little relevance to the treaties for which signing obligations would be most constitutionally problematic.