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SYMPOSIUM ON PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES:
FOREWORD: SYMPOSIUM ON PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF
TREATIES

NAME: STEFAN A. RIESENFELD * and FREDERICK M. ABBOTT **

BIO:

* Emanuel S. Heller Professor of Law, Emeritus, University of California, Berkeley; Professor of Law,
University of California, Hastings College of the Law.

** Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.

SUMMARY:

... We are fortunate to bring together a preeminent group of judges, scholars and government officials from Europe, Latin America and the United States -- each an expert on the relationship between the national constitution and international law -- to address from a comparative perspective the role of the parliament in the making and operation of treaties. ... The Bundestag must by consent approve the ratification of treaties, but the Bundesrat ordinarily may only register objection to legislation approving the ratification of treaties which in the case cited by Professor Frowein it chose not to do. ... According to international law, unless a treaty provides otherwise a nation may qualify its ratification of a treaty by entering a reservation to one or more of its provisions. ... In some nations the parliament may qualify its consent to the ratification of a treaty by requiring the executive to include a reservation or understanding or other declaration in its instrument of ratification. ... With the exception of the view of the U.S. Senate and the unfortunate dicta in *United States v. Stuart*, for none of the countries represented in the symposium has it been suggested that the legislative record with respect to consent to treaty ratification takes precedence over the materials which would otherwise establish its meaning under international law. ...

TEXT:

[*293] We are fortunate to bring together a preeminent group of judges, scholars and government officials from Europe, Latin America and the United States -- each an expert on the relationship between the national constitution and international law -- to address from a comparative perspective the role of the parliament in the making and operation of treaties. We were motivated to convene this symposium by a problem that affects particularly the U.S. constitutional system, that is the attachment by the U.S. Senate of qualifications to its consent to the ratification of treaties that purport to control their domestic effect. In our opinion, the Senate threatens to undermine the credibility of U.S. participation in the international legal process and to deprive U.S. citizens of their constitutional rights. It ultimately threatens the creation of a more democratic international legal system. We are not especially concerned that the legislative branch in the United States is able by the passage of legislation to modify the internal effect of treaties under the last in time doctrine. Rather we are concerned with unicameral efforts by the Senate to appropriate the legislative power to itself. We are similarly alarmed by the Senate's recent attempts to assert post-ratification control over the interpretation of treaties, an activity that also threatens to undermine the integrity of the international legal system and that is not supported by the Constitution. We hoped that the foreign participants in this enterprise would help to illuminate for American legislators, courts and scholars the uniqueness of the Senate's perspective on its role in the international legal system and the potential for harm inherent in that perspective.

Our second motivation for convening this symposium was to take note of the increasing trend toward the use of treaties as legislative instruments conferring rights and duties on individuals and to ask from a [*294] comparative perspective whether a more active role for parliamentary bodies in the treaty process is not therefore warranted. A distinction between legislative treaties ("traites-lois") and political treaties has long been recognized. Yet the treaty-making power has resided principally in the executive, with a subsidiary power of restraint vested in the parliament, largely irrespective of treaty subject matter. In the post-World War Two era there has been a proliferation of important legislative treaties that establish, for example, the rights and obligations of citizens of the European Community, and promote respect for human rights on a global basis. There can be little doubt that the twenty-first century will witness an increasing role for legislative treaties in diverse areas such as trade, environmental protection and information transfer. The question which we hoped that our participants would address was whether the time has come for parliamentary bodies, subject to their constitutional limitations, to assert their primacy in legislative matters and play a more active role in the initiation, negotiation and conclusion of treaties.

We believe that our enterprise has been successful. In this volume is a collection of outstanding papers. We also convened a meeting of the contributors and other inviteesⁿ² in Geneva, Switzerland in November 1991 to discuss drafts of these papers and the general topic. A transcript of that meeting will be published by Martinus Nijhoff Publishers in a hardbound version of this symposium. In this introduction we would like to share some of the results of that meeting, as well as some conclusions that may be drawn from the papers and meeting.

I. THE UNITED STATES

The papers by Professors Damrosch, Glennon, Trimble and ourselves, as well as the first part of our meeting in Geneva, are devoted to the role of the U.S. Senate in the making and operation of treaties. There are two central issues on which the papers and meeting focused. The first is the authority of the Senate to declare the non-self-executing character of otherwise self-executing treaties with binding effect on the courts. The second is the authority of the Senate to control the post-ratification interpretation of treaties.

[*295] A. *Declarations regarding self-execution*

A treaty is self-executing in the sense of creating municipally enforceable rights for individuals if the treaty is intended by the parties to create such rights and if its terms are sufficiently precise to be given legal effect by the courts, unless a written or unwritten constitution otherwise provides. Pursuant to the rules of the Vienna Convention and customary international law, courts will generally look to the terms of a treaty and its context to determine whether it is self-executing.ⁿ³ The U.S. Constitution expressly provides that treaties are the supreme law of the land, and that the President has the power to make treaties with the advice and consent of the Senate. The U.S. Senate has on recent occasions purported to control the self-executing or non-self-executing character of treaties to which the United States has become party by "declaring" the non-self-executing character of the treaties, implying that these declarations are binding on the courts. Under international law a declaration (like an understanding or interpretative statement) does not change the terms of a treaty, but indicates a party's professed understanding of its terms. The Senate has declared the non-self-executing character of the Torture Conventionⁿ⁴ and, most recently, the International Covenant on Civil and Political Rights.ⁿ⁵ The Senate declaration with respect to the Covenant on Civil and Political Rights was adopted after our meeting and after the papers had largely been completed,ⁿ⁶ but represents another case in which a treaty that by its express terms may be understood to establish rights in [*296] favor of individuals is purportedly converted into a non-self-executing treaty. A U.S. citizen is entitled to rely in court on the rights created in his or her favor by a self-executing treaty. The object of the Senate's declaration of non-self-execution is to deny the citizen that right. Because two-thirds of the members of the Senate present and voting are required for consent to treaty ratification, thirty-four Senators have the effective power to require the adoption of such a qualification as the price of not obstructing the ratification process.

