Obama Administration Submits UN Disability Convention to Senate for Ratification

Proposed Safeguards Declare Existing U.S. Law Consistent With Treaty Obligations and Prohibit Judicial Enforcement of the Convention

The Obama administration recently submitted the United Nations Convention on Rights of Persons with Disabilities (“CRPD” or “Convention”) to the Senate for ratification. Signed by President Obama in 2009, the CRPD, which is a treaty, requires the support from two-thirds of the Senate for it to be ratified and binding on the United States. The purpose of the Convention is to ensure that persons with disabilities have the same rights and opportunities as others. It covers a broad range of cultural, social, and economic rights, including provisions on equality and nondiscrimination in employment. However, in order to limit the potentially broad scope of the CRPD, the administration has recommended that the Senate ratify it with several reservations, understandings, and declarations (RUDs), which explain that the obligations under the Convention are entirely consistent with current U.S. law and that no implementing legislation is necessary. With these proposed conditions on ratification, the CRPD has generated early bipartisan support including Republican Senators McCain (AZ) and Barrasso (WY) who sit on the Senate Foreign Relations Committee.

Background on the UN Convention and U.S. Treaty Process

The CRPD was officially adopted by the United Nations on December 13, 2006 although it did not become effective until May 3, 2008, when it had been ratified by 100 countries. So far, 153 countries have signed the CRPD and 117 have ratified it. The Convention is considered a treaty subject to ratification in accordance with the U.S. Constitution. The Constitution provides that the President has power to “make Treaties” but it requires that two-thirds of the Senate must ratify a treaty for it to be binding on the United States.\(^1\) Treaties—like federal laws—are the supreme law of the land,\(^2\) and are “placed on the same footing” with Acts of Congress and when the two apparently conflict the courts will interpret them “so as to give effect to both.”\(^3\) While the U.S. Constitution does not define the term “treaty”, it is generally recognized as “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.”\(^4\) Moreover, international law and practice provides that a “convention” is merely a treaty that has been adopted by several nations or an international organization, such as the United Nations, and it typically remains open for other nations to sign and ratify.

The Convention’s Employment Provisions

Two provisions of the CRPD are directly related to employment: Article 27 (work and employment) and in Article 5 (equality and discrimination). The provisions are generally consistent with U.S. disability law. However, there is some ambiguity with respect to affirmative action and quotas. Specifically, Article 27 provides that State Parties to the Convention “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives, and other measures.”\(^5\) The term “quota” which was included in early drafts of Article 27(h), was replaced with the phrase “other measures.”\(^6\)
According to the legislative history of the Convention, term “quota” was ultimately rejected due to considerable objections to its inclusion and it was decided that it would be left to each State Party whether to allow quotas through the use of “affirmative action programs, incentives and other measures” as possible means of promoting “the employment of persons with disabilities in the private sector.” Thus, based on the language of Article 27 and in light of the history of the negotiations, it is up to each State Party to determine whether quotas are appropriate but the CRPD does not require their use.

**Safeguards to an Overly Broad Interpretation** In order to narrow the potentially broad scope of the CRPD, as previously mentioned, the administration recommended specific reservations, understandings, and declarations. Such measures are used by the President and Senate to limit U.S. treaty obligations by explaining how the U.S. will interpret and implement the Convention.7 Perhaps, the most important limitation is the declaration that the CRPD is not “self-executing” which means that it does not give rise to any individually enforceable rights and it would not be enforceable in U.S. courts. Thus, even if the CRPD did require quotas or an equally questionable employment practice, they could not be enforced through the courts or government agencies. The RUD package contains some additional important safeguards including:

- A reservation and understanding that the CRPD’s prohibition of disability discrimination is consistent with and implemented through existing federal disability law;
- An understanding that the CRPD does not require the U.S. to adopt a comparable worth pay system; and
- An understanding that the meaning of the terms “disability” and “persons with disabilities” are consistent with existing U.S. law.

In sum, the proposed RUDs effectively provide that the rights and remedies under existing U.S. law satisfy the various obligations set forth in the CRPD and that no additional rights would arise from the ratification of the Convention.

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1 U.S. Const. Art. II, Sec. 2.
2 U.S. Const. Art. VI, Cl. 2. Treaties are binding on states and the Constitution expressly forbids states from making treaties. Art. I, Sec.10.
4 Restatement (n. 2 to preface) § 301. The Supreme Court has used a more simple definition: “a compact made between two or more independent nations with a view to the public welfare.” *B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912).
5 Moreover, Article 5 explains “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”
6 The term “quota” is not found in the CRPD.
7 The Supreme Court has recognized the power of the Senate to use reservations in consenting to treaties. *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869).