Defects of the Articles of Confederation, Part 3

Edward D. Duvall
10 Jul 2011

Synopsis: This is the third in a series on the weaknesses of the Articles of Confederation. In this edition, the issue of treaties is examined.

A treaty is nothing more than an agreement between nations. But unlike the numerous pacts, communiqués, diplomatic memorandums and the like that occur commonly in foreign relations, a treaty normally imposes solemn obligations on both sides. Therefore, they are not to be entered into lightly, because they represent promises made by a nation in return for promises to be kept by the other party. A treaty must be established by knowledgeable persons, since violations of a treaty could be a just cause for war, loss of national prestige, loss of confidence by other nations, or many types of economic retaliation. It is of utmost importance then, that a treaty be entered into for sound reasons, that is, for reasons that promote the national interest; but once entered into, be adhered to in good faith. All of this explains why treaties must be negotiated by experienced people, capable of understanding a nation's long-term interests and the threats to them. Otherwise, a detrimental treaty may result, in which case there is no choice but to ask for renegotiation, adhere to it as best as can be done, or take the risk of violating it.

We can observe from history in general some requirements for a successful treaty: a) each party enters into obligations in return for obligations to be observed by the other; b) the provisions are consistent with the long-term goals and interests of the entire nation, not just a portion thereof or one faction; c) it should be made either for a term of years, or to be operable so long as a certain set of conditions prevails; d) should take the long-term view, unless made for a term of years; not focusing only on immediate problems that may be solved with the passage of time, or risking long-term interests for short-term gain; and e) contain a means of termination should both parties find it advisable, or as a means to address violations.

Likewise, conditions conducive to successful negotiations include: a) that both parties have confidence of good faith by the other; in many cases this is known not to be true, in which case, no treaty should be signed without numerous caveats and conditions; b) ability to maintain secrecy if necessary and prudent; and c) that both side believe they will achieve a net gain for their interests.

Congress had full powers to enact treaties under the Articles of Confederation, and the States were likewise constrained, by the first three paragraphs of Article VI and by the first and next-to-last paragraphs of Article IX, as follows:

> **Article VI.** No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.
>
> No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.
>
> No State shall lay any impost or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

> **Article IX.** The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of said courts.
>
> The United States, in Congress assembled, shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

Congress' power of commercial treaties was limited by two exemptions which the states reserved to themselves: a) no commercial treaty negotiated by Congress could prevent the states from imposing duties on foreigners so long as they were equivalent to those imposed on Americans; and b) the states had powers to determine prohibitions on imports and exports. However, the states were prohibited from interfering with treaties under negotiation with France and Spain. The ratification of treaties required the concurrence of nine states (i.e., two-thirds of thirteen), same as most other major topics of government.

After the return of peace in 1781, there arose three major problems with the treaty provisions of the Articles. The first was the inability of Congress to conclude any type of commercial treaty with uniform regulations. A major factor was Great Britain's return to the Navigation Acts on 2 Jul 1783, when King George III issued an order in council regarding trade with the Americans. Britain's main fear was that the Americans would replace the British in the carrying trade in the western Mediterranean; in order to prevent it, Britain sought to weaken American commerce in general. Therefore, Britain imposed regulations designed to weaken the New England states: a) trade between America and the British West Indies could only be conducted in ships built, manned and navigated by British subjects; and b) American ships landing in British ports were permitted to bring in only items produced in states of which the ships' owners were citizens. The first of these nearly ruined the shipbuilding trade in the New England states, and greatly reduced the demand for its fisheries. The second greatly reduced the ability of the southern states to export their products, as none of them had a shipping industry. In fact, the weakness of the southern states with regard to shipping resulted in the British controlling nearly all trade in the southern states, even along the inland waterways. As a result, the states ended up attempting to raise revenues by imposing duties on imports from Europe. This led to a feud between New Jersey and New York, since nearly everything imported into New Jersey had to pass through the port of New York. Meanwhile, although there were demands for Congress to respond to the Navigation Acts, but could not get nine states to agree to give Congress suitable power to regulate commerce.