Professor Glennon takes the position that the Senate has the constitutional authority to control the self-executing/non-self-executing character of a treaty for domestic purposes because the Senate has the express constitutional power to grant or withhold its consent to the ratification of a treaty. In his view, the Senate's power to control the domestic effect of a treaty is ancillary to or implied in its express power of consent. His view is that which has long been advocated by Professor Henkin.ⁿ⁷

Professor Damrosch concurs that the Senate has the constitutional authority to control the self-executing/non-self-executing character of a treaty. She argues, however, that the Senate should refrain from exercising this power because of its adverse affect on the creation of international legal norms and on the rights of U.S. citizens. The Senate may properly act to declare the non-self-executing character of a treaty when there is a compelling reason to engage the

House of Representatives in its implementation. On the other hand, the Senate should refrain from taking steps that, for example, may serve to limit judicial scrutiny of the actions of Executive branch officials.

We believe that the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration [*297] is not law. The Senate does not have the power to make law outside the treaty instrument.

We believe that the Senate and House acting together may strip a self-executing effect for domestic law purposes because the Senate and House acting together have the power to legislate under Article I of the Constitution. Thus if the Congress with the concurrence of the President passes a resolution providing that an international trade agreement is non-self-executing this legislative act should be given effect. Professor Damrosch agrees with this conclusion to the extent that she suggests that the Congress may act freely in the area of trade regulation because Congress is granted the express Article I constitutional power to regulate foreign commerce.

The participation of foreign scholars at the Geneva meeting was very helpful in clarifying the American dialogue with respect to declarations regarding self-execution. Professor Frowein, for example, observed that the question of self-execution has both an international and a municipal law component, and that states may differ on the constitutional mechanism by which they determine to give domestic legal effect to a treaty. According to Professor Frowein, in Germany the parliament may, though it has done so only once, provide that a treaty is non-self-executing with binding effect on the courts. n8 Professor Riesenfeld concurred with Professor Frowein on these points, but noted that the situation of the German parliament is not directly analogous to the situation regarding the U.S. Senate. The Bundestag must by consent approve the ratification of treaties, but the Bundesrat ordinarily may only register objection to legislation approving the ratification of treaties which in the case cited by Professor Frowein it chose not to do. n9 In the United States [*298] the Senate does not have the almost unicameral legislative power of the Bundestag. It is this unicameral legislative activity of the U.S. Senate to which Professors Riesenfeld and Abbott object. Furthermore, while each nation may determine for itself the process by which it chooses to give effect to treaties capable of being self-executing, the question whether or not a particular treaty is self-executing is ultimately one of international law.

Professor Wildhaber suggested that the difference of views between Professors Glennon and Riesenfeld/Abbott on this issue is reminiscent of the monist/dualist debate over the place of international law in the municipal legal order. Professor Riesenfeld said that we were not advocating a monist approach for the United States. He noted that under the U.S. Constitution the Congress as a whole is free in our view to modify the domestic effect of treaties. The problem, he observed, is of the undemocratic character of unicameral action by the Senate.

Lord Templeman observed that in the United Kingdom treaties are never given direct effect by the courts since the unwritten constitution requires that Parliament act to incorporate treaties into domestic law before they may be given effect by the courts. He said that nevertheless in his view it is the courts which must decide whether treaties which have entered into force are self-executing, and not the political branches.

The comments by Professors Frowein and Wildhaber were most helpful by pinpointing that the Riesenfeld/Abbott objection to the Senate declarations regarding non-self-execution relates to the undemocratic character of the Senate's unicameral actions -- particularly in light of the power held by thirty-four Senators to obstruct a positive result -- and not to the advocacy of a strictly monist international law-domestic law hierarchy for the United States.

As the contributions to this symposium demonstrate, nations do not approach the question of the self-executing character of treaties for the purposes of municipal application in a uniform manner. n10 In all of the nations surveyed in this symposium, with the exception of the United Kingdom, the courts may give legal effect to a self-executing treaty once that treaty has internationally come into force for that state without additional [*299] action by the parliament. n11 In the United Kingdom, treaties may never be given direct effect by the courts without implementing legislation by the Parliament. n12 In France and the Netherlands, parliament may not override the terms of a treaty by enacting subsequent inconsistent legislation, n13 and so presumably may not interfere with its self-executing character after entry into force. In all of the other nations surveyed in this symposium, the parliament may enact overriding inconsistent legislation, n14 and thereby modify the self-executing character of treaty provisions. If the position asserted by the U.S.

Senate is adopted by the courts -- and we stress that this position has never been adopted by a U.S. court -- the United States would be unique in permitting a single legislative chamber of a bicameral legislature to override the terms of a treaty by the mechanism of a unicameral act. n15

B. Control Over Interpretation

In the mid-1980s a controversy arose between the Executive and the Senate concerning interpretation of the ABM Treaty entered into by the United States and Soviet Union in 1972. n16 The Reagan Administration [*300] claimed that the treaty permitted the development and testing of futuristic defense technologies (*i.e.* Star Wars). Members of the Senate who had participated in the approval of ratification of the treaty asserted their understanding, based on Executive testimony in 1972, that the treaty did not permit such development and testing. Senate members claimed that the Reagan Administration was bound to interpret the treaty in conformity with the explanation of it given by the Nixon Administration to the Senate in 1972. Hearings were held in 1987 at which Abraham Sofaer, then State Department Legal Adviser, took the position on behalf of the Reagan Administration (and subsequently elaborated) that it would not be bound to interpret a treaty consistent with its representations to the Senate unless those representations were generally understood by the Senate, were relied upon by that body in giving its consent to ratification, and were clearly intended by the Executive as a limitation on it. n17 This became known as the Sofaer Doctrine. In Senate testimony, Professor Louis Henkin took the position that the President was bound as a matter of constitutional principle to interpret a treaty consistent with the Senate's clear understanding of it based on Executive representations, even if this meant that the treaty would have a meaning for domestic U.S. legal purposes inconsistent with the meaning which would be ascribed to it under international law. n18

The issue of control over treaty interpretation did not subside following the inconclusive ABM controversy. The Supreme Court, while not denying its ultimate power to construe treaties for domestic purposes, shortly thereafter rendered a controversial opinion in *United States v. Stuart*, n19 which included dicta, voiced in an entirely different context than the ABM controversy, which suggested that the record of Senate consideration of a treaty may be better evidence of its meaning than the negotiating history. The Senate has since adopted conditions in connection with approving the ratification of the INF Treaty n20 and the CFE Treaty n21 to the effect that as a matter of constitutional principle the President is obligated to interpret a treaty in a manner consistent with an understanding of the treaty he or she shares with the Senate.

[*301] Professor Glennon contends that the President is bound to interpret a treaty consistent with representations made in the course of the advice and consent process. In his view, the advice and consent process would be rendered superfluous if the Senate could not rely on the fact that the Executive would adhere to its own expressed views as to the proper interpretation of a treaty.

Professor Trimble expressed surprise that the Reagan Administration had gone so far as the Sofaer Doctrine because, in his view, as a matter of constitutional principle the area of treaty interpretation is reserved to the Executive in the first instance, and ultimately resides in the courts. There is a point at which treaty interpretation is stretched beyond justifiable limits and at this point interpretation becomes amendment. The President may not amend a treaty without Senate consent. Moreover, the Congress has considerable influence regarding the implementation of treaties through control of the budget and appointment processes, so that the President is not unconstrained in the interpretation process.

We generally concur in Professor Trimble's view. The President is constitutionally mandated to execute the laws of the United States, including the laws made by treaty. As such, in the first instance, the interpretive power resides in the President. Ultimately, however, the question of treaty interpretation is for the courts. We are particularly troubled by the dicta in *United States v. Stuart* regarding the supremacy of the legislative record for interpretative purposes and point in our paper to the myriad cases in which the Supreme Court has otherwise properly stated rules of treaty interpretation consistent with international law. We suggest that when the court has occasion to reconsider the issue raised in *Stuart* that it focus on its own otherwise strikingly consistent record.

The non-U.S. participants in our symposium, particularly Professors Frowein and Wildhaber, expressed strong dissatisfaction with the idea that a treaty may have separate meanings for international and domestic law purposes. n22 In Germany and Switzerland, as examples, the courts would not be bound by representations made by the executive to the parliament. [*302] Professors Frowein and Wildhaber each expressed grave concern that acceptance of the idea that a treaty may have independent meanings under domestic and international law would undermine the integrity of the international legal system. With respect to treaties such as the European Convention on Human Rights, it is important that there be developed a consistent body of law which would not develop if national and international courts rendered inconsistent judgments.

None of the non-U.S. participants in the symposium believe that their parliament has the power to control the national courts' interpretation of a treaty. In France, both the ordinary and the administrative courts have ceased applying authoritative executive treaty interpretations to bring the judiciary into compliance with France's international treaty-based commitment to an independent judiciary. n23 In the United Kingdom the courts do not look at the record of parliamentary debate with respect to any question of statutory interpretation, including statutes implementing treaties, but rely strictly on the text of the statute. n24 This is not to suggest that courts in the United States may not consult the record of legislative approval of a treaty. It is rather to suggest that this record does not control the meaning of the treaty, which meaning must rather be determined in accordance with applicable rules of international law.

II. THE ROLE OF THE PARLIAMENT IN GENERAL

Much of our meeting in Geneva was devoted to the role of parliaments outside the United States. We refer you to the participants' outstanding papers and, of course, we make reference to them throughout this foreword. We also call your attention to the stimulating paper by Professor Haggemacher which delves into the European history of the idea of parliamentary participation in the treaty process and how this may have influenced the American Founding Fathers. At the meeting we also attempted to focus on the general question of the proper role for the parliamentary body in the conclusion and operation of treaties. This process may be segmented into three phases: the initiation and negotiation phase during which the idea for the treaty is proposed and consultations between the executive and parliament regarding the ultimate terms of the treaty may take place; the conclusion phase during which the parliament approves ratification of the treaty by the executive, and during which it may propose that the executive qualify the nation's consent, and; the operation [*303] phase during which the parliament may attempt to control the interpretation or application of the treaty.

A. *The Initiation and Negotiation Phase*

In each of the countries represented in the symposium there is an informal process in which the executive consults with the leaders of parliament during the initiation and consultation phase of the treaty-making process. The degree of interaction appears to vary significantly. In Argentina n25 and France, for example, there has historically been little in the way of executive consultation, although in France, as elsewhere, the parliament is demanding an increasingly active role. n26 It is perhaps noteworthy that in the case of France the executive has historically dominated the field of foreign relations. The Italian Parliament was rarely consulted by the executive during treaty negotiations until the 1970s. In the 1980s the Italian Parliament began to play a very active role during the negotiation phase. In Germany, the Netherlands, Switzerland, the United Kingdom and the United States there is a substantial level of consultation with the parliament by the executive. n27 In the United States there is legislation which mandates congressional consultation in respect to certain trade agreements, n28 and in Switzerland there is legislation pending which would mandate consultations with respect to treaty negotiations. n29

Despite the existence of informal consultation practices, there was a consensus among the participants that the role of the parliament in the initiation and negotiation phase of the treaty-making process should be enhanced. There was some divergence of views as to how this might best be accomplished.