The second major problem was the issue of navigation rights on the Mississippi River. With British trade restricted, the New England states were very interested in obtaining a trade agreement with Spain. But, Spain was adamant in its rejection of American demands that any trade treaty allow American navigation on the river. The southern states wisely recognized that this was an essential point, and important for the future of the nation, since Spanish control of the Mississippi might tempt the western territories to align with Spain, thus causing all of the states to be surrounded by hostile powers. This dispute led to a north-south split among the states, which was not resolved until after the adoption of the Constitution.

The third major problem was that Great Britain refused to enter into any negotiations at all, on the grounds that since the thirteen states each retained powers over trade, there was little point in attempting to negotiate with Congress. It made little sense, from the British view, to conclude a treaty with Congress that could be violated by the states individually. Britain accordingly sought to deal with each state individually, albeit indirectly, by altering regulations that affected one or a few states; i.e., playing the states against one another and weakening all of them. This tempted some of the states to think about entering into commercial leagues among a few states, which were clearly prohibited by the Articles; but the general crisis of the Articles led to the adoption of the Constitution before any of these could materialize. It should be noted, however, that Congress did successfully ratify treaties with Holland (23 Jan 1783), Sweden (29 Jul 1783), and Prussia (17 May 1786).

The U. S. Constitution remedied these problems under several provisions. Two of these are found in Article I, Section 10, which imposes restrictions on State powers:

> "No State shall enter into any treaty, alliance, or confederation..."
> "No State shall, without the consent of Congress, enter into any agreement or compact with another State, or with a foreign power..."

The provisions under Article 1 make it clear that the federal government has a monopoly on the power to make treaties, and in fact, these two provisions were simply carried over from Article VI of the Articles of Confederation. The immediate consequence was to terminate any activities by the respective states to engage in independent agreements with foreign nations to the detriment of other states. In the long run, these provisions ensure that treaties are made by and with the United States as a uniform whole, preventing foreign nations from pitting one state or group of states against another, thus weakening all. It ensures that treaties are of a purely national character; a provision of this sort is necessary especially in compound-republic American system. It corrects one of the more notorious problems with the Articles of Confederation, as Hamilton notes in the Federalist Papers #22:

> "The treaties of the United States, under the present Constitution [i.e., the Articles of Confederation], are liable to the infractions of thirteen different legislatures, and as many courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?"

Another is in Article II, Section 2, which grants certain powers to the Executive:

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur..."

The provisions of Article II are designed to enhance the dignity of the power of making treaties but tempering it with a review and confirmation by the Senate. The President is the only officer in the American system that is elected, albeit indirectly, by the whole voting population; hence he has the dignity of representing the entire people. It serves as a signal to foreigners that the President and his delegates, in his treaty-making capacity, is empowered to negotiate on behalf of the entire nation. But, it would be unwise to place the entire power in the hands of one person, so this same provision requires that two-thirds of the Senators present confirm, or ratify, and treaty presented to them. The Senate was chosen for this task instead of the House because the Senators, being elected to terms of six rather than two years, are more likely to have the maturity and experience from continuity in office to the implications of proposed treaties, especially prior to the 16th Amendment, when members of the Senate were appointed by state legislatures instead of being popularly elected. Note that the number of votes necessary to ratify a treaty is not fixed in the Constitution: it requires only that two-thirds of the Senators present ratify it, as opposed to the provision in the Articles, which required two-thirds of all the states. No doubt this was intended as a compromise between the high threshold of two-thirds of the states, which became a problem under the Articles, and the necessary reduction of risk to the interests of the states. In summary, it was unlikely in the founders' view that both the President and the Senate could make a serious mistake compromising the nation's health.

The next important power regarding treaties occurs in Article III, section 2, describing the powers of the Supreme Court:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made..."

Last, Article VI states the legal status of treaties made under the Constitution as compared to domestic laws:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ..."

The provisions of Articles III and VI provide confidence to foreign nations that the U. S. takes foreign relations seriously, since treaties are to have the force of law equally with the Constitution itself. But the Supreme Court still has a review authority, since clearly, in the American system, no treaty obtained by fraud, or one that contradicts the Constitution or one which reduces the liberties of the people can be valid, even if it was ratified. A treaty with any of these defects is voided the same as any law passed by Congress in violation of the constitution.