Professor Bognetti observed that in Europe, and certainly in Italy, the government has displaced the parliament as the initiator or engine of legislation. The parliament tends to act as a brake. Professor Bognetti agreed in principle that the parliament should play a greater role in the treaty-making process. He noted, however, that in a system of government in which the parliament is weak, as in Italy, enhancing the role of the parliament will make the conclusion of treaties extremely difficult. [*304] He believes that the government must have the power to make final decisions or determinations on behalf of the state. n30

Lord Templeman favored a more active role for the U.K. Parliament, but he cautioned against bringing in the parliament at too early a stage. He believes that the government properly initiates the treaty formation process because the parliament is not well suited to initiation. He suggested that the parliament is best brought actively into the treaty-making process after a draft treaty has been prepared, so that members of parliament will have something before them to mark up and discuss with constituents. Without a specific proposal, parliamentary consideration threatens to become too diffused.

Professor Cottier, who has recently been active in trade negotiations on behalf of the Swiss government, indicated that a lack of parliamentary input in the initial stages of trade agreement negotiation leads to considerable difficulty as negotiated texts emerge. If parliament is only consulted after drafts have been formulated, members are more likely to object to the end product because their positions will not have been taken into account. At least with respect to the

Swiss experience, Professor Cottier suggested that parliament must be brought into treaty negotiations at an early stage so that support for the treaty will exist when it is submitted by the Government for approval. He also intimated, however, that careful thought must be given to the kind of consultation which is sought, attempting to get agreement on the broad goals of the negotiations, while at the same time avoiding immersion in the details. He felt that there should be mechanisms where necessary for assuring confidentiality. Professor Cottier observed that in times of crisis, citizens would be far more likely to stand by a treaty which had been negotiated with broad input and support, rather than as an executive undertaking.

Professor Wildhaber said that he was struck by the importance of the informal processes of treaty consultation in addition to constitutionally or statutorily mandated formal processes. He urged mechanisms for enhancing the informal consultation process between executive and parliament.

Professor Luchaire expressed his great concern that treaties which bear on areas which are the object of legislation continue to be made by the executive. He said that one must have the creative spirit and imagination necessary to devise means for including the parliament in the process of elaborating treaties. He distinguished law-making treaties from [*305] treaties of alliance or political treaties, suggesting that the question of enhanced parliamentary participation relates to the former.

Mr. Crook said that, from the perspective of an active participant in the treaty negotiating process, he would emphasize the complexity of the subject matter of modern treaties, such as treaties on global warming or arms control. He expressed the view that this makes active congressional participation in the negotiation phase difficult and that this factor must be considered when evaluating the appropriate role for the parliament.

Regarding the issue of complexity raised by Mr. Crook, Professor Trimble said that, from his experience, issues which require resolution on the policy-making level can be framed in terms which do not require extensive technical expertise.

Mr. Hahn observed that in light of the role now played by treaties, it is extremely unwise to attempt to exclude the parliament from the treaty-making process because this will only encourage the parliament to seek to overturn the results of treaty-making through subsequent statute and the creation of obstacles to implementation. Mr. Hahn suggested that the more important a treaty is, the more inevitable it is that the treaty-making process must be opened up.

Professor Riesenfeld remarked that it is time to look beyond President Washington's initial unfortunate treaty consultation experience with the Senate -- "It's time that grass covers over that relic." However, granting a few powerful Senators the right to control the treaty-making process is also undemocratic. It is time to consider a more modern approach to the treaty-making process.

Professor Damrosch noted the importance of our discussion to the countries of the former Soviet Union which have no meaningful history of parliamentary participation in treaty-making. She proposed that we focus our attention on assisting the countries of the former Soviet Union in devising effective mechanisms for parliamentary participation in the treaty-making process.

There is an evident range to the proposals by the participants with respect to the initiation and consultation phase, from Professor Bognetti's view that the executive is best suited to impart the impetus; to Lord Templeman's advocacy for enhanced parliamentary participation, tempered by attention to the risk that bringing parliament in too early may jeopardize a successful conclusion; to Professor Cottier who believes that the parliament should be consulted at an early stage on the broad principles of negotiation so that it is more receptive to the ultimate work of the negotiators. Unquestionably there is merit to all of these ideas.

[*306] By concentrating early attention on broad principles, the parliament may avoid falling into a quagmire. In light of the demanding workload confronting modern parliamentarians and their staffs, they may well prefer to concentrate on details only after a draft text has emerged. The structure of the international system will continue to make it difficult for parliaments to interact with each other expeditiously so as to assure that the treaty is in fact made. There remains a need for each nation to be able to represent its view with a focused voice, and a logical choice for that voice is the executive.

B. The Conclusion Phase

1. Approval

The parliament in each surveyed country plays a role in approving the conclusion of treaties, other than agreements in simplified form (or executive agreements). n31 In the Netherlands and United Kingdom approval by the Parliament is assumed if a motion to consider the treaty is not made in the Parliament prior to the expiration of a waiting period. n32 In other states the approval is by act of the parliamentary body, while only in the United States is one chamber of a bicameral legislature entitled to approve treaties. n33

Professor Trimble suggested that in the United States the full Congress should play a much more active role in the treaty-making process in its entirety, since treaties directly affect individual interests even in such areas as arms control. He strongly advocated moving away from the Article II treaty approval process and into a full congressional approval process, seeing no modern justification either for continuing Senate primacy in treaty matters or, conversely, for excluding the House of Representatives from such matters.

[*307] Professor Glennon objected to the idea that a change in the treaty-making process in the United States should be undertaken simply because scholars have concluded that it is undemocratic. In his view the Article II system has worked reasonably well and the notion that the Senate has been a graveyard for treaties is exaggerated. If the Article II process is to be changed, Professor Glennon believes this must be accomplished through a constitutional amendment so as to foster respect for the rule of law.

As we have stated in our paper, we believe that the decision whether to submit a treaty for approval to the Senate or the Congress should remain left to the wisdom of the Executive, as is permitted by the Constitution.

2. Conditions to Approval

According to international law, unless a treaty provides otherwise a nation may qualify its ratification of a treaty by entering a reservation to one or more of its provisions. A valid and effective reservation modifies the terms of the treaty. n34 A nation may also qualify its consent to ratification by appending an understanding or interpretative declaration with respect to a term or terms, but an understanding is not intended to modify the terms of the treaty. n35 In some nations the parliament may qualify its consent to the ratification of a treaty by requiring the executive to include a reservation or understanding or other declaration in its instrument of ratification.

In each of Brazil, Germany, the Netherlands, Switzerland and the United States, the parliament generally is recognized to have the power to attach qualifications to its consent to ratification, but in each of these countries with the exception of the United States the legislative branch has qualified its consent infrequently. Opinion is divided with respect to Argentina. Judge Ruda notes that the Argentine Congress required treaty modifications on a number of occasions in the previous century, but has not attempted to require a modification by amendment or reservation in this century. n36 On the other hand, the Argentine Congress has recently required the executive to communicate interpretative statements as an element of its consent. n37 In France and the United Kingdom the [*308] Parliament may not qualify its consent. In Italy according to actual practice Parliament neither needs to approve reservations which the Government has appended to its signature or intends to append to its ratification of a treaty nor can it impose the attachment of reservations in its approval of ratification. Although conceding that Italian scholars have expressed dissenting views on both propositions, n38 Professor Boggetti suspects that in the rare cases where the Government included reservations in the proposed law of approval that this was done by inadvertence. Professor Boggetti opines that the issue is closed, at least for the time being. Among the European states there have been a few recent and important cases, such as that involving the German parliament's approval of agreements with Poland, n39 in which action initiated by the parliament to qualify its consent to a treaty may have had a significant effect on international relations. n40

The U.S. Senate is the most active legislative body with respect to the formal adoption of qualifications on consent to ratification. As we point out in our paper, between 1970 and 1987 the Senate included qualifications in its consent to the ratification of 33 of the 221 treaties (or 17.5 percent) it approved during that period. More important, in the past several years the Senate has added qualifications on the approval of adherence to major multilateral human rights treaty commitments. n41 U.S. reservations have been the subject of numerous objections by foreign states, n42 and while only the passage of time will permit an empirical evaluation of the impact of U.S. practice on the evolution of the treaty system, widespread adoption of U.S. practices such as reserving the supremacy of its Constitution may well undermine the creation of an effective system of treaty-based individual rights. n43

A recent decision by the European Court of Human Rights, *Belilos* [*309] *v. Switzerland*, n44 emphasized an important dimension regarding the law relating to treaty reservations. In this case the Court decided that a Swiss reservation to the European Convention on Human Rights n45 that was not permitted by the Convention because of its general character n46 would not be given legal effect. The Court decided further that the Convention and the provision as to

which the reservation was made remained in force as to Switzerland without the subject reservation. Although this decision might appear to be a novelty in international law, the Court did not elaborate the basis for its decision. Therefore we were particularly fortunate to have Professor Wildhaber, who argued the case for Switzerland before the Court, and Professor Frowein, who represented the European Commission of Human Rights before the Court, share their views with us.

Professors Wildhaber and Frowein agreed that the European Court probably considered that the European Convention on Human Rights is an "integration" mechanism and that this distinguishes it from an ordinary multilateral treaty. n47 Professor Frowein believes that the rule that an invalid reservation must lead either to invalidity of adherence or disregard of the treaty provision as to which the reservation is made is manifestly contrary to the purposes of an integration treaty. n48 Professor Frowein pointed out that if a treaty provision as to which an invalid reservation is made is disregarded, then the reserving party achieves the same end with an invalid reservation as it would with a valid reservation -- namely, the provision reserved to would not be applied.

Professor Wildhaber stressed that there was a historical point when it was appropriate to permit reservations to integration treaties in order to encourage adherence to them. This historical rationale is perhaps no longer valid. Professor Frowein was critical of the European Convention on Human Rights for permitting reservations from its very beginning.

As noted, in the *Belilos* case it was held that the Swiss qualification to its adherence was invalid as a reservation of a general character in contravention of article 64 of the European Convention on Human Rights. Professor Wildhaber observed that while the Swiss government [*310] had argued that a reservation of a general character meant a reservation that was directed at more than one article of the Convention, the Commission and Court took the position that because the reservation had been intended to affect a broad segment of Swiss criminal and civil procedure, it was of a general character. n49

The *Belilos* decision is important in regard to the U.S. practice of attaching reservations to important multilateral human rights treaties, particularly reservations asserting the supremacy of the U.S. Constitution. If an international or national tribunal finds that such a reservation is inconsistent with the object and purpose of a treaty, for instance because it undermines the establishment of consistent rules, such tribunal may look to *Belilos* for support in disregarding the reservation and applying the treaty to the United States *in toto*.

C. The Operation Phase

1. Self-execution and override

When a self-executing treaty comes into force it may for some nations become legally operative in the domestic legal order without additional legislative action, and in other states it may become internally operative only upon the enactment of implementing legislation. Whether or not implementing legislation is required is a question answered by the domestic constitution in each state. As we discussed in Part I of this foreword, among the countries surveyed in this symposium, only the United Kingdom precludes treaties from having direct domestic effect prior to implementation by legislation. In the Netherlands and France, the parliament may not adopt subsequent legislation to override the terms of a treaty, and therefore may not modify its self-executing character. In all other countries represented in the symposium, the legislature may override a treaty for domestic purposes by enacting inconsistent legislation, and may thereby transform its self-executing character. n50 Only in the United States does a single chamber of an otherwise bicameral [*311] legislative body assert the power to convert a self-executing treaty to a non-self-executing treaty. n51 In all countries surveyed in which a treaty may have direct effect, it is the courts which decide whether a treaty is self-executing, though the parliament, except in France and the Netherlands, may through legislation control this determination.

2. Interpretation

We also discussed, in Part I above, the issue of control by the parliament over interpretation. With the exception of the view of the U.S. Senate and the unfortunate dicta in *United States v. Stuart*, for none of the countries represented in the symposium has it been suggested that the legislative record with respect to consent to treaty ratification takes precedence over the materials which would otherwise establish its meaning under international law.

3. Checks and Balances

In a parliamentary democracy the legislative branch generally may bring down the government through a vote of no confidence or censure. n52 Of course by such censure or threat of censure the executive may be restrained in the implementation of a treaty. In parliamentary democracies, the parliament generally controls the budget and in doing so can bring considerable pressure to bear on the executive with respect to treaty implementation. A budgetary threat need not involve the treaty matter in issue. There are, of course, innumerable other ways in which the legislative and executive branches interact on an ongoing basis. Thus to facilitate the accomplishment of its own programs the executive should generally be restrained from ignoring with impunity important parliamentary demands. Perhaps for this reason it is only rarely that the executive comes into conflict with the parliament in respect to a matter of treaty operation.

IV. CONCLUSION

Our friend and colleague Myres McDouglas wrote in 1952:

Enough creative comparative studies have been made to . . . suggest that the method can be used to clarify the values of the peoples of the world . . . for demonstrating the deep underlying equivalences in their demands for the values of a free society, . . . for increasing the identification [*312] of all free peoples with each other, and for in general establishing the consensus and predispositions necessary to effective cooperation in whatever forms of organization may be most appropriate under contemporary conditions. . . . Certainly no other method promises more in the invention and adaptation of felicitous alternatives, doctrines and procedures, for the achievement of our emerging goals, whether world, regional, national, or local. n53

We hope you will share our feeling that this symposium has helped to clarify and illuminate some important issues of constitutional and international law. Our primary motivation was to call attention to and address the regrettable practices of the U.S. Senate in attempting to determine the non-self-executing character of treaties and asserting the power to interpret them with binding internal effect. We hope that this symposium will assist in persuading the courts that the Senate does not have the constitutional power to accomplish these objectives. We stress that these are not mere technical issues, but rather go to the fundamental problem of assuring democratic participation in the national and international legal order.

We are extremely grateful to all of the participants who contributed such fine papers, and to those other individuals who contributed to the success of our meeting. We thank the Graduate Institute of International Studies in Geneva, Switzerland for allowing us to use their beautiful facilities for our meeting. We especially thank Professor Lucius Cafilisch for helping us make this arrangement. We are most grateful to our financial sponsors: the Chicago-based law firms, Baker & McKenzie and Keck, Mahin & Cate, as well as the Chicago-Kent College of Law. We gratefully acknowledge the assistance of several fine research assistants at Chicago-Kent: Allyson Harris, Laura Finnegan, Micky Forbes, Janis Marzuki and Jamie Sypulski. Finally, our thanks to the editors of the Law Review for their dedication and hard work.

A hardbound version of this symposium will be published by Martinus Nijhoff Publishers. This book will include a transcript of the Geneva meeting, as well as various supplementary materials and finding aids.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments
Federal Government
U.S. Congress
International Law
Treaty Formation
Ratifications
International Law-
Treaty Interpretation
General Overview

FOOTNOTES:

n1 In this symposium, we use the term "parliament" to refer to that organ of the nation responsible for the passage of legislation, though that organ may be constitutionally named the Parliament, Congress, National Assembly and so forth.

n2 In addition to those who contributed papers, those who also attended the meeting from the United States were David Caron, Professor of Law, U.C. Berkeley School of Law and John Crook, Legal Adviser to the U.S. Mission, Geneva, Switzerland. Also attending from Europe were Thomas Cottier, Associate Professor of Law, University of Neuchatel, and Ernst-Ulrich Petersmann, Professor of Law, University of St. Gallen. As we grate-

fully note, all those who contributed papers were able to attend the meeting (except Pieter van Dijk and Jack Weiss).

n3 A treaty may be self-executing in whole or in part. See our contribution to this symposium for a more detailed discussion of the doctrine of self-executing treaties in the United States, Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 574-78, 608-09 (1991). The non-U.S. contributions to this symposium address the question of the self-executing character of treaties within the nations to which the papers relate.

n4 Even before its action on the Torture Convention, the Senate insisted that no self-executing effect would be given to the Genocide Convention. The Senate resolution of ratification with respect to the Genocide Convention included a declaration requiring the President to refrain from depositing the U.S. instrument of ratification until domestic implementing legislation had been enacted. The Senate Foreign Relations Committee also reported its view that the Convention would be non-self-executing. See *id.* at 626-27, 631; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 519-20, 522-23 (1991).

n5 International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, G.A. Res. 2200). See 138 CONG. REC. S47,81, 83-84 (daily ed. Apr. 2, 1992); SENATE FOREIGN RELATIONS COMM., REP. ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. (1992); *International Covenant on Civil and Political Rights: Hearings on S. 478 Before the Senate Foreign Relations Comm.*, 102 Cong., 1st Sess. (1991). There is fairly extensive discussion of the problem of self-execution in the written submissions accompanying the Senate Foreign Relations Committee hearings, most objecting to the proposal to declare the non-self-executing character of the treaty.

n6 It is briefly mentioned in a few, see, e.g., Damrosch, *supra* note 4, at 523.

n7 We discuss our disagreement with Professor Henkin at some length in Riesenfeld & Abbott, *supra* note 3, at 590-601.

n8 In Germany, there are two chambers of parliament, the Bundestag and Bundesrat. The Bundestag is the supreme legislative organ of the nation. However, the consent of the Bundesrat is needed for certain legislation and the Bundesrat has a veto in all other cases, though the veto may be overridden by the Bundestag. Jochen Abr. Frowein & Michael J. Hahn, *The Participation of Parliament in the Treaty Process in the Federal Republic of Germany*, 67 CHI.-KENT L. REV. 361, 366 (1991). Article 59(2) of the German Constitution requires consent of the Bundestag to treaties which regulate political relations or matters of federal legislative powers, while the Bundesrat cooperates in such legislation in the manner as in other legislation.

n9 Professor Frowein and Mr. Hahn refer to a statute whereby, upon proposal of the government, the Bundestag consented to the ratification of the European Convention on the Law Applicable to Contractual Obligation. *Id.* at 375. This so-called ratification law provided expressly that the provisions of the convention have domestically no applicability. The statute was enacted with the proviso that "the constitutional rights of the Bundesrat are observed." In our opinion this example does not militate against our views for a number of reasons. 1) In the first place both chambers of the German parliament agreed on the terms of the ratification law pursuant to their role in the legislative process of ratification laws governing treaties concerning matters of federal legislation. The Bundestag approved of the proposed wording, the Bundesrat registered no objection. GRUNDGESETZ [CONSTITUTION] [GG] arts. 59(2), 77(3) (F.R.G.). 2) Apparently the treaty was not intended to be self-executing according to its legislative history. 3) Whether under the German Constitution the legislative bodies in their entirety could deny self-executing character to a convention that was negotiated as self-executing concerns a subject matter distinct from the subject matter we address in considering the unicameral actions of the U.S. Senate. According to the present state of authority, article 25 of the German Constitution

does not apply to the rule *pacta sunt servanda* (see Stefan Riesenfeld, *Fontes Juris Gentium*, 74 *AM. J. INT'L L.* 473, 474 (1980) (book review).

n10 On this subject see also the recent comparative study, *THE EFFECT OF TREATIES IN DOMESTIC LAW* (Francis Jacobs & Shelley Roberts eds., 1987).

n11 In France and Switzerland, for example, a self-executing treaty itself becomes law upon ratification and publication, following the passage by Parliament of an authorizing law (France) or approval decree (Switzerland). See Francois Luchaire, *The Participation of Parliament in the Elaboration and Application of Treaties*, 67 *CHI.-KENT L. REV.* 341, 342-44, 350 (1991); Luzius Wildhaber, *Parliamentary Participation in Treaty-Making, Report on Swiss Law*, 67 *CHI.-KENT L. REV.* 437, 450 (1991). In Italy, a self-executing treaty is transformed into domestic law by an "order of execution" which accompanies the statute authorizing ratification. See Giovanni Bognetti, *The Role of the Italian Parliament in the Treaty-Making Process*, 67 *CHI.-KENT L. REV.* 391, 408 (1991).

n12 It should be noted that Lord Templeman has in several important decisions of the House of Lords referred to the European Convention on Human Rights (in force for the United Kingdom but not implemented by Parliament) at least for the consistency or inconsistency with it of British common law. See Lord Templeman, *Treaty-Making and the British Parliament*, 67 *CHI.-KENT L. REV.* 459, 469-71 (1991).

n13 See Luchaire, *supra* note 11, at 350-52 (in France the superior rank of a treaty is conditioned on its being applied by the other party(s)); Pieter van Dijk & Bahiyiyih G. Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 *CHI.-KENT L. REV.* 413, 422 (1991).

n14 See GERMAN J. BIDART CAMPOS, *MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO* 70-71 (1975) (a writer cited in Jose Maria Ruda, *The Role of the Argentine Congress in the Treaty-Making Process*, 67 *CHI.-KENT L. REV.* 485, 491 (1991)); Guido F.S. Soares, *The Treaty-Making Process under the 1988 Federal Constitution of Brazil*, 67 *CHI.-KENT L. REV.* 495, 508 (1991); Bognetti, *supra* note 11, at 409; Frowein & Hahn, *supra* note 8, at 382. For Switzerland, at our meeting Professor Wildhaber and others discussed that article 113(3) of the Swiss Constitution may be understood to preclude the courts from avoiding the application of statutes adopted subsequent to treaty ratification. In some nations this matter is not entirely free from doubt. See, e.g., *supra* note 9, regarding Germany.

n15 In the United Kingdom the legislative power of Parliament is concentrated in a single chamber, i.e. the House of Commons, with the House of Lords playing a largely revising and advisory role. See Templeman, *supra* note 12, at 459, n.1. The U.K. Parliament acts with respect both to general legislative matters and to legislation implementing treaties in the same manner.

n16 See Phillip R. Trimble & Jack S. Weiss, *The Role of the President, the Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 *CHI.-KENT L. REV.* 645, 694-97 (1991); Riesenfeld & Abbott, *supra* note 3, at 611-12.

n17 See Abraham Sofaer, *Treaty Interpretation: A Comment*, 137 *U. PA. L. REV.* 1437 (1989).

n18 See *The ABM Treaty and the Constitution: Joint Hearings on S. 110 Before the U.S. Senate Comm. on Foreign Relations and the Comm. on the Judiciary*, 100th Cong., 1st Sess. 90 (1987) (cited in Riesenfeld & Abbott, *supra* note 3, at 617-18).

n19 489 *U.S.* 353 (1989). See discussion in Riesenfeld & Abbott, *supra* note 3, at 612-19.

n20 See Trimble & Weiss, *supra* note 16, at 697-701.

n21 See *id.* at 701.

n22 Professor Frowein remarked, for example:

seen from the German perspective, you would always start from the idea that every treaty, as an international legal instrument binding upon the states which have become members, is a legal rule which has one correct interpretation only. . . . We must also agree that the interpretation may change across, with a certain time period elapsed. But, from a German perspective, although you would be faced with the fact that, for instance, the federal government will have explained in very great detail the terms of the treaty in the internal ratification procedure, you would never say that this in itself becomes binding on either administrative authorities, governmental authorities or the courts. Because there is, under German law, no possibility to make binding commands by explaining the text of a treaty. That is, of course, quite impossible.

n23 See Luchaire, *supra* note 11, at 348-49.

n24 Remarks by Lord Templeman.

n25 See Ruda, *supra* note 14, at 488.

n26 See Luchaire, *supra* note 11, at 353-58.

n27 See, e.g., Wildhaber, *supra* note 11, at 344-45. Professor Soares who reported on Brazil did not discuss the issue of consultation.

n28 See Riesenfeld & Abbott, *supra* note 3, at 637, with respect to the "fast track" approval process.

n29 See Wildhaber, *supra* note 11, at 445. Lord Templeman noted that in the United Kingdom proposals with respect to European Community secondary legislation are reviewed by the Select Committee of the House of Lords. See Templeman, *supra* note 12, at 476-80.

n30 Professor Bognetti observed that as a matter of common terminology, the executive in Europe is now called the "government", reflecting its role as the engine of the state.

n31 Regarding executive agreements with respect to the United States, see Riesenfeld & Abbott, *supra* note 3, at 635-36. The term "agreement in simplified form" refers to a broad species of inter-governmental agreement concluded without the involvement of parliament, although there are of course substantial nation to nation differences with respect to the context in which such agreements may be used, see, e.g., Soares, *supra* note 14, at 503-08; Bognetti, *supra* note 11, at 397-400. The constitutions of a number of the states represented at the symposium set forth a list of subject matter, treaties as to which require express approval, see, e.g. Luchaire, *supra* note 11, at 347; Frowein & Hahn, *supra* note 8, at 358-68. In Switzerland treaties regarding adherence to supra-national organizations and to organizations for collective security are subject to compulsory referendum. Certain other categories of treaty are subject to optional referendum, see Wildhaber, *supra* note 11, at 441-42.

n32 In the Netherlands pursuant to a constitutional provision, see van Dijk & Tahzib, *supra* note 13, at 426-28. In the United Kingdom pursuant to the Ponsonby Rule, see Templeman, *supra*, note 12, at 465-66.

n33 The factors which distinguish the English and German situations are discussed, *supra* notes 9 and 15.

n34 Reservations may be invalid or ineffective for several reasons. Matters to consider include whether the reservation is permitted by the terms of the treaty, whether it is objected to by other parties, and whether it is consistent with the object and purpose of the treaty. *See* Riesenfeld & Abbott, *supra* note 3, at 586-89.

n35 For a discussion of understandings and interpretative statements, *see id.* at 602-03.

n36 *See* Ruda, *supra* note 14, at 492.

n37 *Id.* at 492-93.

n38 *See, e.g.,* recently, VICENZO LIPPOLIS, LA COSTITUZIONE ITALIANA E LA FORMAZIONE DEI TRATTATI INTERNAZIONALE 107-16 (1989) (cited by Professor Boggetti).

n39 *See* Frowein & Hahn, *supra* note 8, at 378-81.

n40 In Germany and Switzerland, for example, the executive may propose reservations or interpretative statements to alleviate the concerns of parliament with regard to the rights of components of the federal system, i.e. the Lander and the cantons. *See id.* at 365-66; Wildhaber, *supra* note 11, at 452, 456-57.

n41 Namely the recent conditions respecting adherence to the Genocide, Torture, and Civil and Political Rights Conventions.

n42 *See* Riesenfeld & Abbott, *supra* note 3, regarding in particular the Torture and Genocide Conventions.

n43 Although international law tolerates the use of reservations and understandings, a substantial increase in the frequency of their use might well give rise to an unwieldy, if not unworkable, multilateral treaty regime. Much criticism of the current GATT arrangement, for example, centers on the use of side agreements which have the effect of creating different sets of rules applicable to GATT contracting parties. *See, e.g.,* JOHN JACKSON, THE WORLD TRADING SYSTEM 52 (1989).

n44 132 Eur. Ct. H.R. (ser. A) (1988). *See* discussion at Wildhaber, *supra* note 11, at 453-57; Riesenfeld & Abbott, *supra* note 3, at 588-89.

n45 The Swiss had denominated their qualification as an interpretative declaration, but the Court recharacterized it as a reservation. *See infra* text accompanying note 49.

n46 Reservations of a general nature are expressly prohibited by the European Convention. *See infra* text accompanying note 49.

n47 Professor Wildhaber also suggested that the Court may have drawn a distinction between treaties with "objective effect," such as human rights treaties, and "reciprocal" treaties.

n48 Professor Wildhaber mentioned that he had not pressed the idea of invalidating Swiss adherence to the treaty before the Court because this was not a result to be encouraged, and withdrawal would in any event be considered afterwards by the Swiss public.

n49 In Professor Wildhaber's view, the Swiss position was weakened by the fact that at the time the reservation was entered, the Swiss had not compiled a list of the statutes to which it would be applicable, reinforcing the notion that the Swiss were painting with a broad brush.

Professor Frowein suggested that perhaps in 1974 when the Swiss formulated their condition as an interpretative declaration they knew full well that the Convention would not permit a reservation of the sort they were attempting to make, and that the Swiss had taken a subtle approach to accomplishing their purpose. He observed that the Turkish government had denominated certain of its conditions of adherence to the Convention as interpretative declarations, expressly adding that the Convention organs would determine their effect. He suggested that the Turkish government was also well aware that it could not validly make reservations of the kind it attempted to make by interpretative declarations.

n50 Only with respect to Germany and the United States were we apprised of circumstances in which the legislative body or a single chamber has converted or purported to convert a self-executing treaty into a non-self-executing treaty.

n51 *See* discussion with respect to Germany and the United Kingdom, *supra* notes 9 and 15.

n52 *See, e.g.,* Luchaire, *supra* note 11, at 354.

n53 Myres S. McDouglas, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 *AM. J. COMP. L.* 24, 34-35 (1952).